

UNITED STATES DEPARTMENT OF DEFENSE

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JUDICIAL PROCEEDINGS PANEL

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PUBLIC MEETING

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FRIDAY  
DECEMBER 9, 2016

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The Panel met in the Grand Ballroom,  
Holiday Inn Arlington at Ballston, 4610 North  
Fairfax Drive, Arlington, Virginia, at 9:00 a.m.,  
Hon. Barbara Jones presiding.

PRESENT:

Hon. Elizabeth Holtzman\*  
Hon. Barbara Jones  
Mr. Victor Stone  
Mr. Tom Taylor  
VADM(R) Patricia Tracey

WITNESSES:

Hon. Andrew Effron - Director, Military Justice  
Review Group, Department of Defense  
Ms. Lisa Friel - JPP Subcommittee Member  
Ms. Laurie Kepros - JPP Subcommittee Member  
Dean Lisa Schenck, COL(R) - JPP Subcommittee  
Member  
BG(R) James Schwenk - JPP Subcommittee Member  
Mr. Dwight Sullivan - Associate Deputy General  
Counsel for Military Justice, Department  
of Defense  
Ms. Jill Wine-Banks - JPP Subcommittee Member

**STAFF**

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

Director

Ms. Meghan Peters - Attorney Advisor

Ms. Terri Saunders - Attorney Advisor

**OTHER PARTICIPANTS:**

Ms. Maria Fried, Designated Federal Official

(DFO)

\*Present via telephone

A G E N D A

Page

Welcome and Introduction . . . . . 4

Site Visit Presentation on Defense

Resources and Deliberations on

Subcommittee Recommendations . . . . . 7

Deliberations on Victims' Appellate

Rights . . . . . n/a

Presentation on the Proposed Military

Justice Act of 2016. . . . . 138

Public Comment . . . . . 201

Adjourn. . . . . 215

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

2 (9:19 a.m.)

3 MS. FRIED: Ms. Jones, we're ready.

4 CHAIR JONES: Thank you, Ms. Fried.

5 The meeting's open. Good morning to everyone.  
6 I'm Barbara Jones, a member of the JPP and I've  
7 been asked to, by Chair Holtzman, to provide  
8 today's opening comments, as she is here with us  
9 but only by telephone.

10 So, I'd like to welcome the  
11 participants and everyone in attendance today to  
12 the 25th meeting of the Judicial Proceedings  
13 Panel. Four of the panel members, as you can  
14 see, are here and as I indicated, Liz Holtzman is  
15 participating on the telephone. Today's meeting  
16 is being transcribed in full, and the full  
17 written transcript will be posted on the JPP  
18 website.

19 The Judicial Proceedings Panel was  
20 created by the National Defense Authorization Act  
21 for fiscal year 2013, as amended by the National  
22 Defense Authorization Acts for fiscal years 2014

1 and '15. Our mandate is to conduct an  
2 independent review and assessment of judicial  
3 proceedings conducted under the Uniform Code of  
4 Military Justice involving adult sexual assault  
5 and related offenses since the most recent  
6 amendment to Article 120 of the UCMJ in 2012.

7 Today's meeting will include a  
8 presentation from JPP Subcommittee members on the  
9 Subcommittee report to the Judicial Proceedings  
10 Panel on Military Defense Counsel Resources and  
11 Experience. Following that presentation, the JPP  
12 will conduct deliberations on the recommendations  
13 of the Subcommittee from that report.

14 In the memorandum dated May 20, 2016,  
15 just to give you some background, the JPP  
16 directed the Subcommittee to conduct site visits  
17 at various military installations, to obtain base  
18 level perspectives on topics relating to JPP  
19 tasks, including the special victims counsel  
20 program, special victim investigation,  
21 prosecution capability, attorney training and  
22 experience, victim's rights with regard to

1 commanders, including expedited transfer and  
2 involvement in courts-martial proceedings, and  
3 recent legislative changes to judicial  
4 proceedings including revisions to Article 32  
5 hearings.

6 The Subcommittee visited bases  
7 throughout the United States and Asia, speaking  
8 to over 280 individuals involved in the sexual  
9 assault military justice process, and we very  
10 much look forward to hearing the observations of  
11 the Subcommittee from their site visits. We will  
12 then continue our deliberations as the Panel in  
13 victim's appellate rights.

14 In the afternoon, we'll receive a  
15 presentation on the Military Justice Act of 2016  
16 from the Honorable Andrew Effron, who is already  
17 here in our audience, welcome, and Mr. Dwight  
18 Sullivan. Mr. Sullivan, are you here yet? Thank  
19 you. I just wanted to welcome him, who is the  
20 associate military counsel at the Department of  
21 Justice.

22 Each public meeting of the Judicial

1 Proceedings Panel includes time to receive input  
2 from the public. We received no requests for  
3 public comment at today's meeting. All written  
4 materials received and reviewed by the panel  
5 members are available on the JPP's website at  
6 jpp.whs.mil, M-I-L. Thank you very much for  
7 joining us today.

8 We're ready to begin the meeting. Our  
9 first presenter is Ms. Laurie Kepros, who is a  
10 JPP Subcommittee member and also the Director of  
11 Sexual Litigation for the Colorado Office of the  
12 State Public Defender.

13 I should just note that also at this  
14 front table is Brigadier General Retired James  
15 Schwenk, Ms. Lisa Friel and Dean Lisa Schenck,  
16 and many of you probably already know their  
17 backgrounds. But I will ask them to tell us  
18 again how accomplished they are before they  
19 speak. Okay. Ms. Kepros, we'd like you to  
20 begin. Thanks.

21 Site Visit Presentation on Defense Resources

22 MS. KEPROS: Thank you, thank you.

1 Judge Jones and panelists, as was indicated, we  
2 had a great opportunity to meet with numerous  
3 military justice personnel across countries  
4 around the world, at diverse installations, in  
5 all the Services.

6 We had the benefit of speaking with  
7 trial counsel, prosecutors. We had the  
8 opportunities to speak with defense counsel,  
9 judges. We spoke with victim advocates. We  
10 spoke with everyone that we could think of that  
11 was touching the legal system as it reflects on  
12 these cases, because our overriding concern was  
13 to find out what was happening on the ground, and  
14 what were the policies, particularly those things  
15 that have been amended over the last several  
16 years. What were the effects of those  
17 impracticalities? Were things working as they  
18 were intended, and were they ultimately bringing  
19 benefit to the administration of justice in the  
20 military?

21 CHAIR JONES: So Ms. Kepros, I  
22 apologize. I have to interrupt you because I

1 forget my other role here today, which is that as  
2 the chair of the Subcommittee, I want to advise  
3 the JPP that this is our report to the panel on  
4 military installation site visits, and it's being  
5 presented to you for your deliberations, and let  
6 me just give you a little more background on  
7 that.

8           It was in May of this year, 2016, that  
9 the panel requested that Subcommittee members  
10 visit these military installations to hear these  
11 base level perspectives on the tasks that the  
12 panel charged them with. At least two  
13 Subcommittee members attended each of the site  
14 visits, and as you recall, Ms. Holtzman and I  
15 were both appointed as members of the JPP  
16 Subcommittee, and so we participated in some of  
17 those visits.

18           From June through September, members  
19 of the Subcommittee visited military  
20 installations throughout the United States and  
21 Asia, as I previously said, and again spoke to  
22 over 280 individuals representing 25 military

1 installations. Obviously, it was all about the  
2 military justice process and sexual assault in  
3 the military.

4 I think we've already covered the  
5 range of people that we spoke to, prosecutors,  
6 defense counsel, investigators, special victims  
7 counsel, paralegals, commanders, victim advocates  
8 and all sorts of other personnel frankly who  
9 touch upon the system.

10 The Subcommittee members asked the  
11 participants questions about special victim's  
12 counsel program, victim's rights, the new Article  
13 32 preliminary hearing process, its effect,  
14 attorney training and experience, sexual assault  
15 investigations as well as a number of other  
16 topics.

17 We spoke to the participants, and this  
18 is an important note, in non-attributinal  
19 setting, in order to hear candid views on the  
20 topics that were raised. This was something that  
21 the response panel had previously done, and from  
22 their experience we found that it was an

1 effective way to get candid views from people.

2           There were several topics discussed on  
3 the site visits for which the Subcommittee  
4 determined that we needed additional research  
5 before we could report back to the panel, and  
6 that's why today, the Subcommittee will be  
7 presenting just one report, certainly not all the  
8 reports that will be forthcoming, and that one  
9 report will be on military defense counsel  
10 resources and experience.

11           As I think you just figured out, we  
12 also anticipate future reports or a report  
13 certainly covering all the other issues that were  
14 raised on the site visits, or at least those that  
15 we feel we have something important to say about.  
16 Possibly the Article 32 process, prosecution  
17 standards in examining the conviction and  
18 acquittal rates for sexual assault courts-  
19 martial. Those are all among the topics that  
20 we're still considering and working on.

21           So as we go forward, the Subcommittee  
22 will keep the panel apprised of our progress.

1 And now after that very impolite interruption,  
2 would you go ahead, Ms. Kepros? Thanks.

3 MS. KEPROS: My pleasure, Judge. In  
4 addressing today the issue of defense counsel  
5 resources, I have to start by saying our method  
6 is quite strong. The current resourcing of  
7 defense counsel puts justice at risk.

8 This is a serious issue that goes to  
9 the legitimacy and fairness of the military  
10 justice system, and is of course of tremendous  
11 importance with the consequential effects of  
12 sexual assaults on victims, on those who are  
13 accused of such offenses in their military  
14 careers and obviously in their lives on the  
15 planet.

16 We spoke about this issue not only  
17 with defense counsel, and I think it's important  
18 to understand. We also spoke about it with all  
19 those other entities that were described, and we  
20 heard not just from defense counsel but also from  
21 prosecutors, from investigators about the  
22 relative under-resourcing of defense counsel when

1 it comes to helping defend against these charges.

2 We learned that defense counsel  
3 reported being under-resourced in attorney  
4 staffing, in paralegal staffing, in access to  
5 defense investigators and experts. At one large  
6 military installation that has ten defense  
7 counsel, they had one paralegal and zero defense  
8 investigators available to them.

9 The military criminal investigative  
10 organizations that do the initial case  
11 investigation that leads to the prosecution, the  
12 preferment of charges, does not do investigation  
13 at the request of defense counsel, so that is not  
14 a resource for them.

15 Moreover, that entity would not  
16 operate within the professional privileges of the  
17 attorney-client privilege of the work product  
18 privilege that are available to, for example,  
19 civilian defense counsel when they retain private  
20 investigators or public defenders who are working  
21 with in-house investigators to conduct  
22 investigation for the defense.

1                   We also learned from the military  
2                   investigators that current practices require them  
3                   to adopt, using your terminology, non-  
4                   confrontational approaches in interviewing  
5                   victims, and some of how that works was described  
6                   as extremely as not investigating the victim, or  
7                   in one case we were told we investigate what  
8                   happened, not what didn't happen.

9                   That means if an investigation is  
10                  being conducted with no one investigating the  
11                  possibility that the crime did not occur, it is  
12                  incumbent for defense counsel to find out if that  
13                  is generally the case. They are particularly  
14                  challenged in doing that without internal defense  
15                  investigator resources.

16                  Currently, attorneys, defense  
17                  attorneys are in a difficult position because  
18                  they cannot interview witnesses without risking  
19                  the possibility that they could inject themselves  
20                  as a witness in the case if there were  
21                  discrepancies in statements at trial and things  
22                  like that.

1           So it's an ethical issue for them to  
2 do it themselves, in addition to obviously the  
3 resource issue of the person has to do the job of  
4 being a lawyer and all of the other demands of  
5 litigation, and advising and representing their  
6 clients.

7           We heard that to make a request  
8 through the military for the appointment of the  
9 defense investigator, the defense needs to reveal  
10 case strategy, possible avenues of inquiry to the  
11 government, the same entity that has decided to  
12 prosecute the accused in the first place,  
13 creating I would suggest at least an appearance  
14 of impropriety.

15           There have been obviously significant  
16 changes to the Article 32 process in recent  
17 years. Most notably, for the impact on the  
18 defense investigation, has been the fact that few  
19 witnesses testify at these hearings anymore.  
20 Victims are no longer required to testify at  
21 these hearings, and this hearing had been the  
22 principle discovery vehicle for defense counsel

1 in the history of the military.

2 As the recent changes have transformed  
3 the military's more investigative model to  
4 something that looks more and more like the  
5 civilian adversary system, it is absolutely  
6 necessary that adequate tools be provided to both  
7 sides in an adversary process, so that the  
8 relevant facts can be discovered and presented as  
9 appropriate.

10 Additionally when it comes to Article  
11 32, the scope of what's relevant at the hearing  
12 has been dramatically narrowed, so that it is now  
13 a probable cause inquiry and does not allow a  
14 more searching inquiry into issues that could be  
15 relevant at trial.

16 That has been described to us, again  
17 by various personnel in different roles, as a  
18 principally paper process at this time, where  
19 documents are tendered. They're reviewed by the  
20 preliminary hearing officer and that becomes the  
21 basis for the decision at most, although not all  
22 Article 32 proceedings.

1                   At this time the Navy is the only  
2                   service that employs defense investigators. This  
3                   was a relatively recent development and it has  
4                   been -- I would look at it almost as sort of a  
5                   pilot over the last few years, to see how it  
6                   worked. It has only added eight people worldwide  
7                   to this kind of defense investigative role.

8                   However, they have proven to be very  
9                   useful to defense counsel in the Navy. They have  
10                  found them to be a great resource, but they have  
11                  also identified that additional staff to conduct  
12                  these kind of functions would be very helpful.  
13                  The other services do not have any independent  
14                  budget that would allow them this sort of person  
15                  or this kind of staff.

16                  They have to go to the convening  
17                  authority or at a later stage in the process,  
18                  once there is one, the military judge. That  
19                  obviously could also delay the ability to even  
20                  make a request for a defense investigator.

21                  That being said, even when those  
22                  requests are made, they are routinely denied.

1 That was uniformly agreed upon by both  
2 prosecutors and defense counsel that we talked  
3 to, that they are just generally not permitted,  
4 and this has caused, in practice, defense counsel  
5 to rely heavily on junior paralegals that have  
6 been assigned to their offices.

7 The paralegals have not been trained  
8 as investigators. The paralegals are unable to  
9 put the same time into the paralegal job duties  
10 for which they were hired because they are busy  
11 trying to locate and interview and follow up with  
12 witnesses.

13 In some instances defense counsel have  
14 also asked of their service member clients that  
15 the client pay to hire an investigator on the  
16 case because of the inadequacy of the military's  
17 resources.

18 There is obviously a constitutional  
19 ramification to this situation. To have  
20 effective assistance of defense counsel, the  
21 accused needs to have lawyers that are  
22 investigating the facts in their case, that are

1 presenting the relevant evidence in their  
2 proceedings, whether it's at the trial or  
3 pretrial litigation.

4 And so it's not just a matter of  
5 legitimacy and fairness, although I think it is  
6 those things as well, but also a matter of  
7 constitutional rights. This concern was  
8 previously reported in hearings before the  
9 Response Systems Panel and in other presentations  
10 before the JPP, so it's not completely new.

11 But I thought it was very powerful,  
12 the observation of a former president of the  
13 National Association of Criminal Defense Lawyers  
14 who addressed the RSP a few years ago, when she  
15 said I don't know a lawyer in the country that  
16 does sex offense representation without an  
17 investigator, except in the military.

18 Really, there is no such thing. There  
19 was testimony from the Army Chief of Trial  
20 Defense Services, who noted that in doing an  
21 informal survey, defense investigators have been  
22 approved in one out of 12 sexual assault cases,

1 and obviously that also implicates due process  
2 rights in addition to Sixth Amendment rights.

3 We understand that the JPP has  
4 received and will continue to receive additional  
5 information about what have been described as  
6 high acquittal rates in sexual assault cases in  
7 the military in recent years.

8 But we wanted to address that in the  
9 sense that that fact, whether there's a  
10 conviction or an acquittal in a given case does  
11 not speak to whether the process was fair, and  
12 does not undermine our concern that it needs to  
13 be, and that adequate resources be provided to  
14 the defense.

15 One other consequence of that is that  
16 it has led cases not to make it to the appellate  
17 review stage, perhaps causing this issue to go  
18 undetected, and of course it does not speak to  
19 the fact that there may still be wrongful  
20 convictions occurring as a result of under-  
21 investigated and under-defended cases.

22 There has been identified examples of

1 lack of parity and resources for trial counsel  
2 and defense counsel, including the availability  
3 of highly qualified experts, which have been  
4 identified as a useful, if temporary resource for  
5 less experienced lawyers. Additionally, the  
6 introduction of the special victims counsel and  
7 victim legal counsel programs into the services  
8 has added to the areas of work that need to be  
9 addressed by defense counsel.

10 The litigation is more complicated  
11 obviously by the inclusion of a third lawyer, but  
12 also issues like accessing the complainant for an  
13 interview are by design more complicated when  
14 those counsel are involved in the process, and  
15 will require the additional work of an  
16 investigator to necessarily complete all the  
17 proper communication to make sure that any  
18 requests are done in an appropriate way.

19 I think it's also worth remembering  
20 some of the prior testimony that we've heard from  
21 law professors at the JAG school and these kind  
22 of people in these kind of training positions

1 about the inherent complexities of Article 120  
2 proceedings and all the legal changes that have  
3 been made over the last several years and  
4 evidently will continue to be made given the  
5 make-up of the 2017 National Defense Act.

6 But with all of these additional  
7 responsibilities, technicalities that the defense  
8 attorneys need to be sensitive to, leaving them  
9 as the sometimes sole investigator on a case in  
10 addition to everything else is really  
11 problematic. As a result, with respect to  
12 defense investigators, we do have two  
13 recommendations that we've proposed to the JPP.

14 Recommendation No. 1 is that in order  
15 to make sure of the fair administration of  
16 justice, all of the military services provide  
17 independent and deployable defense investigators  
18 under their control in sufficient numbers so that  
19 every defense counsel has access to an  
20 investigator as needed.

21 Our second recommendation is that the  
22 military services immediately review service

1 defense organization staffing, including defense  
2 counsel, paralegals, highly qualified experts and  
3 administrative support personnel, and augment  
4 current levels in order to alleviate the reported  
5 understaffing.

6 The Secretary of Defense should direct  
7 an audit by an independent outside entity of  
8 defense staffing across all of the military  
9 services, to determine the optimum level of  
10 staffing for the service defense organizations in  
11 the long term.

12 The second topic that I'm going to  
13 address today concerns defense access to experts.  
14 Like the investigators, defense counsels do not  
15 currently have access to their own funding  
16 source for defense experts, and to get experts  
17 funded they must make that request from the  
18 convening authority.

19 These requests are also frequently  
20 denied or in some cases a substitute is proposed  
21 by the government that is actually inadequate for  
22 the purpose for which the expert is needed. One

1 example of that was a case that we heard about,  
2 where the defense needed an expert in child  
3 suggestibility, and was instead offered an expert  
4 who was a general child psychologist, who did not  
5 have the necessary expertise for the issues in  
6 the case.

7 Even when experts are approved, it is  
8 often occurring on the eve of trial, and at that  
9 point in the case the defense counsel does not  
10 get the benefit in developing their case strategy  
11 with the insights and the expertise that the  
12 expert can provide. So it's just sort of a Hail  
13 Mary at the end, instead of somebody who's really  
14 helping them put together the most thoughtful and  
15 coherent case.

16 Additionally, to get the expert  
17 approved in the first place, defense counsel is  
18 required to reveal their strategy for the case,  
19 and show their cards and lay it all on the table  
20 so that they cannot conduct the kind of  
21 confidential inquiry that civilian defense  
22 counsel rely upon to effectively represent their

1 clients.

2 In contrast, observations of both  
3 trial counsel and defense counsel at the  
4 installation level is that prosecutors are not  
5 being denied experts in the same way, that they  
6 often can obtain expert assistance at the early  
7 stage in the case, and then have the benefit of  
8 that expert through their preparation and the  
9 development of their strategy.

10 In prior testimony, the RSP has heard  
11 about models such as public defender agencies  
12 that have their own budget for experts, and there  
13 has been information about how that can be a  
14 workable model, and that certainly has informed  
15 the recommendations that we are going to provide  
16 today.

17 I think it's also important to  
18 recognize that civilian defense counsel routinely  
19 benefit from consulting experts. That is, people  
20 they never put on the stand as a witness, but  
21 rather someone they can consult to find out is  
22 this an issue, is this something we should be

1 concerned about, and to do it in such a way that  
2 if the answer is no and if the information might  
3 even inculcate the accused, it need not be  
4 explored under the full surveillance of the  
5 government that is seeking to prosecute the  
6 accused.

7           It allows defense counsel to get  
8 better quality information and to make a more  
9 candid and thoughtful assessment of the evidence  
10 in their case, and provide appropriate advice to  
11 their client about likely outcomes at trial and  
12 things like that.

13           The United States Supreme Court has of  
14 course recognized the constitutional right to  
15 expert assistance in *Ake v. Oklahoma*. It has  
16 been a right that's been recognized in the  
17 context of trial experts as well as sentencing  
18 experts, which we know is another significant  
19 phase in military trials.

20           To make the request for an expert in  
21 the military system, defense counsel is also  
22 required to identify what value they would get

1 from a proposed expert, and while I think on its  
2 face that seems like a fairly reasonable thing to  
3 ask of someone, it denies the defense counsel the  
4 opportunity to first learn what the expert can do  
5 for them.

6 It is particularly problematic in a  
7 system that is inevitably made up of primarily  
8 young lawyers who do not have the knowledge and  
9 experience to necessarily identify all the  
10 potential benefits in the experts' field of  
11 knowledge.

12 So, they could be denied for not  
13 knowing and then once they know, we have heard  
14 they were sometimes told you already know this  
15 topic, so you don't need an expert to assist you,  
16 then causing the difficulty of what the lawyer's  
17 supposed to do to present evidence on that topic  
18 if there is no expert in the room who is  
19 sufficiently knowledgeable.

20 As a result, our third recommendation  
21 is that the Secretary of Defense direct the  
22 military services to vest defense expert funding

1 and approval authority within the defense,  
2 service defense organizations.

3 The last issue really dovetails with  
4 what I've already said about the experience of  
5 defense counsel. There is -- there are a couple  
6 of levels of disparity that we had brought to our  
7 attention.

8 One is that the experience levels that  
9 are required across services are inconsistent,  
10 and also we learned that even where there are  
11 metrics identified for the qualifications of  
12 defense counsel, they're not always met in  
13 practice. So they become aspirational instead of  
14 what is necessarily happening in the field.

15 Of particular concern, we learned that  
16 in both the Army and the Marine Corps, first tour  
17 judge advocates who had no experience in military  
18 justice were assigned to defense counsel billets.  
19 Because of the current situation where more than  
20 half their case loads are sexual assault cases,  
21 it is unlikely that they will have an opportunity  
22 to handle numerous less serious cases and develop

1 some experience as a trial lawyer before they  
2 have to handle one of these cases.

3 We did hear several reports of lawyers  
4 in their, you know, first couple, three trials,  
5 second or in one case even first chairing an  
6 Article 120 sexual assault trial.

7 Within the area of sexual assault  
8 litigation, obviously there are particularly  
9 complex legal issues, rules of evidence that are  
10 specific to things like rape shields and  
11 privilege, in addition to the necessity of trial  
12 skills in cases that are more likely to go to  
13 trial than some other types of charges, requiring  
14 some level of litigation skill in trial.

15 As I mentioned, there has been value  
16 identified to us in the highly qualified experts  
17 when those are utilized. They provide some  
18 continuity from year to year, and when we learned  
19 about defense counsel in the Marine Corps having  
20 18 month tours, that was essential. I mean there  
21 are cases that can't even be resolved in the  
22 length of the tour, because of how complicated

1 the case is.

2 Then when the lawyers change, and I'm  
3 referring to defense counsel, trial counsel and  
4 the VLC in the Marine Corps, that can further  
5 slow things down obviously. But even those HQEs  
6 are not permanent positions. They are time  
7 limited and they do come to an end. So the need  
8 to have some sort of institutional continuity was  
9 definitely identified for us.

10 There was testimony in May before the  
11 JPP that in the Army, 20 percent of the attorneys  
12 assigned to a defense counsel billet have no  
13 prior experience, and obviously we are talking  
14 about a type of case where there is going to be  
15 extensive motions practice.

16 I've already discussed the  
17 investigation demands that may come to the fore,  
18 and we are living in a time when the potential  
19 for technical evidence is probably higher than it  
20 has been in the past.

21 In most cases, the parties have cell  
22 phones, computers. There may be DNA, and there's

1 a whole other universe of potential facts in  
2 investigations that may be relevant to developing  
3 the case, developing the motions practice and  
4 developing the trial defense. That doesn't even  
5 speak to the level of sophistication necessary to  
6 present effective mitigation when talking about  
7 sentencing someone for a sex crime.

8 To be effective at trial, defense  
9 attorneys also need to be able to put together a  
10 coherent and persuasive trial strategy, which is,  
11 I would suggest, an art and something that can  
12 improve greatly with experience.

13 As a result, our fourth recommendation  
14 is that the military services only permit a  
15 defense counsel with prior military justice or  
16 civilian criminal litigation experience to serve  
17 as lead defense counsel in a sexual assault case.  
18 The military services should develop a formal  
19 process using both objective and subjective  
20 criteria to determine when a defense counsel is  
21 qualified to serve as the lead defense counsel in  
22 a sexual assault case.

1           In addition, the military services  
2 should set the minimum tour length for defense  
3 counsel at two years or more, except when a  
4 lesser tour length is approved by the service  
5 judge advocate general or staff judge advocate to  
6 the Commandant of the Marine Corps. I know my  
7 colleagues are happy to take your questions.

8           CHAIR JONES: Well before I ask the  
9 panel to ask questions, I would like to let each  
10 of you introduce yourselves, so that everyone  
11 will understand the tremendous amount of  
12 background on this topic and experience with it.  
13 So I should say Ms. Jill Wine-Banks is here with  
14 us now, and perhaps you could just start and tell  
15 us your past experience.

16           MS. WINE-BANKS: Certainly, thank you.  
17 I am Jill Wine-Banks and I really appreciate the  
18 opportunity the JPP has provided to us to  
19 investigate this very important issue, and to  
20 allow us to go on the site visits, which I think  
21 really helped us to get a different perspective  
22 than we were getting from testimony. So thank

1 you for that.

2 I have served as general counsel of  
3 the Army. So I have that background. I was a  
4 prosecutor before that, a defense lawyer after  
5 that, and also have served in corporations as an  
6 executive in international business development.

7 CHAIR JONES: Thank you. Laurie, can  
8 you tell us a little bit more about your  
9 background?

10 MS. KEPROS: Okay. As you mentioned  
11 Judge, I'm the Director of Sexual Litigation for  
12 the Colorado Office of the State Public Defender.  
13 I trained and advise over 800 lawyers and other  
14 staff in the Colorado Public Defender's Office  
15 statewide in their representation of individuals  
16 who have been accused or convicted of sex crimes.

17 I was a trial lawyer in the Public  
18 Defenders Office for more than ten years,  
19 including a period of time where I handled  
20 exclusively sexual assault cases. I have advised  
21 on I think probably over 5,000 sexual assault  
22 cases in the civilian context.

1 CHAIR JONES: Thanks. General  
2 Schwenk.

3 BG SCHWENK: Yes, thank you. I was  
4 commissioned in the Marine Corps as an infantry  
5 officer and having failed miserably at that, I  
6 went to law school and became a judge advocate.  
7 As a judge advocate, I tried a couple of hundred  
8 courts-martial, and as a trial counsel or a  
9 defense counsel when Clayton Lonetree decided to  
10 become a spy for the KGB, I was put in charge of  
11 that process.

12 Eventually I retired and took a job in  
13 the DoD General Counsel's Office, because unlike  
14 the other people on the panel, I couldn't get a  
15 real job in the civilian world, and in the DoD  
16 General Counsel's Office my primary duty was not  
17 military justice. But I was the backup on  
18 military justice and whenever there was a gap in  
19 that billet or whatever, then I would fill in.

20 So I was the one person in the office  
21 who was absolutely delighted when Dwight Sullivan  
22 showed up, because that ended my one year of gap

1 duty in military justice.

2 CHAIR JONES: Thanks. Lisa Friel.

3 MS. FRIEL: My name is Lisa Friel. I  
4 went to the Manhattan District Attorney's Office  
5 right out of law school back in 1983 for what I  
6 thought was going to be a three year commitment,  
7 but I made it to Robert Morgenthau at the time  
8 and I walked out of there 28 years later. So I  
9 have a long prosecutorial background.

10 Of the 28 years I was there, I spent  
11 25 of them in the Sex Crimes Prosecution Unit, 11  
12 years as the deputy chief for the unit and ten  
13 years, my last ten years there as the chief of  
14 the unit and Manhattan being a very big place,  
15 there were a lot of sexual assault cases and  
16 investigations I handled in that time period.

17 I left in the fall of 2011. I went to  
18 a security and a consulting firm, and I opened a  
19 division for them doing sexual misconduct  
20 consulting and investigation in the private  
21 sector. So my clients were schools of all  
22 levels, private businesses as well as sports

1 teams and leagues. I got hired as a consultant  
2 to the National Football League in the fall of  
3 2014 after one of their players, Ray Rice, had  
4 had a pretty infamous domestic violence incident.

5 I worked as an outside consultant for  
6 them about seven months and they offered me a  
7 full-time job, and I am now there as their  
8 special counsel of investigations. They have a  
9 workplace conduct policy, called the Personal  
10 Conduct Policy, that dictates the behavior of all  
11 our employees at the NFL, players, coaches and  
12 people like me who work at the league office, and  
13 basically tells us we have to behave 24-7 and not  
14 just when we're at work.

15 I oversee the investigations of people  
16 who are alleged not to have behaved in a way that  
17 upholds the standards of the National Football  
18 League.

19 CHAIR JONES: Thanks, Lisa. Dean  
20 Schenck.

21 DEAN SCHENCK: Yes. I'm Associate  
22 Dean Lisa Schenck and --

1                   CHAIR JONES: Could you speak up just  
2 a little bit?

3                   DEAN SCHENCK: Sure.

4                   CHAIR JONES: Thanks.

5                   DEAN SCHENCK: I was in the Army for  
6 25 years. I was a signal officer first and then  
7 I was in the Legal Education Program and went to  
8 law school. I served in the Army JAG Corps in  
9 many positions. I was a prosecutor and a special  
10 assistant U.S. attorney.

11                   I taught Constitutional and Military  
12 Law at West Point, and I was a chief of military  
13 justice. I was on the Criminal Appellate bench  
14 before -- on the Court of Criminal Appeals.  
15 Spent almost six years as the senior judge on  
16 that court.

17                   I was appointed as an appellate judge  
18 for the Military Commission as an additional  
19 judge, and I decided to retire. For one year I  
20 was a senior advisor to the Defense Task Force on  
21 Sexual Assault in the military Services.

22                   Then I went to George Washington

1 University Law School. I'm the associate dean  
2 for Academic Affairs there. I've been there  
3 since 2009. I teach military justice. I co-  
4 authored a book on military justice, and I was  
5 also -- I'm the co-director of the National  
6 Security Law Program. I thank you for including  
7 me in this, and I've really enjoyed working with  
8 my colleagues. They're extremely motivated and  
9 really, really experts in this field.

10 I also would like to thank the panel  
11 for looking at these issues. I think it's  
12 extremely important that we have experts such as  
13 my colleagues looking at the military justice  
14 system. It's a very specialized system, and it  
15 needs experts on both sides, people who have  
16 worked with General Schwenk and Jill in the area  
17 of military justice, as well as who are experts  
18 in the civilian sector. I really thank the  
19 panel.

20 CHAIR JONES: Thank you. I want to  
21 just say in particular thanks to you Laurie for a  
22 terrific report, and there's nothing better than

1 a report that's clear and complete and  
2 persuasive, I think. But that's in my capacity  
3 as your colleague on the Subcommittee. All  
4 right.

5 MS. KEPROS: The staff should get  
6 credit for that.

7 CHAIR JONES: True enough.

8 Mr. Taylor.

9 MR. TAYLOR: Yes. Let me add my  
10 thanks to each of you for your efforts here, as  
11 well as Professor Schinasi, who could not be here  
12 today. I think also the presentation that you  
13 provided this morning was superb. I really  
14 appreciate that. I just have three or four  
15 questions, and I'd like to direct them to the  
16 panel in general. So if anyone would feel free to  
17 respond, please do so.

18 When you were conducting your field  
19 visits, did you have an opportunity to talk to  
20 people higher in the trial defense service  
21 chains, that is to say regional defense counsel,  
22 and do you have a sense of whether there has been

1 the proper requests for resources made known to  
2 their higher-ups and had pushback, or do you get  
3 the sense that the whole defense community is  
4 pushing for this, but somehow their voices aren't  
5 heard? What do you think is happening there in  
6 terms of what you have described as the real  
7 need, which I agree with?

8 By the way, I started my career as a  
9 young JAG officer, and I would say that all the  
10 complaints that you've surfaced here I could have  
11 surfaced many, many years ago, because I had the  
12 same experiences and the same sense that I never  
13 got as many resources as the prosecution, and  
14 certainly didn't get what I needed.

15 So I would just be curious to know to  
16 what extent do you think people have given voice  
17 to this as high as they can, give that voice in  
18 their respective chains and with what if any  
19 results?

20 BG SCHWENK: I'll take a shot at some  
21 of that, Mr. Taylor. The first thing I'll say is  
22 I think part of it is for the very reason you

1 gave, looking at your background. This is not a  
2 new phenomenon in the military justice process  
3 and probably in the civilian criminal process  
4 either.

5 And so as the more senior people grew  
6 up to making their complaints when they were more  
7 junior, they grew to accept the system. That's  
8 the way the system is. We're always short. We  
9 never have enough resources to really adequately,  
10 if you're looking at a world class military  
11 justice process, which is what we like to  
12 advertise we have in the Department of Defense.

13 There are never enough resources and  
14 you become used to it. Then the new lawyers.  
15 Then you get to a supervisory position and the  
16 young lawyers come and when you visit them they  
17 say "Man, I'm working seven days a week. I have  
18 one paralegal for ten lawyers. I've got to do my  
19 own investigations. I've made these requests and  
20 those requests," and you say as a supervisor I'll  
21 take that up with my boss and see what I can do  
22 for you, and of course you know the well is dry,

1 you know.

2 We have -- we're going to have a  
3 Military Justice Review Group, no disrespect to  
4 Judge Effron. We're going to have a Military  
5 Justice Review Group. Where is that staff going  
6 to come from? It's going to come from some of  
7 the people who are residing in the military  
8 services, who were supposed to be in billets out  
9 in the field and they're not. They're in D.C.  
10 working for the Military Justice Review Group.

11 What about advisory, federal advisory  
12 committees, not to name any in particular. Where  
13 do the staffs for that come from? Sometimes we  
14 staff them with military people and they come  
15 from the services. The whole criminal process  
16 for detainees, you know. That was originally  
17 staffed with all military people pulled right out  
18 of the services.

19 So that whole ethos of do more with  
20 less, you know, that you never have all that you  
21 need, it makes it, I think for most supervisors,  
22 a leadership thing, of trying to do the best you

1 can to help your people and going to your bosses  
2 and saying boy, we're really short on this, and  
3 have them say to you man, you're absolutely  
4 right.

5 I couldn't agree with you more, but  
6 look, there's nothing in this pocket and there's  
7 nothing in that pocket, and I've got Joe over  
8 here yelling and screaming there's not enough in  
9 Operational Law and Fred over there, there's not  
10 enough in legal assistance for our young enlisted  
11 guys and their wives and families that need help.  
12 I'm out of Schlitz.

13 So I think it's not -- I definitely  
14 believe it is not a callous disregard for the  
15 needs of the defense or for military justice at  
16 large. I think it's an over time, unfortunate in  
17 my opinion, but a system where people just grow  
18 in the system to accept the limitations on  
19 staffing.

20 One big thing that happened was when  
21 the Air Force had their unfortunate problem in  
22 Texas and what was one of the solutions? Throw

1 people at it, and they were able to get well real  
2 fast with extra bodies.

3 I think you probably remember the time  
4 the Air Force JAG decided to change their  
5 staffing model and somehow convinced the manpower  
6 people in the Air Force to let them do it, and  
7 they ended up getting their big plus up in Air  
8 Force judge advocates because they were able to  
9 prove they needed them.

10 None of that trickled to the other  
11 services, which is why our recommendation is for  
12 an outside agency to do it across the services,  
13 so that they can actually try to figure out how  
14 do you evaluate how many defense counsel you  
15 really need and how many paralegals and what have  
16 you. So, I don't know if that helps but --

17 MR. TAYLOR: Yeah, thank you. Would  
18 someone else like to comment on it?

19 MS. WINE-BANKS: Yeah. Tom, I'd like  
20 to answer it in a slightly different way, which  
21 is we did talk to people at all levels, from the  
22 new ones to senior people, regional counsel,

1 commanders, and there is no one who differed with  
2 this opinion. Everyone was aware of it.

3 I think General Schwenk is quite  
4 correct. People are just okay, this is the  
5 system. We accept it, and it would take an  
6 outside intervention like this one to possibly  
7 bring it to the attention that this is a serious  
8 due process issue, that it also is affecting I  
9 believe the overall impression of military  
10 justice.

11 The high acquittal rate means people  
12 start to lose faith in the military justice  
13 system. There are a lot of explanations for why  
14 the high acquittal rate. Part of it is what  
15 we've identified as a lack of resources. There  
16 are other reasons as well, but it does affect a  
17 general opinion.

18 So it's an important issue to solve,  
19 and I don't -- I'm not aware of, no one ever said  
20 to us I've been asking and asking and asking and  
21 I didn't get a response.

22 I think it really was more there's no

1 point in asking. In the same way that they've  
2 used the system, they go to the commanding  
3 officer to ask for an expert. They go to the  
4 judge to ask, and it's denied. So at some point  
5 they say why am I even bothering. I'm making a  
6 record but it's not going to go to appeal. So  
7 what good does it do? So I think that's more the  
8 explanation, that people have just not tried.

9 MS. FRIEL: And I'd like to add, if I  
10 may, just to put it in a civilian perspective,  
11 having dealt in the prosecution world of sexual  
12 assault for almost three decades, that I don't  
13 know of any defense attorney or defense  
14 organization in my experience that does not have  
15 investigators, whether it was the Legal Aid  
16 Society in New York, public defenders or  
17 individual defense attorneys who hired them  
18 themselves.

19 I was surprised to hear, I didn't know  
20 much about the criminal -- the military justice  
21 system. I've learned a lot in the last two  
22 years. But I was surprised to hear that they

1 don't have this resource, because it is just such  
2 a fundamental resource that I took for granted as  
3 a prosecutor that the other side had.

4           The other thing I'd like to put in  
5 perspective, Tom, as you point out, this is not a  
6 new problem and you'll hear in subsequent reports  
7 from us that there are issues with the  
8 investigative resources for the prosecution as  
9 well. So the resource issue, especially with  
10 investigators, is not a new problem.

11           But what I do think we have to think  
12 about is how we are handling in the justice  
13 system, civilian and military and even our  
14 schools, if you think about colleges and  
15 universities, how we are handling sexual assault  
16 is dramatically different in the last couple of  
17 years than we did when you started your career a  
18 few years before that.

19           You know, we have gone to great  
20 efforts in the civilian and military world to  
21 increase reporting, recognizing this is such a  
22 severely under-reported problem and those efforts

1 have borne fruit, and we are seeing higher  
2 reporting rates again, military and civilian.

3           So now we have a lot more of these  
4 cases in our systems, and they require a lot more  
5 resources and a lot more expert resources. I  
6 tell everybody we can joke all we want about all  
7 the Law and Order shows, but there was a reason  
8 there's a Law and Order SVU show, and it's  
9 because you do need special training and  
10 experience to handle a sexual assault case,  
11 whether you're a prosecutor, whether you're a  
12 defense attorney, whether you're an investigator.

13           So the world has really changed, and  
14 that's I think why we have these panels and we  
15 have the Subcommittee looking at it. We're going  
16 to need to make a change to keep up with the way  
17 the world wants to handle sexual assault going  
18 forward.

19           DEAN SCHENCK: I'd like to also make  
20 a comment.

21           CHAIR JONES: Liz.

22           CHAIR HOLTZMAN: As a member of the

1 panel that was also put on the Subcommittee, and  
2 this is to respond and kind of add a little  
3 footnote to what Ms. Friel just said, which is  
4 that it may be that this is an age-old problem of  
5 lack of resources for defense counsel. But the  
6 terrain has changed, and in the past perhaps they  
7 could make do with a very different kind of  
8 Article 32 procedure, which was a kind of  
9 discovery procedure, a discovery tool.

10 It was very, very valuable and of  
11 course that is gone now, and there's nothing to  
12 replace it. So the need for some of these  
13 investigative tools and resources has become much  
14 more acute, because the system has changed. I'd  
15 just add that footnote. Thank you.

16 DEAN SCHENCK: This is Lisa Schenck,  
17 Congresswoman Holtzman. I'd like to also add  
18 that in these cases, there's about 50 percent or  
19 more that are sexual assault cases out there in  
20 the field that they're trying easily, and with  
21 the new system, the modified 32 where it's just a  
22 probable cause hearing, with the special victim

1       counsels only for sexual assault cases, defense  
2       counsel are fighting with one hand behind their  
3       backs.

4                It's just impossible for them to do  
5       their jobs and it's not fair to the accused in  
6       these cases, and like I said, there are a  
7       majority of these cases. So that's why the call  
8       for resources has been magnified, by us making  
9       sexual assault cases. It's been magnified  
10      because of that special victim counsel. So  
11      special victim counsel can decide whether or not  
12      the defense counsel can even talk to the accused.

13              Also, I want to point out the kinds of  
14      sexual assault cases that are being tried in the  
15      military services are about 50 percent sexual  
16      abusive contact cases, which are generally  
17      alcohol, involving alcohol, and many people in  
18      the units. So defense counsel has to rely on the  
19      criminal investigation, the MCIOs, to give them  
20      information about what happened in the incident.

21              They have to wait, and they have to  
22      wait to talk to the victim, and maybe not even

1 get to talk to the victim if the special victim  
2 counsel says you cannot. They have to allow for  
3 the file to come to them, as opposed to be  
4 proactive with an investigator of their own and  
5 speak to people in the units, because these are  
6 he said/she said cases or involving many people,  
7 eyewitnesses in the units where the defense  
8 investigator could help draw the facts out from  
9 both sides.

10 In the old days, the Article 32  
11 hearings were used for just those sort of cases.  
12 The commanders referred the cases, appointed 32  
13 officers and said let it go. Let the 32 officer  
14 make a determination about what happened. The 32  
15 officer called the victim. The 32 officer called  
16 the people in the units. The 32 officer heard  
17 testimony from everybody, the investigators.  
18 They sorted it out.

19 That's not happening anymore. It's a  
20 probable cause hearing. The victims don't have  
21 to testify. They don't testify. It's a paper  
22 case. So and that's what we heard from the

1 field. The 32s are giving them nothing. The  
2 defense counsel have no opportunity to interview  
3 the victim.

4 Yes, there are acquittals. There are  
5 acquittals because the cases are going forward  
6 because victims want to go forward with the case,  
7 and they're not testifying until -- they're not  
8 telling their story even to the prosecutor in  
9 some cases until they get on the stand. When you  
10 get on the stand and you have them cross-examined  
11 by the prosecutor or talk to practice  
12 prosecution, practice direct, practice cross-  
13 examination, you're going to get acquittals.  
14 That's what's happening.

15 You know, it looks funny because  
16 you're getting acquittals and you're asking for  
17 defense resources. But that's because of what's  
18 happening before they get into that courtroom.

19 MR. TAYLOR: Well, I'm glad you made  
20 that point, because I think that is a strong  
21 counterfactual that needs to be understood. So  
22 thank you very much for doing that, and the segue

1 that you set up, I think, for my next question,  
2 my only question in this round I suppose, when we  
3 were in Charlottesville in May at the Army's  
4 Legal Center and School, we had the services come  
5 in and tell us about their training programs.

6 And as Ms. Kepros pointed out, we  
7 understood the differences between what the  
8 Marine Corps and the Army in particular do and  
9 assignment of counsel from the other services.

10 It seemed that the argument that the  
11 Army and the Marine Corps were proffering was  
12 essentially that because they didn't have  
13 experience, they would provide intense training  
14 and the intense training would somehow compensate  
15 for the lack of experience.

16 And my question to you as a panel of  
17 experienced litigators is how valid is that as a  
18 way of thinking about the problem?

19 MS. FRIEL: It's not. I often say  
20 expertise is training and experience. It's both.  
21 You have to have both. You would never in a  
22 civilian, at least not in a big office like my

1 old office, let anyone near a felony sex crime  
2 who hadn't tried a number of cases. They'd  
3 probably have to be at the DA's office for five  
4 years to do that, because there are just skills  
5 that you learn doing it that you can't learn in a  
6 courtroom.

7 MS. WINE-BANKS: I agree completely  
8 with Ms. Friel. The training that everybody  
9 commented on they said was excellent, but it  
10 cannot substitute for actually knowing. I can  
11 still remember the first time I ever went to  
12 court, and getting there and suddenly realizing  
13 do I actually say "may it please the Court"?  
14 That's what I was taught in trial practice class,  
15 but is that what I really do, and just having no  
16 idea the first time I second chaired a case.

17 After my boss did the cross-  
18 examination of the defendant, I went how did he  
19 know where to get those questions from? I was  
20 fully prepared on the case, but you just don't  
21 know until you've sat through a number of trials  
22 as second chair and then had an experienced

1 lawyer with you while you did some stuff.

2 Experience cannot be substituted.

3 (Dial tone.)

4 (Technical difficulties.)

5 CHAIR JONES: Mr. Stone? Can we fix  
6 this first?

7 CPT TIDESWELL: Why don't we take a  
8 moment to --

9 (Pause.)

10 CHAIR JONES: Why don't we take a  
11 couple of minute break and get Ms. Holtzman back  
12 on the phone? Thanks.

13 (Whereupon, the above-entitled matter  
14 went off the record at 10:06 a.m. and resumed at  
15 10:10 a.m.)

16 CHAIR JONES: Thank you, Liz. I'm  
17 sorry we lost you there.

18 CHAIR HOLTZMAN: It's all right,  
19 thanks.

20 MR. STONE: Thank you. I'm not sure  
21 if Ms. Kepros you are the chair of the panel, or  
22 if one of you down there was the person who was

1 designated to speak for the Subcommittee. So  
2 when I ask a question, please consider this  
3 directed to all of you, because I see that I  
4 don't think anybody went to all six site visits,  
5 is that correct? And panel members only went to  
6 three of them, is that right? A single panel  
7 member was at three of them?

8 CHAIR JONES: Are you talking about  
9 the panel members or are you talking about the  
10 whole Subcommittee?

11 MR. STONE: I'm talking about our --  
12 no, I'm not talking about the Subcommittee. I  
13 was looking at the attendance sheet that was  
14 handed to us as page 15, and it indicates that  
15 only one panel member went to three of the six  
16 visits, and I was just trying to check if that's  
17 accurate.

18 MS. KEPROS: I think that most were  
19 attended by Ms. Wine-Banks. I attended six  
20 installations in three different trips.

21 CHAIR JONES: No. I think you're  
22 talking about Ms. Holtzman and myself, is that

1 right?

2 MS. KEPROS: Right. Oh yeah, yeah,  
3 yeah.

4 MR. STONE: I'm actually looking  
5 right, at all the attendance.

6 CHAIR JONES: Right, oh okay.

7 MR. STONE: Some of these trips only  
8 show two people. But yes, I'm also asking if you  
9 and Ms. Holtzman went to -- together went to a  
10 visit or it just -- it looks like you each went  
11 to separate ones?

12 CHAIR JONES: That's right. We did  
13 not do a joint visit.

14 MR. STONE: Okay, and I guess I'll  
15 start maybe in reverse order, if I may, with the  
16 recommendations that I saw were made. The last  
17 recommendation is the one that speaks about only  
18 allowing defense counsel in sexual assault cases  
19 who have a lot of experience, and the last two  
20 comments I just heard from this group before me  
21 were from people who were saying if I got it  
22 correctly, that even prosecutors shouldn't be

1 handling these cases without significant  
2 experience.

3 One of the comments was in the New  
4 York DA's office, no one without four or five  
5 years of experience would have been trying one of  
6 these cases, because these are complex cases. Is  
7 that right?

8 MS. FRIEL: That's correct.

9 MR. STONE: All right. So I guess my  
10 question is you have correctly articulated what  
11 we heard last May, that a lot of defense counsel  
12 don't have that kind of experience. Did you also  
13 ask and line up to speak with prosecutors at  
14 these installations, to find out whether they had  
15 that kind of experience?

16 MS. KEPROS: Do you want me to --

17 CHAIR JONES: Go ahead, Laurie.

18 MS. KEPROS: We did.

19 MR. STONE: And what was the result of  
20 that?

21 MS. KEPROS: Most of the prosecutors  
22 were starting in military justice in a

1 prosecution billet. That was a first assignment.  
2 That was a common pathway across the services.  
3 However, there was a lot more available in terms  
4 of senior trial counsel. That was apparently a  
5 more desirable career path, and so we saw a  
6 little bit more institutional memory, longevity  
7 within the prosecution community and some of  
8 those kind of dynamics were different.

9 The training resources were different.  
10 I think I mentioned or it's in the report --

11 MR. STONE: I guess that was not my  
12 question.

13 MS. KEPROS: Okay.

14 MR. STONE: My question was did you  
15 find that the prosecution counsel in these cases  
16 had significantly more trial experience than the  
17 defense counsel?

18 MS. KEPROS: Those who were trying the  
19 cases did, yes.

20 MR. STONE: And do you have numbers?  
21 Did you back that up with numbers at those  
22 places?

1 MS. KEPROS: We were collecting  
2 qualitative information. I know there was some  
3 quantitative information that various, you know,  
4 parts of this Committee are looking at. I don't  
5 have those numbers.

6 MR. STONE: Because we have previously  
7 heard that many front line prosecutors also don't  
8 have -- certainly they don't have four to five  
9 years of experience before they handle sexual  
10 assault cases in the military, and they don't  
11 have much more experience than defense counsel,  
12 which is due in part simply to the rotational  
13 policies of the military services.

14 MS. KEPROS: Yeah.

15 MR. STONE: Does anybody on the panel  
16 disagree with that?

17 DEAN SCHENCK: No, but I do want to  
18 point out that --

19 MR. STONE: Can you turn your mic so  
20 we can hear?

21 DEAN SCHENCK: Yes. I do want to  
22 point out that the Navy has a different set up

1 now, where it's almost an apprenticeship type  
2 series, where they serve in six month sections of  
3 their career, and before they are even certified,  
4 I believe, they have to serve the six months for  
5 prosecution, six months for defense, six months  
6 doing installation law, you know.

7 And so there's four of those things,  
8 and then at the end of two years, then they can  
9 go out and I'm not sure if they go to defense or  
10 to the prosecution, but they have that. You  
11 know, they have to do every kind of law that's  
12 practiced in the Navy. So the Navy's got a  
13 little bit different tone on things.

14 With the testimony I heard and from my  
15 experience and knowledge of the Army JAG Corps,  
16 the prosecutors are more experienced that are  
17 trying the sexual assault cases and they usually  
18 do a co-chair, you know, an assistant trial  
19 counsel to train folks on the folks we heard, as  
20 far as defense --

21 A couple of installations I went to  
22 had all the services testify, talk to us, and

1 they indicated that they were put in those  
2 defense billets with limited experience, whereas  
3 the prosecutors didn't complain about their  
4 experience as being problematic with their  
5 trials. Their complaints were more of  
6 investigation, the special victim counsel,  
7 unavailability of the victim to talk to them.

8 MR. STONE: And that's just  
9 summarizing the testimony that we previously  
10 heard?

11 DEAN SCHENCK: No, no. The  
12 discussions we had with the folks in the field,  
13 when they spoke to us when we went out for the  
14 site visits.

15 MR. STONE: Okay. I didn't see any of  
16 that in her report.

17 CHAIR JONES: Just so we're clear, I  
18 think that the Subcommittee is really only  
19 talking about, you know, what they learned during  
20 their site visits.

21 MR. STONE: Which look to me --

22 CHAIR JONES: Unless they labeled it

1 differently.

2 MR. STONE: Which look to me from the  
3 tenor of this report like they did not go into  
4 whether prosecution counsel had the requisite  
5 experience in the same number or similar number  
6 of cases and more importantly, and this is what  
7 came up at the last hearing that we had here,  
8 whether the trial judges had the requisite  
9 experience, because they are also rotated and  
10 they also typically don't have four to five years  
11 of sexual assault case experience, which frankly  
12 adversely affects all the parties.

13 I wondered whether the panel, when it  
14 was out there, made an attempt to talk to  
15 military judges who handle these kinds of cases,  
16 because I don't see it in the report.

17 MS. KEPROS: If I could address that,  
18 Mr. Stone, your observation is correct. This  
19 report does not address any of that. We talked  
20 about a lot of other topics on the site visits.  
21 This report is very narrow. It is only on the  
22 issue of defense counsel resources.

1                   We are going to be preparing  
2 additional reports on other aspects of our site  
3 visit investigation. This is narrow. This is  
4 not addressing the broader issues that you've  
5 identified, and that we certainly did collect  
6 some information on those topics. So you're  
7 right. We don't get into that here. I did want  
8 to note one thing I did hear about in terms of  
9 prosecution experience in sex assault cases on  
10 the site visits.

11                   There are service branches that have  
12 a function and forgive me if I get the  
13 terminology wrong, but it's essentially a special  
14 victim prosecutor, and I do not believe we heard  
15 about any equivalent expertise on the defense  
16 side in any of the branches, aside from the  
17 Navy's military criminal justice track, which was  
18 just alluded to by Dean Schwenk.

19                   MR. STONE: We've heard testimony  
20 before this panel that the special victims  
21 counsel, which is not the special victims  
22 prosecutors, are also brand new and don't have

1 sufficient experience to be able to handle those  
2 positions. Did you interview any of those  
3 special victims counsel and receive information  
4 about their lack of experience?

5 MS. KEPROS: We did, and that is one  
6 of the topics for our future reporting.

7 MR. STONE: So really, what I guess  
8 I'm getting to is I don't see anything that  
9 explains whether this problem of lack of  
10 experience, due in my view to the rotational  
11 policies of the military, which it has other  
12 reasons for, doesn't affect all the participants  
13 in these proceedings. It may be an adverse  
14 effect, but it seems to me that it affects all  
15 the participants. Do you agree with that?

16 MS. KEPROS: My personal opinion,  
17 because we've not deliberated on this as a  
18 Subcommittee, is it does affect all of them.  
19 However, my concern about defense counsel is they  
20 appear to be more dramatically affected, and they  
21 are the parties who are affected to whom there is  
22 a constitutional right that is guaranteed.

1                   And when they cannot fulfill that  
2 constitutional right, the actual legitimacy of  
3 the conviction is jeopardized so --

4                   MR. STONE: Did you collect any  
5 statistics that compare the lack of experience  
6 and the effect on all these different parties on  
7 the proceedings?

8                   MS. KEPROS: I collected qualitative  
9 information. I do not have any statistics.

10                  MR. STONE: I assume, maybe I'm wrong,  
11 but I assume that the panel is familiar with the  
12 transcripts of -- the Subcommittee is familiar  
13 with the panel's various hearings, because a lot  
14 of this data is repetitive of what we heard, and  
15 indeed you're quoting back to us stuff we heard  
16 last May. So I wanted to know if the panel that  
17 went out on each of these visits was familiar  
18 with all of our prior hearings?

19                  MS. FRIEL: We were. We've been  
20 provided with background and I know from our  
21 discussions that we've all reviewed it and read  
22 it. It helped us form our questions, to go out

1 in the field and see if the testimony that you  
2 got, for instance, out in the field if we were  
3 hearing the same thing.

4 In a number of areas, we did hear the  
5 same thing out in the field. In other areas  
6 there was a discrepancy and as Laurie mentioned,  
7 we will have other reports on different areas  
8 that we specifically looked into and have  
9 recommendations based on it, and in some you'll  
10 see we learned, as I say, something consistent  
11 with what you heard in testimony, and in other  
12 places we heard inconsistent with how it is in  
13 practice.

14 MR. STONE: Well, can you tell me what  
15 other --

16 CHAIR HOLTZMAN: This is Elizabeth  
17 Holtzman. I was a member of the Subcommittee,  
18 and I traveled both to several bases in the  
19 United States as well as several abroad, and I  
20 heard the testimony before the JPP panel.

21 Just because we heard testimony from  
22 people doesn't mean that what we heard was

1 representative. That was one of the reasons that  
2 I wanted to be on the Subcommittee and felt that  
3 our exploration and investigation was important.

4 I don't think the Subcommittee report,  
5 or even Ms. Kepros' very fine presentation in any  
6 way captures almost a tone of desperation that we  
7 heard, that I heard at these various  
8 installations, which was not just reflected by or  
9 expressed by defense counsel, but by prosecutors,  
10 investigators and others who are part of the  
11 system.

12 The concern was that the inadequacy of  
13 the resources, whether you looked at it in terms  
14 of investigative help or staffing or training or  
15 experience, the inadequacy of resources is  
16 affecting the very quality of justice. That was  
17 what I took away from this. Now can you quantify  
18 that? Maybe, maybe not. I can't quantify it for  
19 you.

20 But that was to me really disturbing,  
21 because it wasn't one person who said it, it  
22 wasn't one side that said it. It was a virtually

1 unanimous expression of concern by people who are  
2 part of the system, and they wanted to be proud  
3 of that system and they wanted it to work as a  
4 system of justice and they were not seeing that.  
5 That's what I took away.

6 So I just wanted to give you a sense  
7 of somebody who heard the JPP testimony, and had,  
8 if you will, a substantial reinforcement and  
9 expansion and deepening of it as a result of the  
10 work on the Subcommittee.

11 MR. STONE: That actually raises my  
12 next question, which is the recommendations of  
13 the Response System Panel, which I understand  
14 from your resume, Ms. Kepros, you were an expert  
15 on and I presume you know something about, made  
16 this one of their -- several of their  
17 recommendations related to the lack of resources  
18 that the Defense Council in the military were  
19 getting.

20 I don't understand why we should be  
21 simply restating at this late date the same  
22 recommendations that were made and which the

1 Department of Defense has been endeavoring to  
2 respond to.

3 Is there something here that you think  
4 is different than the Response Systems Panel  
5 said, and if so, I'd like to hear that, and I'd  
6 also like to hear what it was that the  
7 Subcommittee heard that I've just heard responded  
8 to me that some things were different than we  
9 heard here? That's what I'd like to hear, what  
10 the Subcommittee found.

11 CHAIR JONES: Can I respond, jump in  
12 as a member of the Subcommittee and just respond  
13 to the first question? It's true that many of  
14 the recommendations of the Response Panel have  
15 been adopted in some form or other and are now  
16 legislation and rule.

17 But I'm unaware of any actual movement  
18 in terms of trying to fulfill the recommendation  
19 of the Response Panel with respect to enhancing  
20 defense resources. So I don't -- I don't think  
21 procedurally there's really any issue with us  
22 doing another look at it and raising it again,

1 and it was something that the Subcommittee was  
2 tasked to do by the JPP.

3 Now I've forgotten your second  
4 question. I'm sorry, Mr. Stone, but --

5 MR. STONE: Well I guess -- I guess  
6 what that raises in my mind is before we would  
7 adopt any recommendations that repeat the  
8 Response System Panel's recommendation about  
9 additional resources that are needed for the  
10 defense counsel in the system, shouldn't the  
11 public hearing give the Department of Defense or  
12 General Counsel's Office or the Joint Services  
13 Panel or whomever agrees that they have some  
14 responsibility to review those recommendations, a  
15 chance to come up here and tell us what their  
16 progress is?

17 CHAIR JONES: I think that's -- I  
18 think that's a good idea, and that we should  
19 discuss that as a matter of our deliberations, as  
20 opposed to presenting it to the Subcommittee.  
21 Does that make sense?

22 MR. STONE: Well I guess -- okay. So

1 then I can assume one, the Subcommittee didn't go  
2 into talking to high level officials at these six  
3 bases or on these six visits, and find out  
4 whether or not the Response System Panel's  
5 recommendation has been somewhat implemented, not  
6 implemented, controversial, discussed. They  
7 didn't go into the RSP's progress on these  
8 recommendations. Is that right?

9 CHAIR JONES: No. What the  
10 Subcommittee did, at least my own experience and  
11 I was unfortunately only able to go on one of  
12 these site visits, was we found out from people  
13 who were there speaking to us, prosecutors,  
14 defense lawyers, everyone in the system what they  
15 had and what they didn't have now, regardless of  
16 what recommendations may have been made.

17 We didn't really analyze or ask the  
18 question well gee, after that recommendation,  
19 didn't you get any more resources? So we don't  
20 know that answer. But we know they don't have  
21 the resources.

22 MR. STONE: So this, to the extent

1 that this was covered by the RSP, this is an  
2 update of that recommendation, bringing it  
3 forward to a more recent point in time?

4 MS. FRIEL: I would say that's  
5 accurate. I think the point is here we are in  
6 December of 2016, and we have learned there is  
7 still a need for additional defense resources in  
8 the area that we've described.

9 MR. STONE: Okay, and I guess you  
10 haven't presented the report yet, but I'll ask  
11 you about the Subcommittee visits. Did you also  
12 look into, at that time, the current status of  
13 that trial judge experience, the prosecutor's  
14 need for experience and the special victims  
15 counsel's lack of resources and need for  
16 experience, which the special victim counsels  
17 explicitly made a point in testimony before us?

18 MS. KEPROS: Do you want me to address  
19 it?

20 CHAIR JONES: Yes, go ahead Laurie.

21 MS. KEPROS: Okay. We did not collect  
22 judicial information like that. We did interview

1 concerning trial counsel and special victim  
2 counsel about resources, and as I mentioned, I  
3 anticipate we're going to be covering that in  
4 future reports.

5 MR. STONE: Well, and so I come back  
6 to what I started. It seems to me that if you  
7 have a recommendation on additional experience  
8 that you require in your Recommendation No. 4, it  
9 seems to me it ought to await including whether  
10 or not that should cover prosecutors, special  
11 victims counsel and the trial judges before this  
12 panel talks about who at military first level  
13 courts-martial should get more resources.

14 CHAIR JONES: So that's an issue for  
15 the JPP to decide, that perhaps the tasking  
16 wasn't broad enough, okay.

17 MS. WINE-BANKS: But we will be  
18 covering trial counsel in future reports. It's  
19 just that this report was focused only on the  
20 defense side. So that we could get some  
21 information to you, we decided to present it  
22 piecemeal. Possibly it would have been better to

1 wait many months until we could finish all of our  
2 reports.

3 I'm not sure. Has our -- have the  
4 detailed minutes of our site visits been made  
5 available to the JPP?

6 CPT TIDESWELL: No ma'am, they have  
7 not.

8 MS. WINE-BANKS: Okay, because we do  
9 have detailed minutes of who we met with and what  
10 we were told without attribution to any  
11 particular person, that could be made available.  
12 At every site visit there were notes taken and  
13 captured the findings that we were relying on.  
14 We used the ones from, you know, we pulled out  
15 the ones that related to this topic to do this  
16 report.

17 In future reports, we would pull out  
18 the information from those detailed reports to  
19 cover the others, and make recommendations  
20 regarding trial counsel, regarding special victim  
21 legal counsel who --

22 By the way again, we haven't discussed

1 this, but from my perspective, the ones that I  
2 heard from all sounded like they had much more  
3 experience than the others.

4 There was also an issue raised that  
5 the defense now felt quite outmanned because  
6 there was one of them and there were at least two  
7 against them, usually three because there was  
8 usually two prosecutors plus the victims counsel  
9 and the victims advocate, adding a fourth not  
10 legal component, but a fourth thing.

11 So that's just an observation that's  
12 not part of our deliberations yet.

13 MR. STONE: Let's follow that line for  
14 a second. We heard in testimony before this  
15 panel that the trial counsel at these military  
16 first level trials, both the prosecution and the  
17 defense, have regional bodies, regional counsel  
18 to whom they call.

19 When I specifically asked how they  
20 handle difficult questions, because neither side  
21 necessarily had an experienced person at that  
22 proceeding, they said oh, well we have people.

1 We grab ahold of them on the phone. We run  
2 issues by them and they help us about the issues  
3 so we know what we're doing.

4 That's available. You didn't find  
5 that that's not available to defense counsel in  
6 these cases, did you?

7 MS. WINE-BANKS: No sir, we did not.

8 MR. STONE: So then why is it that  
9 your report says that they wouldn't have the  
10 ability, with the expertise that they can get  
11 from their regional counsel who are experienced,  
12 to know even what to do or what questions to ask,  
13 which we just heard is part of your report?

14 MS. WINE-BANKS: I think what we found  
15 was that they were available often too late.  
16 They would come in to assist at the last minute,  
17 much like the experts who came too late, if they  
18 were even the particular specialty that was  
19 needed, and that it was not a question of they  
20 aren't available.

21 They are. There just aren't enough of  
22 them and the main work is being done before the

1 experts get involved. I don't know if the other  
2 panel had other memories of their testimony.

3 MR. STONE: Well I don't -- does  
4 anybody else want to comment on that?

5 BG SCHWENK: Well I think one of the  
6 -- one of my thoughts on that is when we talk  
7 about the availability of regional defense  
8 counsel or whoever they are, they are available.  
9 But they're not available when you're in the  
10 courtroom. They're not available when the  
11 members of the jury are sitting there looking at  
12 the cross-examination or the direct or whatever,  
13 and that's where the experience comes in.

14 As Lisa was talking about, that's  
15 where the experience, and when you don't have it,  
16 you don't have it. And you're learning it, but  
17 your client, the accused, suffers in the meantime  
18 while you're on a learning curve. So they are  
19 available and they are very helpful when you can  
20 call them ahead of time and identify an issue and  
21 talk it out with them and get some guidance or  
22 they can visit you.

1           But the problem of knowing the right  
2 question to ask or whatever comes from experience  
3 and, you know, we're all a victim of it takes a  
4 while to develop experience.

5           MR. STONE: So you're suggesting that  
6 no defense counsel should have less than several  
7 years of experience because they won't know what  
8 questions to ask ahead of time?

9           BG SCHWENK: Oh that oversimplifies,  
10 I think, the report that you heard from Laurie  
11 and that's written for you to read. But I do  
12 think that when we look at what they should be  
13 able to do, our recommendation is no lead defense  
14 counsel in a sexual assault case should be  
15 someone without experience.

16           So if you're going to have a sexual  
17 assault case, you should ensure the lead defense  
18 counsel has sufficient experience to be able to  
19 handle the case.

20           MR. STONE: And since that expert's  
21 not available on the phone to the prosecution  
22 either, you agree that that ought to be true of

1 the prosecutor in the case too, don't you?

2 BG SCHWENK: I'm not going to talk  
3 about the prosecution side of it because we  
4 haven't deliberated. So you know, I can tell you  
5 that experience says not everybody in a military  
6 court-martial can all be equally experienced,  
7 because somebody has to get experience somehow.  
8 So we do it by second seating. That's where our  
9 recommendation on the defense side is.

10 The lead counsel has experience. That  
11 allows the new counsel to sit and learn and  
12 develop it, so they can become lead when the  
13 objective and subjective criteria are  
14 established. Sounds reasonable that the  
15 government would have something on the trial  
16 counsel side also, but we haven't deliberated so  
17 --

18 MR. STONE: I guess --

19 BG SCHWENK: I don't want to jump  
20 ahead of the FACA rules and say anything.

21 CHAIR JONES: So Mister --

22 MR. STONE: I guess what doesn't sound

1 reasonable to me is that if the statistics are --

2 CHAIR JONES: Mr. Stone, I really --  
3 do you have a question for them?

4 MR. STONE: Yes, I do.

5 CHAIR JONES: Okay.

6 MR. STONE: If the statistics are that  
7 the vast majority of these cases result in  
8 acquittals, as you've noted, and the defense  
9 counsel doesn't have the opportunity to have an  
10 expert at their side, nor does the prosecution,  
11 that doesn't suggest like they're doing a bad  
12 job.

13 Are you implying that the military is  
14 indicting cases improperly? Because if they're  
15 not, then defense counsel, by looking at the  
16 results, suggest they're able to do and are doing  
17 a pretty good job.

18 BG SCHWENK: I think that's an  
19 oversimplification of how you evaluate a court-  
20 martial or a criminal case in general. There are  
21 a lot of reasons that can result in an acquittal.  
22 One can be a very difficult case to prosecute,

1 and if you take a very difficult case to  
2 prosecute and you have your ace prosecutor with  
3 all the experience in the world, who does a bang-  
4 up superb job, the end result could be not  
5 guilty, because it was a hard case to begin with.

6 MR. STONE: Let me ask you another  
7 question because you've been in the military.  
8 The military system is different than every  
9 civilian system because in effect there is a de  
10 novo raising of issues on appeal. The record  
11 that's made at the trial court and the evidence  
12 offered to the defense counsel at the trial court  
13 is not closed with the end of that proceeding.

14 As we've heard before, 513 issues are  
15 very common in sexual assault cases, which are  
16 the access to privileged psychological records of  
17 the victim and sexual assault cases, as you  
18 pointed out, are now very high, in very high  
19 numbers in the military system, maybe a majority  
20 of cases.

21 But when the case gets to appeal, an  
22 experienced defense appellate counsel gets to

1 review not only the record below but also new  
2 material and make any arguments that counsel  
3 wants to.

4 CHAIR JONES: All right. Mr. Stone --

5 MR. STONE: Why doesn't that correct  
6 the problem? Did you inquire about that concern  
7 in your Subcommittee deliberations?

8 CHAIR JONES: Thank you. Thank you  
9 for your question. I think it's something that  
10 we can discuss in deliberations. I think it goes  
11 beyond a question appropriate for the panel.  
12 Okay.

13 MR. STONE: Well, if you're going to  
14 cut me off, I do have something else I want to  
15 know for the record and I'm going to ask whoever  
16 was in charge of the Subcommittee to put it on  
17 the record. At our May meeting in  
18 Charlottesville, a meeting was held by this  
19 panel that was not public to decide on whether or  
20 not there would be these Subcommittee visits.

21 I was told there would be a public  
22 vote on that, there never was. At that meeting,

1 I only agreed to the visits on the condition that  
2 if two panel members were not going on a  
3 particular visit, I wanted to be invited because  
4 I wanted, just like this panel has said, and just  
5 like the chair of our panel told us on the phone,  
6 I wanted to be there in person to see what these  
7 people had to say.

8 Because as you said, it might be  
9 entirely different from the testimony we got  
10 here. I was told don't worry, that certain panel  
11 members were going, had every intention of going  
12 and therefore I could not go because you couldn't  
13 have three panel members go on a Subcommittee  
14 visit because that would constitute a quorum.

15 I want to state for the record the  
16 attendance shows that two panel members from this  
17 JPP didn't go on any of those visits. I was  
18 never invited to go on them, despite saying that  
19 I wished to go. I was the only panel member who  
20 said they wished to go on any of the visits, and  
21 we've also never heard a report, a financial  
22 accounting of how many tens of thousands of

1 dollars was spent on this report, which I was, I  
2 believe, improperly not invited to attend. Thank  
3 you.

4 CHAIR JONES: Well, I can only say  
5 that I attended two administrative meetings.  
6 They were not public, you're correct Mr. Stone,  
7 where the panel discussed whether or not these  
8 site visits were something that we should do,  
9 whether the expenditures to go and make these  
10 site visits were going to result in worthwhile  
11 information that we couldn't get with just having  
12 hearings with people.

13 We had had this experience with the  
14 RSP and we found that being able to talk to  
15 installation level people who are not speaking  
16 for attribution was very, very important in order  
17 to understand things in context and get  
18 additional information.

19 We also, as I said, we had two  
20 meetings. At the second meeting, my recollection  
21 is there was -- I don't think everybody said on  
22 here no, but there was an understanding that you

1 did not agree to the panel meetings. But and I  
2 can be corrected. I think the other members of  
3 the panel did agree that we should go forward on  
4 it.

5 I don't recall there was ever a public  
6 announcement of that, but we did do them at two  
7 administrative meetings. With respect to the  
8 rule about panel members, if more than two panel  
9 members attend -- in other words, if three panel  
10 members attend a meeting, then under my  
11 understanding of the FACA rules it becomes a  
12 deliberation of the panel and therefore if we did  
13 that, we would not have been able to have these  
14 site visit meetings where we could talk to people  
15 and do it without attribution.

16 It is a fact that neither Ms. Holtzman  
17 nor I ever attended together one of these site  
18 visits, and I recall in our conversations that I  
19 told you, Mr. Stone, that I would be happy if you  
20 wanted to attend one with me. There would only  
21 be two of us, that way we could do it.

22 I apologize if -- and I don't know.

1 You were never contacted or given a schedule or  
2 if you never called to ask specifically once we  
3 agreed to do site visits, to go. That's all I  
4 can say for the record.

5 MR. STONE: Well, my only response is  
6 that part of my concern, which the Ethics Council  
7 to this panel agreed with when I was told that  
8 the deliberations and open vote on whether there  
9 would be Subcommittee visits as opposed to panel  
10 visits, which is what I wanted, that the vote on  
11 that would be public.

12 That did not happen despite that  
13 opinion from the Ethics Council, and I frankly  
14 think that what happened here is a violation of  
15 the Open Meetings law. Thank you.

16 CHAIR JONES: Okay. Well, I don't  
17 have any familiarity with that opinion. All  
18 right. Admiral, did you have some questions for  
19 the panel?

20 VADM TRACEY: I apologize.

21 (Simultaneous speaking.)

22 CHAIR JONES: Or the Subcommittee.

1                   VADM TRACEY: --Schwenk. I don't know  
2 how to pronounce your last name.

3                   BG SCHWENK: We try to confuse  
4 everybody. Lisa and I have done a great job.  
5 She is a Schenck and I am a Schwenk, and I don't  
6 know why that is, but that's the way it is.

7                   (Simultaneous speaking.)

8                   DEAN SCHENCK: -- because I married  
9 him and I took his name.

10                  VADM TRACEY: The Navy process that  
11 you described, is that a new process or --

12                  DEAN SCHENCK: I think it is. I  
13 actually -- I don't know why they do it, but I  
14 believe it's in the last few years, maybe two or  
15 three years.

16                  VADM TRACEY: Okay.

17                  MS. WINE-BANKS: Could I just add that  
18 they also have then developed a military justice  
19 track, a litigation track and that has been  
20 highly regarded by many of the services, who may  
21 be or may not be considering whether that would  
22 be an appropriate track to develop for

1 themselves.

2 VADM TRACEY: That's also recent,  
3 right?

4 MS. WINE-BANKS: Yes.

5 VADM TRACEY: Did you get to talk to  
6 convening authorities? I don't know if I heard  
7 that in what you had to say.

8 MS. WINE-BANKS: Yes, we did.

9 VADM TRACEY: Is there -- can you  
10 characterize what their perceptions are of the  
11 issues that you raise around the inherent risk to  
12 fairness in the resourcing of the defense side?

13 MS. KEPROS: I can tell you I think I  
14 only met with maybe two or three convening  
15 authorities, so I don't think we had as  
16 representative a perspective. And I don't  
17 specifically remember discussing the defense  
18 resource topic in that meeting.

19 Frankly, the broader topic that I  
20 reflect on is we were talking about preferral of  
21 charges, that process, and how those convening  
22 authorities were resolving decisions about

1 whether to go forward, what was significant to  
2 their decision, the role of the victim's wishes  
3 in the formulation of that decision.

4 VADM TRACEY: Anyone else have any  
5 recollection of --

6 MS. WINE-BANKS: No, that was my  
7 recollection. Many of the convening authorities  
8 also were just indoctrinating us in the base that  
9 we were on and the mission of that particular  
10 facility, rather than being as much in our list  
11 of questions or topics that we wanted to cover.

12 VADM TRACEY: Just confirm for me, if  
13 you would, that except for the Navy's eight  
14 defense investigators, my understanding would be  
15 that even at the regional defense counsel level,  
16 there are not investigative resources available  
17 to assist at the defense counsel level?

18 MS. WINE-BANKS: Yes ma'am.

19 VADM TRACEY: Okay. Last question.  
20 Ironically, NPR ran a piece on public defender  
21 resource shortages this week. Is there a best  
22 practice in the public defender world around

1 developing the right kind of experience for  
2 counsel?

3 MS. KEPROS: I love your question.

4 BG SCHWENK: Well, then I want to  
5 answer it.

6 MS. KEPROS: Right, so take it away.  
7 I can't be trusted. We actually discussed that a  
8 lot in our deliberations in arriving at the  
9 recommendations, and specifically the  
10 recommendation to have an outside entity take a  
11 look at staffing needs.

12 We are under-informed but very  
13 sensitive to the diversity of needs across  
14 services, the differences in not just size but  
15 the geography and, you know, how they function  
16 within their justice systems.

17 But what we have seen nationally is  
18 various jurisdictions with public defender  
19 offices, and to be clear those are organized in  
20 really diverse ways, right? They might be at the  
21 municipal level, they might be at the federal  
22 level, they might be at the state level and it's

1 all over the map as you go across the country.

2 There has been increased attention to  
3 auditing those kind of diverse issues and  
4 figuring out that the needs in a jurisdiction  
5 that is rural, that has small caseloads are going  
6 to be different from the needs in a jurisdiction  
7 that is urban and has large caseloads.

8 For example, in the urban jurisdiction  
9 the attorneys can generate experience a lot more  
10 quickly, and they might have easier access to  
11 experts and other kinds of help. In the rural  
12 jurisdictions, the caseload size might not be a  
13 problem, but they can't get help and they don't  
14 have people to turn to to learn what they need to  
15 be effective in their work.

16 So there have been attempts to put  
17 metrics to these kind of questions. They involve  
18 processes such as surveying private defense  
19 attorneys in given communities, finding out what  
20 do they charge somebody to work on a case.

21 What are their expectations for what  
22 it really takes to do a responsible job

1 representing a client in this kind of case? What  
2 are their expectations for experts? What are  
3 their expectations for hours that they could bill  
4 a private client?

5 Obviously, public defenders are not in  
6 necessarily the same situation, but it starts  
7 providing some metrics. They are also collecting  
8 data from various public defender agencies to  
9 look at how much time do the attorneys actually  
10 spend. There have been published reports with  
11 the sponsorship of, I believe, the American Bar  
12 Association out of the state of Missouri.

13 And as you might be aware, I didn't  
14 hear the NPR story but I know there has been  
15 press looking at lawsuits in jurisdictions where  
16 public defenders are saying we are not  
17 sufficiently resourced to provide adequate  
18 representation, and I suspect in the course of  
19 the civil lawsuits, these kinds of figures are  
20 also coming up.

21 CHAIR JONES: Liz, unless you have  
22 some questions, I think we've concluded that

1 part. Any questions?

2 FEMALE PARTICIPANT: Did we lose her?

3 CHAIR JONES: We may have lost her.

4 All right. I want to thank you all very much,  
5 and especially again express the appreciation to  
6 the panel for giving a very clear presentation  
7 and also for all the work you've done on this  
8 report as well as all of the other site visits  
9 that you've conducted. So thank you.

10 BG SCHWENK: Thank you.

11 CHAIR JONES: All right.

12 BG SCHWENK: Let's take a break.

13 CHAIR JONES: Let's take a ten minute  
14 break, a real break this time and we'll come back  
15 and begin our next session.

16 (Whereupon, the above-entitled matter  
17 went off the record at 10:48 a.m. and resumed at  
18 11:03 a.m.)

19 CHAIR JONES: Okay, we are going to  
20 begin now and for this portion, we are going to  
21 at least begin our deliberations on the  
22 Subcommittee Report that we just heard. I think

1 some of the Subcommittee Members are still here.  
2 They are not allowed to deliberate. If they are  
3 here and there is a question, we may ask them but  
4 this is a Panel deliberation.

5 Liz, are you there?

6 CHAIR HOLTZMAN: Yes, ma'am, thank  
7 you.

8 CHAIR JONES: Okay, thanks.

9 All right, we should take it  
10 recommendation by recommendation, I guess would  
11 be the most orderly way to do it. And unless  
12 there are some preliminary comments, I think if  
13 we just start with their recommendation that, in  
14 order to insure the fair administration of  
15 justice, all of the military Services provide  
16 independent and deployable defense investigators  
17 under their control in sufficient numbers so that  
18 every defense counsel has access to an  
19 investigator, as needed.

20 And so I would like to hear any  
21 comments with respect to that recommendation.

22 Yes, Admiral.

1           VADM TRACEY: While I was compelled by  
2 the argument that the Article 32 changes makes  
3 this an even more important issue, perhaps, than  
4 it was under the previous model Article 32  
5 hearing, sort of grounding a recommendation  
6 around this quite clearly in the fact that in  
7 addition to what has been the historic under  
8 resourcing, there is this additional change that  
9 has occurred, making this an even more -- having  
10 a bigger impact on the defense counsel than  
11 perhaps was true in the old model of Article 32  
12 hearings.

13           CHAIR JONES: Yes, and the Article 32  
14 piece of this was something that, obviously, we  
15 learned a lot about because it has, you know the  
16 change occurred in the last year and a half and  
17 so there was a lot of commentary about that, as  
18 the Subcommittee described and it has made it  
19 even more difficult.

20           Although, I think, frankly, the RSP  
21 concluded three years ago that they were already  
22 in pretty bad shape. But I completely agree that

1 their needs have only gotten greater because they  
2 have access to even less information.

3 VADM TRACEY: With reference to this  
4 Panel's responsibility to evaluate the effects of  
5 those changes, here you have at least anecdotal  
6 evidence suggesting that this particular change  
7 is having a profound impact on something that was  
8 already an issue.

9 CHAIR JONES: Right. I agree with  
10 that.

11 MR. TAYLOR: I think, to some extent,  
12 what has been identified here is as much a  
13 cultural issue as the way people have been  
14 thinking about this problem in an historical  
15 context for a very long time, as I reflected on  
16 my own experience. So, certainly hearing someone  
17 say that this is so important that it puts  
18 justice at risk raises the stakes, it seems to  
19 me, for taking some action that is clear.

20 I certainly appreciate what Mr. Stone  
21 had to say about the fact that this is a kind of  
22 recommendation that has been made in the past but

1 it seems to me that it is pretty clear that not  
2 enough attention yet has been paid to the issue  
3 and certainly not enough resources developed and  
4 devoted to the issue. So, I am in support of  
5 this.

6 CHAIR JONES: Mr. Stone?

7 MR. STONE: Yes, I would like to start  
8 by continuing on the last line that we just  
9 heard. I agree that everybody who needs  
10 investigators at the first level court-martial  
11 hearing ought to have some access, reasonable  
12 access to an investigator but we have not heard  
13 from DoD what they are doing. And if it turns  
14 out that they are in the process of hiring more  
15 investigators or they have already expanded the  
16 number of investigators and the fact is they are  
17 in training right now, then the fact that this  
18 Subcommittee has found that they may not be on  
19 the ground yet is not a reason for us to make a  
20 recommendation. I think the recommendation is  
21 premature before we have heard from DoD. And it  
22 is also premature because we just heard they

1 really didn't quiz the convening officers on the  
2 basis they went to as to whether this is  
3 something different than what we heard from  
4 everybody earlier in the year.

5 So, I think that before we have heard  
6 from DoD on this particular need, it is premature  
7 because they do have an RSP out there that states  
8 this. So, the second feeling I have is we don't  
9 need to repeat something, if it turns out it is  
10 in the process of being fixed.

11 And the other comment I have is that  
12 I would change the language because we  
13 specifically heard testimony that the SVCs don't  
14 have investigators that they need. So, if this  
15 is a recommendation, the recommendation should be  
16 that the military Services provide independent  
17 and deployable investigators for defense counsel,  
18 prosecution counsel, and Special victims' counsel  
19 in sufficient numbers so that every counsel has  
20 access to an investigator as needed. That we  
21 have to be even handed across the board.

22 And so without an update from the DoD

1 and without being even handed to talk about all  
2 of the participants, I don't find this  
3 recommendation, in its current form, acceptable  
4 and I will not vote for it.

5 CHAIR JONES: Well, I see no problem  
6 at all not getting an update from DoD. I haven't  
7 seen any evidence that more investigators are  
8 being hired and are being given to the defense  
9 counsel throughout the military. I don't think  
10 that is happening but I see no reason not to make  
11 sure that we are not recommending something that  
12 is already in process.

13 So, I think the Staff can put their  
14 heads together and figure out how we get that  
15 update. And we can be absolutely sure we are not  
16 recommending something that is already in  
17 process.

18 My own reaction to expanding this to  
19 give independent investigators, I guess we can  
20 always say if needed, to special victims' counsel  
21 and the prosecutors, I put them in two different  
22 buckets. I think that I haven't heard that the

1 prosecutors claim they need it because they  
2 already have their special victim capability but,  
3 again, we can double-check and make sure that  
4 they are not expressing a need for more  
5 investigators.

6 With respect to special victims'  
7 counsel, I think we are overcrowding the field.  
8 The Government has investigators, I believe, and  
9 they need them. And certainly the defense needs  
10 investigators and they don't have them. It is  
11 not clear to me well, one, what an investigator  
12 for a special victims' counsel would do,  
13 independent of what the Government or the defense  
14 would do. But I am open-minded on the subject.  
15 I just think it is a lot of investigators running  
16 around in one case.

17 MR. STONE: Well, I think this goes  
18 back to the difference between special victims'  
19 counsel and the prosecutors and the fact that the  
20 prosecutor does not have an attorney-client  
21 relationship with the victim and the special  
22 victims' counsel does. The special victims'

1 counsel may want to go out and question, and this  
2 is just a hypothetical, a woman who says she was  
3 assaulted by talking to three or four of her  
4 prior boyfriends or whatever and does not  
5 necessarily have to or want to have that  
6 information conveyed to the prosecution  
7 investigator, who, by virtue of it being in the  
8 prosecution's hands, has to turn it over to  
9 defense counsel. That is up to the victim to  
10 decide with the victim's counsel.

11 And that is the whole issue of whether  
12 or not the victims have slightly different  
13 concerns than the prosecutors and their  
14 investigators who are bound under *Brady* to turn  
15 material over to the defense counsel and why they  
16 need special investigators. And I heard a ton of  
17 testimony about that when I went to the training  
18 session in Charlottesville with special victims'  
19 counsel, how they have no investigators. And so  
20 when a victim tells them something at the first  
21 level, they can't follow it up before they decide  
22 how that information, if it is relevant, should

1 be turned over to the prosecution about say the  
2 woman's prior sexual history or lack thereof or  
3 whatever and whether that is going to be turned  
4 over.

5 CHAIR HOLTZMAN: This is Liz Holtzman.  
6 First, I didn't get a chance to thank the Panel,  
7 maybe because I was serving on it. I do want to  
8 say that the Members of the Subcommittee really  
9 did an amazing job and spent an enormous amount  
10 of time and traveled around the country. They  
11 are extremely qualified and thoughtful people and  
12 experienced, and expert.

13 And so I want to say thank you to each  
14 and every Member of that Subcommittee, present  
15 company, myself excluded, and including the  
16 Chair, Chair Barbara Jones.

17 CHAIR JONES: You can exclude me, too.

18 CHAIR HOLTZMAN: I also want to say  
19 that it is -- talking about premature, we have  
20 not had the benefit of the deliberations of the  
21 Subcommittee on the issue or their fact-finding  
22 with respect to the issue of Special victims'

1 counsel and with respect to trial counsel. So,  
2 this report, as the Subcommittee made very clear,  
3 is limited in its scope. If you want to object  
4 to the report on the grounds that it should have  
5 addressed all those other things, there is no  
6 reason -- you can have an objection on any  
7 grounds, I guess. But I would completely object  
8 to any inclusion of any material that does not  
9 have the benefit of the Subcommittee's reflection  
10 and deliberation.

11 And so, I would oppose expanding this  
12 and any such material. And I just wanted to  
13 express my support. I share Admiral Tracey's  
14 view particularly that the grounds have shifted  
15 and that the needs have become much more exigent  
16 and urgent because of the change in Article 32.

17 And I wonder whether -- and maybe  
18 Maria can help us figure out how we approach this  
19 problem. Maybe can we vote in favor, pending a  
20 Defense Department report, as to whether they are  
21 doing something on this issue or should we just  
22 postpone the vote until we hear a report from the

1 Defense Department.

2 Maria, do you have a suggestion about  
3 that?

4 MS. FRIED: I think it probably -- my  
5 suggestion would be to defer, pending more  
6 information from the Defense Department, if the  
7 panel agrees that they need more information.

8 CHAIR HOLTZMAN: That we should defer?  
9 I'm sorry, because I am on a speaker phone I  
10 couldn't hear you. Defer?

11 MS. FRIED: Yes, I think if the panel  
12 believes that they need more information from  
13 DoD, my recommendation would be to defer this  
14 recommendation, pending further information from  
15 the Department of Defense.

16 CHAIR JONES: I mean my thought was  
17 simply that we could ask the question whether or  
18 not there were any plans or if, indeed, any of  
19 the Services had already begun to provide  
20 investigators to defense sides in each of the  
21 Services.

22 I don't know that we need any

1 information beyond that. And I understand Mr.  
2 Stone's concern that maybe they are already doing  
3 this. As I said, I see no evidence of it. We  
4 haven't heard any evidence of it either from the  
5 Subcommittee or I think from anyone we have heard  
6 testify here.

7 But I am not opposed, as sort of, you  
8 know if it is a one-question request to each of  
9 the Services. It should be a simple answer, I  
10 think.

11 I don't know. You know more than I do  
12 about these things, Mr. Taylor.

13 MR. TAYLOR: No, but just as a point  
14 of clarification, did the RSP recommendations  
15 also extend to Issues 2, 3, and 4, in terms of  
16 equality or parity between prosecution and  
17 defense? That is to say, the funding not only of  
18 office personnel but also the witness expert  
19 funding and staffing and experience. Did the RSP  
20 recommendation cover that as well?

21 CHAIR JONES: I only remember that we  
22 recommended more funding for the defense.

1                   CHAIR HOLTZMAN: It was in the report,  
2 Mr. Taylor, because the report does reference the  
3 RSP's recommendations in this area. So, it  
4 should be -- if the RSP did it, it would be in  
5 the report.

6                   MS. FRIED: Page 3.

7                   CHAIR JONES: Oh, defense  
8 investigators. Well, yes, it does include the  
9 RSP's recommendation, which was Recommendation  
10 81, the Secretary of Defense direct the Services  
11 to provide independent, deployable defense  
12 investigators in order to increase the efficiency  
13 and effectiveness of the defense mission and the  
14 fair administration of justice. So, yes, we  
15 certainly did make that recommendation.

16                   CHAIR HOLTZMAN: But they made the  
17 other ones, too, further that --

18                   CHAIR JONES: They may have but I  
19 would have to go take a look and I didn't.

20                   VADM TRACEY: There is also from RSP  
21 Recommendation 82 speaks to the Military Defense  
22 Counsel Organization is adequately resourced in

1 funding, resources, and personnel including  
2 defense supervisor personnel with training and  
3 experience. I don't see --

4 CHAIR JONES: Comparable to their  
5 prosecution counterparts, right.

6 MR. TAYLOR: That was my recollection,  
7 although we did not get this report until late  
8 last night and I didn't have a chance to study  
9 it. But I thought that the same issue that Mr.  
10 Stone raised also would apply to something other  
11 than the defense investigators.

12 VADM TRACEY: Witness and expert  
13 funding is Issue 3.

14 CHAIR JONES: Right, to the extent  
15 that we are recommending, that the Subcommittee  
16 is recommending that the Secretary do certain  
17 things and provide resources, whether it is for  
18 investigators or personnel with more experience,  
19 they would all, I guess, Mr. Stone, correct, fall  
20 under that same question that you have. Aren't  
21 they already doing this? That is how I  
22 understand your question.

1                   MR. STONE: Well, that is one part of  
2                   it. And the other part is, legally, can what is  
3                   being recommended be done? In other words, it  
4                   says here Recommendation 3 says recommends the  
5                   Secretary of Defense direct the military Services  
6                   to vest defense expert funding and approval  
7                   authority. I don't know if they can do that  
8                   legally.

9                   I mean I would want to hear from them  
10                  that it is even -- that vesting of monetary power  
11                  can be done. It may be that it has to be changed  
12                  to be something that can be done. I don't know.  
13                  We haven't heard from the Secretary of Defense on  
14                  any of these.

15                 CHAIR JONES: Right. I mean,  
16                 obviously, right now the budget for all of these  
17                 types of things is with the convening authority.  
18                 And I don't know whether it can legally be done  
19                 but I guess all things can be changed legally, at  
20                 some point.

21                 But that is another question that you  
22                 would like answered and I think that is a valid

1 point. It may very well help us to figure out if  
2 this is the right way to make this recommendation  
3 or whether it needs more information in it.

4 Any other comments on the substance?  
5 We have heard opinions about more defense  
6 investigators. And we have your suggestions, Mr.  
7 Stone, and we are going to find out the answers  
8 with respect to all of these where we are talking  
9 about recommending more resources and find out  
10 whether, in fact, there are plans to do it  
11 already.

12 And in the instance of separate  
13 funding for defense organizations, see whether or  
14 not that can even be done under current policy  
15 and law.

16 MR. STONE: That is in Recommendation  
17 3.

18 CHAIR JONES: Yes, 3.

19 MR. STONE: Did you want to talk about  
20 Recommendation 2 next?

21 CHAIR JONES: I do, substantively.  
22 The Subcommittee recommends that the military

1 Services immediately review Service defense  
2 organizations' staffing defense counsel,  
3 paralegals, highly qualified experts, and  
4 administrative support personnel, and augment  
5 current levels in order to alleviate the reported  
6 understaffing.

7 The Secretary of Defense should direct  
8 an audit by an independent, outside entity of  
9 defense staffing across all of the military  
10 services to determine the optimum level of  
11 staffing for the Service defense organizations in  
12 the long-term.

13 That is the second recommendation and  
14 it is born of the site visits, as well as other  
15 information that was received, that their defense  
16 are understaffed. They are not just more  
17 inexperienced than most of the prosecution  
18 counsel, they are also understaffed.

19 Mr. Stone, I'm sorry.

20 MR. STONE: Okay, as to Recommendation  
21 2, the first part, the first sentence of it, once  
22 again, ignores the fact that we haven't asked the

1 Department of Defense, the Secretary of Defense,  
2 if they are, in fact, currently reviewing Service  
3 defense organization staffing. My guess is that,  
4 as a regular part of what they do, they are doing  
5 that and/or if they have plans to do it in a more  
6 focused manner in the future. That is my  
7 complaint about the first sentence.

8 CHAIR JONES: Well, I think everyone  
9 agrees that we are going to do that with respect  
10 to the expenditure requested in all of these.

11 MR. STONE: Okay. Moving to the  
12 second sentence of that recommendation, I  
13 strongly object to the word outside that is on  
14 the second line, where it says Secretary of  
15 Defense should direct an audit by an independent  
16 outside entity of defense staffing, to determine  
17 the optimum level of staffing. And I also would  
18 object for it to say for the Service defense  
19 organizations. Again, it should say for  
20 prosecution, defense, and special victims'  
21 counsel organizations in the long-term.

22 The reason I object to the word

1 outside is, frankly, we have heard no evidence,  
2 and there is none here that people who are  
3 familiar with the military system can't do that  
4 kind of an audit, especially if they are  
5 independent, like an IG. And no Service would  
6 appoint an IG who has not been enmeshed in the  
7 current military Services. I, for one, have  
8 heard repeatedly from this panel, civilian sexual  
9 assault representatives tell us how their numbers  
10 don't correlate with the military numbers. Their  
11 trial procedures don't correlate with the  
12 military trial procedures. And they made the  
13 case, and we have seen it in our statistics, that  
14 the two systems are not interchangeable.  
15 Therefore, I don't think we need a non-military,  
16 non-Department of Defense expert. It is clearly  
17 sufficient if it is an independent entity, just  
18 like an IG who does a review. And I am not even  
19 certain that they have to be independent because  
20 I have not heard any panel member say that they  
21 have heard people within the Defense Department  
22 say we have more than enough defense

1 investigators. So, it is not like anybody is  
2 covering anything up or there is any reason that  
3 we need somebody who has less expertise than the  
4 people we have been bringing before the panel.

5 So, I object to the second sentence to  
6 the use of the word outside and, again, the  
7 limitation on optimum levels of staffing that  
8 they are examining just for defense  
9 organizations.

10 CHAIR JONES: Any other comments?

11 MR. TAYLOR: I just have a question to  
12 follow-up on that. And someone can tell me if  
13 this is not an appropriate question. But since  
14 we still have Subcommittee Members here, just as  
15 a point of information, when you wrote  
16 independent outside entity, what were you  
17 thinking? Because what I was thinking when I  
18 read this was not that it would be some  
19 organization that had no chops, if you will, for  
20 defense manpower but some defense manpower  
21 organization, as opposed to an organization that  
22 would have no understanding of the military. But

1 perhaps someone can enlighten us on that, if you  
2 are able.

3 CHAIR JONES: General Schwenk.

4 BG SCHWENK: I believe that what we  
5 thought is that there are outside -- we were told  
6 that there are outside organizations that are  
7 private auditing agencies that go around to  
8 public defenders offices and whatever offices  
9 similar to that, to help them with assessing  
10 staffing needs and requirements.

11 And we thought if we could get one of  
12 those, if the Department got one of those outside  
13 organizations with expertise and brought them in,  
14 they could do a cross-Service scrub and share  
15 their results with the Services and let them take  
16 it and proceed from there.

17 MS. FRIEL: Yes, Ms. Kepros was aware  
18 of at least one that she mentioned to us by name  
19 that had done such an audit in I think it was  
20 three different states. So, they had a real  
21 background in looking at defense organization  
22 staffing needs. And we thought that that would

1 be a great thing for the military to do across  
2 all its Services, use that expertise.

3 CHAIR JONES: Admiral Tracey. I'll  
4 just put you on the spot.

5 VADM TRACEY: Yes, could we  
6 accommodate Mr. Stone's concern by trusting the  
7 Secretary of Defense to know whether the audit  
8 needs to be done by an independent internal  
9 organization or if he needs to go outside the  
10 Department to get the sort of insight that he  
11 wants? And modify that sentence, perhaps, to the  
12 Secretary of Defense should direct an independent  
13 audit of defense staffing across all the military  
14 Services.

15 CHAIR JONES: I like that. Yes, go  
16 ahead, Liz.

17 CHAIR HOLTZMAN: My concern about that  
18 is that the example that Mr. Stone offered of the  
19 IG, I think it is inappropriate because the IG  
20 doesn't do consulting work. The IG finds fraud.  
21 The IG finds inappropriate money spent. This is  
22 not an IG issue.

1           I don't know exactly what agency you  
2 would -- I mean I am not that familiar with the  
3 Defense Department but is there an agency that is  
4 independent that could do this? I mean if there  
5 is, that is a different story.

6           But I do think that my own view is  
7 that assuming that the answer comes back to the  
8 Defense Department has no plans particularly to  
9 augment or deal with the issue of defense  
10 resources, then it does raise the question about  
11 the need for an outside audit because the Defense  
12 Department has had this issue before it for  
13 several years and hasn't taken any action.

14           Assuming that is the case, if that is  
15 the case, then I would feel no problem about  
16 having a non-governmental, non-Defense Department  
17 agency take a look at this just so that we could  
18 have a very thorough report. And I certainly  
19 trust the Secretary of Defense to find an  
20 appropriate entity to do the analysis. I have no  
21 problem with that but I do think it should be an  
22 entity that is outside the Defense Department

1 with no stake in the outcome.

2 CHAIR JONES: Well, and it may not be  
3 the entity that was just described by some of the  
4 Subcommittee Members. It could be an entity that  
5 knows the military quite well for having done a  
6 lot of consulting with it. So, there wouldn't be  
7 an entity that had no relevant background.

8 I'm sorry, I interrupted you, Liz.  
9 What did you say?

10 CHAIR HOLTZMAN: I said like RAND  
11 Corporation or something like that.

12 CHAIR JONES: Right.

13 MR. STONE: I would just like to state  
14 I think everybody is aware that recently in the  
15 newspaper they have had articles about how the  
16 Department of Defense has, according to at least  
17 one report, way many more auditors on its staff  
18 than spending millions of dollars than other  
19 people think are necessary. So, it is clear to  
20 me they have plenty of auditors and I strongly  
21 oppose an auditing group composed of people who  
22 are not working in the military and how audit

1 non-military systems that are very different.

2 CHAIR JONES: All right, do we have --  
3 Liz, you feel strongly about an outside entity.

4 CHAIR HOLTZMAN: I do.

5 CHAIR JONES: Can I hear from Mr.  
6 Taylor, Admiral Tracey?

7 MR. TAYLOR: Well, I know that Admiral  
8 Tracey, at one time, was the senior informed  
9 person in the personnel business. And I, again,  
10 think that there are individual organizations  
11 within the Department that I have thought, in the  
12 past, had a duty to simply call balls and  
13 strikes, based on their understanding of what the  
14 mission requirements were and, therefore, would  
15 be in a position to do an independent assessment.

16 But without, I guess, putting you on  
17 the spot too much, Admiral Tracey, do you have a  
18 sense about that one way or the other?

19 VADM TRACEY: In my experience, which  
20 is now dated, but in my experience, we typically  
21 buy that service from someone like the RAND  
22 Corporation or Center for Naval Analysis. And we

1 tie a DoD person to that study to help them  
2 navigate what might question they have.

3 CHAIR JONES: So, does the phrase or  
4 definition independent outside entity, is that an  
5 accurate description of what you just said?

6 VADM TRACEY: Yes, it would be. And  
7 I don't have any objection to this. I think what  
8 the Subcommittee was trying to vector to was to  
9 capitalize on the experience of some of these  
10 organizations who have actually been looking at  
11 whether, even in the private sector, the defense  
12 resources are adequate for the defense demands.

13 CHAIR JONES: Right.

14 VADM TRACEY: And there is some  
15 benefit to vectoring DoD to look at whether they  
16 actually want to apply just a manpower study to  
17 this or do they want a manpower study that has a  
18 lens specific to this topic?

19 And this, no matter how we say this,  
20 this particular formulation of the recommendation  
21 by itself will not point them to the fact that it  
22 was the opinion of the Subcommittee that there

1 are some people who are specializing in this  
2 right now who might be helpful informants to the  
3 Department.

4 CHAIR JONES: Right.

5 MR. STONE: But we didn't hear any  
6 testimony about that, though, from the  
7 Subcommittee when they gave their presentation.  
8 And eliminating the word outside does not mean  
9 that, if the Secretary of Defense finds he does  
10 not have internal resources, that he can't then  
11 contract with somebody like the RAND Corporation.  
12 It just doesn't mandate that it is outside, which  
13 frankly I take to be a slap in the face of the  
14 Secretary of Defense.

15 VADM TRACEY: My recommendation is  
16 two-fold. One, the edit that I suggested  
17 earlier, which is direct an independent audit of  
18 defense staffing across all military Services.  
19 And can we add some statement in the  
20 recommendation, I know it is in the body of the  
21 report but sometimes executives don't read the  
22 body of the report, so getting into the

1 recommendation a statement to the effect that  
2 there are agencies, organizations, entities that  
3 have been conducting similar kinds of assessments  
4 of public defender resources in various  
5 jurisdictions that might be useful, something to  
6 that effect.

7 CHAIR JONES: Well, I would definitely  
8 agree with that. I think that is very helpful.

9 Mr. Taylor, Mr. Stone?

10 MR. STONE: Again, the first part of  
11 it makes me suggest that we can't vote on it  
12 today.

13 CHAIR JONES: Okay.

14 MR. STONE: The other thing that I  
15 think needs to be pointed out, and maybe the  
16 Secretary of Defense would put out is that to the  
17 extent somebody identifies that, they have to  
18 realize, based on this pink sheet, page three  
19 that is in the work product, that that would  
20 suggest that it is possible someone is going to  
21 be looked at for violating Article 46 of the  
22 UCMJ, which declares that trial counsel, defense

1 counsel, and the court-martial shall have equal  
2 opportunity to obtain witnesses and other  
3 evidence in accordance with such regulations as  
4 the President may prescribe.

5 And before I am going to set somebody  
6 out to write a report that could result in  
7 accusations of violation of the UCMJ, I want to  
8 hear what DoD has to say first.

9 CHAIR JONES: Well, why don't --

10 CHAIR HOLTZMAN: I don't understand  
11 your point, Mr. Stone. The DoD to say what?

12 CHAIR JONES: Well, I mean I think if  
13 we are all in agreement that there should be an  
14 audit, leave aside the word outside, I don't  
15 think we don't want to do it because we are  
16 afraid of what we might find.

17 So, I think we should go ahead and if  
18 the Staff, based on our conversation, our  
19 deliberations, would add some of the language and  
20 the concepts that Admiral Tracey just gave us and  
21 also her other edit, and then we can continue the  
22 deliberation on this. Because we will have to

1 continue anyway with respect to at least two  
2 questions that we have reserved to find out from  
3 the military, the DoD.

4 MR. STONE: But before we drop that  
5 recommendation --

6 CHAIR JONES: Sure.

7 MR. STONE: -- I would also like an  
8 alternate recommendation written that recommends  
9 that the audit cover not only the defense access  
10 to these things but also special victims' counsel  
11 and the prosecution. As long as we are going to  
12 do an audit, I would like people to audit what  
13 all the parties at that hearing have.

14 CHAIR HOLTZMAN: I object to that  
15 recommendation because while it may make sense on  
16 the surface, I think it should come -- our  
17 recommendation should be based on what we have  
18 heard from the Subcommittee and they should  
19 deliberate on this. And this report is simply  
20 recommending defense resources.

21 It does not mean that other parts of  
22 the military justice system are fully resourced

1 or not but it doesn't address those. So, I would  
2 wait until we have a response from them on the  
3 subject.

4 CHAIR JONES: I agree with that. I  
5 wouldn't add special victims' counsel or the  
6 prosecution with respect to -- for the same  
7 reasons with respect to either Issue 1 or Issue  
8 2.

9 CHAIR HOLTZMAN: And I agree with what  
10 Admiral Tracey has said. I think she formulated  
11 it very well and I have no objection to that.

12 CHAIR JONES: All right. I think we  
13 understand your objections, Mr. Stone, on 2.  
14 Were there any other objections to 2 or can we  
15 move to 3?

16 All right 3 is witness and expert  
17 funding and approval. The Subcommittee  
18 recommends that the Secretary of Defense direct  
19 the military Services to vest defense expert  
20 funding and approval authority in the Service  
21 defense organizations.

22 I think you raised the valid point,

1 Mr. Stone, and we sort of already discussed this,  
2 but if anyone has anything additional to say I  
3 would like to hear it, that it would be a good  
4 idea to figure out if there needs to be more said  
5 here with respect to whether this can simply be  
6 done. And I think that was one of your comments  
7 on that. Anything else from anyone?

8 MR. STONE: Well, I would just make a  
9 comment again that if it is expert funding and  
10 approval authority, that as we heard early on,  
11 and again I heard at the training in  
12 Charlottesville, special victims' counsel  
13 organization is much like the defense counsel  
14 organization in that they are an independent  
15 entity at the military trial. And just like the  
16 defense counsel has client confidences that he  
17 doesn't have to share with anyone, the special  
18 victims' counsel is in the same way. And again,  
19 it is a different line of authority.

20 So, I think that if we are going to  
21 vest authority for expert funding and approval  
22 and take it away from the chain of command for

1 the defense counsel, the same thing has to extend  
2 to special victims' counsel to keep them on even  
3 footing, if they need it, when they need it.

4 CHAIR JONES: All right, well, I have  
5 expressed my opinion. I think these -- and has  
6 Ms. Holtzman, that these recommendations should  
7 be limited to what the Subcommittee looked at,  
8 which relates to defense resources.

9 Mr. Taylor?

10 MR. TAYLOR: I agree with that.

11 CHAIR JONES: Admiral Tracey?

12 VADM TRACEY: I agree.

13 CHAIR JONES: Okay. So then, number  
14 4, the Subcommittee recommends that the military  
15 Services only permit a defense counsel with prior  
16 military justice or civilian criminal litigation  
17 experience to serve as lead defense counsel in a  
18 sexual assault case. The military Services  
19 should develop a formal process, using objective  
20 and subjective criteria to determine when a  
21 defense counsel is qualified to serve as a lead  
22 defense counsel in a sexual assault case.

1           In addition, the military Services  
2 should set the minimum tour length for defense  
3 counsel at two years or more, except when a  
4 lesser tour length is approved by the Service  
5 Judge Advocate General or Staff Judge Advocate to  
6 the Commandant of the Marine Corps.

7           Everybody want time to think about  
8 that or do you want some comments? Go ahead.

9           MR. STONE: I will start by saying  
10 that is almost verbatim RSP Recommendation 86,  
11 which we all have on page four of the current  
12 materials, the Staff work product. It is almost  
13 verbatim.

14           And again, I don't see why we should  
15 be repeating an RSP recommendation verbatim  
16 without getting an update. It doesn't make any  
17 sense to me.

18           CHAIR JONES: Okay. I agree that we  
19 will ask for an update on all four of these,  
20 since each of them refers to prior  
21 recommendations for resources.

22           MR. STONE: Okay and then the second

1 point I want to make here is the same one that I  
2 have made before, which is that I think there has  
3 to be a minimum tour length of experience of two  
4 years or more for all the trial counsel in the  
5 case. And that includes the prosecutor, which  
6 maybe will be easy for them, I don't know. But I  
7 think it has to include the SVC, too, because I  
8 have heard anecdotal evidence at the training I  
9 went to in Charlottesville of brand new lawyers  
10 being thrown into the trial of sexual assault  
11 case as SVC who have not even yet had training  
12 because the training cycle hasn't caught up with  
13 them and saying how, frankly, in retrospect, they  
14 knew they weren't doing -- providing adequate  
15 representation because they had never been in  
16 that situation before.

17 So, I think it has to extend -- it is  
18 a good recommendation. It needs to be extended  
19 across the board. If half of the cases are not  
20 sexual assault cases, then let them get their two  
21 years of experience rotating, as we heard the  
22 Navy does, in other types of cases or sitting

1 second chair.

2 CPT TIDESWELL: Judge Jones, it might  
3 be helpful to draw the Panel's attention to the  
4 bottom of page four.

5 CHAIR JONES: Okay.

6 CPT TIDESWELL: Which outlines a  
7 portion of the FY17 National Defense  
8 Authorization Act that we know has passed the  
9 House and Senate at this point. And it talks  
10 about creating an effective program for the  
11 prosecution and defense to sort of establish  
12 skill designators, sort of monitor the experience  
13 levels to set up pilot programs.

14 So, that might be beneficial to review  
15 as part of your deliberations.

16 MR. STONE: Thank you for calling the  
17 Panel's attention to that. That is another  
18 reason, I think, why this recommendation, at this  
19 point, may be premature and ought to wait and see  
20 if that provision of the NDAA actually gets  
21 passed, in which case it seems to me that the  
22 recommendation would be substantially changed.

1 It might have to do with something in this  
2 program, looking at those programs before we tell  
3 them they don't know -- they are not doing it.

4 CPT TIDESWELL: Yes, sir. We believe  
5 this will be the language. Right now, it is just  
6 pending the President's signature. But based on  
7 the voting, it is veto-proof at this point. So,  
8 I think it is safe to assume --

9 CHAIR JONES: You are saying this is  
10 --

11 CPT TIDESWELL: Almost done, yes,  
12 ma'am.

13 CHAIR JONES: It is almost done?

14 CPT TIDESWELL: Yes, ma'am.

15 CHAIR JONES: All right.

16 CHAIR HOLTZMAN: But I want to just  
17 understand. The NDAA calls for the creation of a  
18 pilot program. Am I correct?

19 CPT TIDESWELL: Yes, ma'am, it does.

20 CHAIR HOLTZMAN: So, it is not calling  
21 for an across the board change in this regard.  
22 It is calling for what I would call a baby step

1 in what is the right direction. The Subcommittee  
2 calls it --

3 CPT TIDESWELL: Well --

4 CHAIR HOLTZMAN: Let me just finish my  
5 question. The Subcommittee is calling for  
6 something more comprehensive. Is that correct?

7 VADM TRACEY: Doesn't paragraph (a) in  
8 that box suggest that so is the NDAA? The  
9 secretary concerned shall carry out a program to  
10 ensure trial and defense counsel detailed to  
11 prosecute or defend a court-martial have  
12 sufficient experience and knowledge to  
13 effectively prosecute or defend a case, and 2) a  
14 deliberate professional development process is in  
15 place to ensure effective prosecution and defense  
16 in all courts-martial.

17 There is a paragraph (c) that is about  
18 the pilot program but I think paragraph (a) is  
19 actually directing the comprehensive solution.

20 CHAIR JONES: Right. And I suppose it  
21 is never a bad idea to have a pilot program to  
22 figure out how to reach your goals.

1 Well, I don't know if there is  
2 anything that was intended by any of the other  
3 Subcommittee Members that goes beyond what I  
4 didn't appreciate was two steps away from being  
5 law.

6 VADM TRACEY: So is there,  
7 potentially, a message from the Subcommittee and  
8 the Panel that you believe this should be acted  
9 on expeditiously?

10 CHAIR JONES: Right.

11 VADM TRACEY: Again, and the role of  
12 evaluating what the impact is of changes that  
13 have been made.

14 CHAIR HOLTZMAN: What is the  
15 difference between the Subcommittee's  
16 recommendations and NDAA? Is the Subcommittee's  
17 more specific like only for three years or is  
18 that more experience? I'm sorry, I don't have  
19 the document in front of me.

20 VADM TRACEY: It has got here that the  
21 NDAA does not specify a tour length.

22 CHAIR HOLTZMAN: The NDAA does what?

1                   VADM TRACEY: Does not specify a tour  
2 length.

3                   MR. STONE: Except that it does say  
4 that there is going to be a report after four  
5 years on each of these programs. So, that  
6 implies that they had better get started quickly  
7 if they are going to be able to put them in  
8 place, evaluate them, and write a report.

9                   I might also add that portion (b) of  
10 the proposed legislation says that the Secretary  
11 shall establish and use a system of military  
12 justice experience designators or skill  
13 identifiers for purposes of identifying judge  
14 advocates with skill and experience, et cetera,  
15 et cetera. And that very much is the same thing  
16 as the recommendation that says military Services  
17 should develop -- in Recommendation 4, military  
18 Services should develop a formal process using  
19 objective and subjective criteria to determine  
20 when a defense counsel is qualified.

21                   So, it seems to me they are looking at  
22 that as well, not just a program to give them

1 more experience but also to identify in each  
2 service when they can identify somebody who has  
3 met that level of experience.

4 CHAIR JONES: The recommendation is,  
5 I would say, just more specific and basically  
6 very blunt when it says that only a defense  
7 counsel with prior military justice or civilian  
8 criminal litigation experience should be  
9 permitted to serve as the lead defense counsel.  
10 That sort of is a black and white recommendation.

11 And I am not surprised that the  
12 wording of the legislation proposed in the NDAA  
13 grants considerably more sort of discretion to  
14 the military to figure out when somebody is  
15 experienced enough to try that case.

16 So, this is almost a -- I don't know  
17 whether that will be the outcome of their pilot  
18 project or were there deliberations on this.

19 VADM TRACEY: So, there would  
20 certainly be room, if the Panel thought those  
21 were important metrics to apply, that they could  
22 suggest that. In execution of the NDAA, those

1 are things that we would recommend.

2 MR. STONE: I point out that the  
3 Recommendation 4 that the Subcommittee gave us  
4 which, again, repeats what the RSP recommendation  
5 was, does say in the last sentence, except when a  
6 lesser tour length is approved by the Service  
7 Judge Advocate General, or Staff Judge Advocate  
8 to the Commandant of the Marine Corps. So, that  
9 recommendation also recognizes that there will be  
10 exceptional circumstances.

11 And so I see no reason not to let the  
12 NDAA and the Secretary of Defense figure out what  
13 happens if this passes and then report to us on  
14 what they have in mind before we start telling  
15 them what they are not doing.

16 CHAIR JONES: Yes, I think --

17 CHAIR HOLTZMAN: Well, excuse me, I  
18 think they know what they are not doing. The  
19 Congress know what they are not doing because it  
20 is up to the Secretary of Defense to address this  
21 problem. So, I think the fact of the matter is  
22 that Congress recognizes that there is a serious

1 problem here.

2 So, the Subcommittee is not doing  
3 something that was pie in the sky in a sense or  
4 unwanted. The only question is given the  
5 recommendation and that it is more descriptive  
6 than the NDAA, does the JPP want to go forward or  
7 does the JPP want to somehow acknowledge that  
8 there is a problem that the Subcommittee -- I  
9 mean I think there are several options. But one  
10 would be if we don't accept the recommendation of  
11 the Subcommittee, we could still acknowledge that  
12 the Subcommittee identified the serious problem,  
13 one that the Congress also identified, and that  
14 the recommendation of the Subcommittee is  
15 something that Defense Department might want to  
16 consider as a response to the prescription of the  
17 NDAA.

18 CHAIR JONES: I think it would be  
19 worth working with that. I agree with Mr. Stone  
20 that almost everything past the first sentence I  
21 would like to compare with what is in this so  
22 that we can accurately describe what additional

1 consideration we would like them to give.

2 So, I would ask the Staff to work on  
3 that as well.

4 All right, I think we have deliberated  
5 as far as we can deliberate on the Subcommittee's  
6 recommendations. I see that you remained and I  
7 appreciate your continued presence here. Thank  
8 you very much.

9 All right, is it lunch? What would I  
10 do without you, Mr. Taylor? All right, we will  
11 adjourn for lunch now.

12 (Whereupon, the above-entitled matter  
13 went off the record at 11:50 a.m. and resumed at  
14 12:44 p.m.)

15 CHAIR JONES: All right. It's 12:45  
16 or thereabouts, and the Panel has decided to move  
17 to the presentation on the proposed Military  
18 Justice Act of 2016, since we are fortunate to  
19 have Judge Effron here and Mr. Sullivan. And we  
20 are going to put over to our next meeting our  
21 deliberations on victims' appellate rights.

22 So let me begin by again welcoming

1 both of you to the Panel, and we are actually  
2 thrilled to be able to hear you come in and be  
3 able to talk to us about some things. I remember  
4 your first appearance -- and you were great -- to  
5 one of the subcommittees, but things were still  
6 in the mix. They hadn't been decided. So I  
7 think you can shed a lot of light on the work now  
8 that you've done, and we're anxious to hear it.

9 HON. EFFRON: Thank you, Judge Jones,  
10 and members of the Panel. And Dwight Sullivan  
11 will begin with a brief summary of how we got to  
12 where we are now, and then I will talk about  
13 specific provisions of the legislation.

14 CHAIR JONES: Great. Thank you.  
15 Dwight?

16 MR. SULLIVAN: Good afternoon. It's  
17 good to see you again, Judge Jones, and members  
18 of the Panel.

19 So the Military Justice Act of 2016  
20 traces its origin to a request from General  
21 Martin Dempsey when he was Chairman of the Joint  
22 Chiefs of Staff, asked the Secretary of Defense

1 to order a comprehensive, systemic review of the  
2 UCMJ, expressing concern that because of the way  
3 the military justice system had been modified in  
4 piecemeal fashion, it may no longer -- the gears  
5 may no longer mesh.

6 And so we asked for a comprehensive  
7 review, and the Secretary of Defense agreed,  
8 which led to the formation of the Military  
9 Justice Review Group.

10 Now, I note that just a few miles from  
11 here we have had the baseball national meetings  
12 this week. And of course each team goes there  
13 with their wish list. And we have a wish list  
14 for who we wanted for the Military Justice Review  
15 Group, and there was one name that was at the top  
16 of our wish list, and that was the Honorable  
17 Andrew S. Effron. And we were luckier than many  
18 of the teams at the national -- at the baseball  
19 winter meetings because we signed the person at  
20 the top of our list. We were just thrilled that  
21 Judge Effron was willing to come and lead the  
22 project. There would have been no one that could

1 have done this and led this project as well as  
2 he.

3 But, of course, it wasn't all Judge  
4 Effron. Each of the services provided  
5 representatives to the Military Justice Review  
6 Group. And as the Military Justice Review Group  
7 conducted its study, it circulated proposals  
8 within the Department of Defense, and so we had a  
9 rolling coordination process even while the study  
10 was ongoing.

11 And then in March of 2015 the Military  
12 Justice Review Group produced a 1,300-page  
13 comprehensive report that analyzed literally  
14 every single article of the Uniform Code of  
15 Military Justice, looked at proposed improvements  
16 to those articles, and then suggested legislation  
17 to make those improvements happen. And that was  
18 a wonderful product.

19 Once that was produced, then it was  
20 circulated within the Department of Defense for  
21 formal coordination. There were some revisions  
22 made as a result of that process, and then the

1 Department of Defense forwarded it to the Office  
2 of Management and Budget. At that point, it was  
3 coordinated throughout the entire executive  
4 branch.

5 Additional revisions were made as a  
6 result of that coordination process, and then on  
7 December 26th of 2015, the Department of Defense  
8 and the administration -- so that it is an  
9 administration bill -- to Congress on  
10 December 26, 2015.

11 So at that point, both the House and  
12 Senate Armed Services Committee took the Military  
13 Justice Act of 2016, the legislative portion of  
14 this report, and inserted it into the National  
15 Defense Authorization Act for fiscal year 2017.  
16 And so on May 18th, the full House of  
17 Representatives adopted the National -- their  
18 version of the NDAA, which included their revised  
19 version of the Military Justice Act of 2016.

20 On June 14th, the Senate passed their  
21 version of the NDAA. And not only were there  
22 other differences with the NDAA, but there were

1 differences in the two houses' adoption of this  
2 proposal.

3 On July 7th, the House then once again  
4 passed their version of the Military Justice Act,  
5 which once again was different than the Senate  
6 version, and requested a Conference Committee.  
7 At that point, the Conference Committee -- the  
8 resulting conference report occurred.

9 And then on December 2nd, the House  
10 passed the conference version. Just yesterday  
11 the Senate passed the conference version. So now  
12 both houses have passed an identical version of  
13 the Military Justice Act of 2016 that is largely  
14 the same as the version that was proposed here,  
15 but with some important departures, and Mr.  
16 Effron will talk about those departures.

17 Now, in addition to including the  
18 Military Justice Act of 2016, the NDAA also  
19 includes a separate subtitle, Subtitle 5(e), that  
20 includes some other military justice reform  
21 measures. There are nine measures in  
22 Subtitle 5(e). And it may be important to go

1 through those, but they aren't as important as  
2 the Military Justice act provisions that Mr.  
3 Effron will discuss.

4 So let me just quickly mention those  
5 nine. If anyone wants to discuss them further, I  
6 will be more than happy to engage with that, but  
7 just -- just to get them out there.

8 So there are some reforms regarding  
9 the Court of Appeals for the Armed Forces. Those  
10 are largely personnel and technical reforms.  
11 There is a provision to enhance the professional  
12 development of Judge Advocates who both prosecute  
13 and defend court-martial cases. There is a  
14 provision dealing with SAPRO reports and the  
15 inclusion of allegations of retaliation that  
16 result from the reporting of a sexual assault.

17 There is another provision in the bill  
18 which deals with the SAPRO report. It extends  
19 the life of the reporting requirement from 2017  
20 to 2021, and then also links up that report with  
21 an enhanced family advocacy program report that  
22 is required by a different portion of the bill.

1           The bill also calls for SAPRO to  
2           develop retaliation metrics, and also identify  
3           best practices and disseminate those to the  
4           services. It provides for training for those who  
5           investigate retaliation, including training in  
6           the nature and effects of sexual assault trauma.  
7           There is another provision that deals with the  
8           notification of the results of retaliation  
9           investigation. It provides for the person that  
10          made the report to be notified of the results,  
11          including whether the report was substantiated or  
12          not.

13                 There is a broadening of the  
14          definition of sexual harassment. It takes away  
15          the concept of work environment and applies it to  
16          the environment writ large. And then, finally,  
17          there is a hazing prevention and data collection  
18          provision. So those are the non-Military Justice  
19          Act of 2016 provisions that are still related to  
20          the military justice system.

21                 And with that, I will turn it over to  
22          our number one draft pick, Mr. Efron.

1                   HON. EFFRON: Dwight, you are too  
2 kind. This project would not have made it  
3 through the legislative process if I hadn't had a  
4 partner with his knowledge and experience, not  
5 only of military justice but of governmental  
6 processes in general. And also the partnerships  
7 of the Judge Advocates General and the people  
8 that they sent to work on the Military Justice  
9 Review Group. It was a real pleasure to work  
10 with them.

11                   We also benefitted tremendously from  
12 the work done by the RSP and the JPP. We  
13 benefitted from your recommendations. We  
14 benefitted from the studies and analysis that you  
15 all prepared throughout our work. So thank you  
16 very much for that, and I know that the  
17 Department, and the nation as a whole, is very  
18 grateful for the work that you have done and that  
19 you are doing.

20                   With respect to the Military Justice  
21 Act of 2016, I am going to give a brief overview  
22 and then talk about several specific items that

1 your staff has suggested that I discuss.

2 Taken together, the legislation which  
3 has now been passed by both houses, awaiting the  
4 President's consideration and hopefully  
5 signature, will increase transparency in the  
6 military justice system, will strengthen the  
7 structure of the military justice system, enhance  
8 fairness and efficiency in pretrial and trial  
9 process, streamline post-trial, modernize the  
10 military appellate practice, improve the clarity  
11 and utility of the punitive articles, and provide  
12 for an independent, ongoing review of the  
13 military justice system.

14 Some people have asked me, "What have  
15 you fixed?" I say, "We haven't fixed anything."  
16 We have given the judges and the counsel and the  
17 managers of the military justice system the tools  
18 to improve and enhance the quality of military  
19 justice, so we can give the men and women of the  
20 armed forces a system that is worthy of their  
21 service and sacrifices. That was our goal, and  
22 that is what I believe Congress has done in this

1 area.

2 Now, we're going to talk about today  
3 seven different areas -- transparency, the  
4 preliminary hearing, disposition guidance,  
5 sentencing, pretrial agreements, the appellate  
6 process, and depositions. I'd be glad to talk  
7 about any other aspects of the legislation or  
8 military justice that you'd like us to address.

9 And it will take me probably 10  
10 minutes, 15 minutes to go through those, but  
11 please feel free to interrupt with questions at  
12 any time as we go through.

13 Now, with respect to transparency, the  
14 legislation requires the Secretary of Defense to  
15 enhance public access to court-martial and  
16 appellate documents by establishing uniform  
17 procedures that reflect the best practices of the  
18 federal and state courts. I know some of your  
19 reports have referred to PACER, and we will be  
20 looking at PACER as we implement. But not just  
21 PACER. PACER has been around for a while. There  
22 are some criticisms of PACER. We are going to

1 look at state systems as well as that is  
2 developed.

3 It requires the Secretary of Defense  
4 to prescribe uniform procedures for case  
5 management, data collection, and accessibility of  
6 court-martial information to enhance the  
7 efficiency of the military justice system and to  
8 facilitate the evaluation. I listened to your  
9 deliberations this morning. Hopefully, when that  
10 system gets into place, the data will be there to  
11 make much better decisions about the management  
12 of the military justice system into the  
13 evaluation and management into the future.

14 Now, it is never going to be perfect  
15 because the problems that you have -- you collect  
16 data on the problems you know today. You look at  
17 a dynamic society, legal systems are dynamic, so  
18 that system will have to evolve over time. But  
19 hopefully that will give us a better set of data  
20 than we have right now.

21 Another thing that -- for transparency  
22 is it mandates that all updates to the military

1 justice system will be done -- will be promptly  
2 placed on the internet. So that we won't be  
3 wondering what's in the manual for courts-martial  
4 and have to look at three or four different  
5 documents and executive orders to do it.

6 We will have one place promptly where  
7 people can look and see, these are the rules,  
8 these are the statutes that govern the military  
9 justice system.

10 We are going to provide for public  
11 access to the disposition guidance that is put  
12 out by the Secretary of Defense. Like the U.S.  
13 Attorney's Manual is made public now, so there  
14 will be a sense of what are the basic criteria  
15 that are being used in deciding whether to go  
16 forward with the case or not. That will be new.

17 I'll turn next to the preliminary  
18 hearing, Article 32, which you have been  
19 discussing. Now, as was mentioned frequently  
20 this morning, the traditional Article 32  
21 investigation consisted of a relatively open-  
22 ended inquiry into the facts and circumstance of

1 alleged offenses, with broad opportunity for the  
2 government and defense to present and examine  
3 witnesses and documentary evidence.

4 Over the past three years, Congress  
5 has transformed that traditional Article 32  
6 proceeding into something that somewhat  
7 resembles, but does not emulate, a civilian-type  
8 preliminary hearing. Current law provides that a  
9 victim may not be required to testify at an  
10 Article 32 proceeding.

11 Now, the Military Justice Review Group  
12 recommended a number of modest enhancements in  
13 light of those congressional changes. First, we  
14 required a more comprehensive preliminary report.  
15 That is, the preliminary report is not simply to  
16 say up or down, go to a court-martial or not, but  
17 to give the Staff Judge Advocate and the  
18 Convening Authority information that they can use  
19 in making that decision.

20 So the recommendation is in many  
21 respects the least important part of the process,  
22 because the preliminary hearing officer is not a

1 decision-maker. The preliminary hearing officer  
2 is putting together information. So that's part  
3 one.

4 Secondly, it provides an opportunity  
5 for all parties -- government and defense -- and  
6 also for victims to submit additional information  
7 at the conclusion of the hearing regarding the  
8 appropriate disposition of charges. So after the  
9 hearing takes place, there is an additional  
10 opportunity for documentary information and  
11 written submissions to come to the Staff Judge  
12 Advocate and the convening authority via the  
13 preliminary hearing officer for consideration in  
14 whether a case should go forward or not.

15 And the statute requires the  
16 preliminary hearing officer to analyze and  
17 organize that information in a way that will  
18 better assist the SJA and the Convening Authority  
19 in making the disposition decision.

20 The disposition recommendation,  
21 although not a focus of the hearing, would be --  
22 in our recommendation was an optional item.

1 Congress has now made that a mandatory item.  
2 That is, that's the one major change that  
3 Congress made in our recommendation. Instead of  
4 having a recommendation on disposition being  
5 optional with the convening authority as to  
6 whether they would get that from the preliminary  
7 hearing officer, now it is mandatory that the  
8 preliminary hearing officer make a  
9 recommendation.

10 In terms of the disposition guidance,  
11 under current law the UCMJ provides very little  
12 in the way of guidance on the exercise of  
13 prosecutorial discretion. The Manual for Courts-  
14 Martial provides broad principles without much in  
15 the way of useful guidance. Our group  
16 recommended to replace Article -- replace the  
17 current Article 33 and name it Disposition  
18 Guidance, requiring the President to direct the  
19 Secretary of Defense to issue non-binding  
20 guidance regarding the factors that commanders,  
21 staff judge advocates, and judge advocates should  
22 take into account when exercising their duties

1 with respect to the disposition of charges in the  
2 interest of justice and discipline.

3 Under the proposal, the guidance would  
4 take into account the guidance in the principles  
5 of federal prosecution in the United States  
6 Attorney's Manual, with appropriate modifications  
7 to reflect the differences between military and  
8 civilian practice. The conference report adopted  
9 that recommendation with only minor technical  
10 changes. So now that will be a part of military  
11 law, to have something akin to the U.S.  
12 Attorney's Manual guiding commanders and their  
13 staff judge advocates in these disposition  
14 decisions.

15 Sentencing is an area which received  
16 a great deal of attention in the report and a  
17 great deal of attention in Congress. As you all  
18 know from the work that you have done, current  
19 law authorized a court-martial to adjudge any  
20 punishment, or no punishment at all, subject only  
21 to the maximum punishments established under  
22 Article 56(a) by statute and by any mandatory

1 minimum punishment.

2           So for most offenses in the UCMJ, an  
3 appropriate punishment is -- or, excuse me, an  
4 authorized punishment is anywhere between zero  
5 and what the maximum is. The UCMJ contains very  
6 few mandatory minimum punishments, including  
7 mandatory punitive discharges for certain sex  
8 offenses and mandatory confinement, life with the  
9 possibility of parole, for premeditated murder.  
10 But with those few exceptions, only the maximum  
11 governs.

12           Under current practice, the court-  
13 martial adjudges a single sentence for all  
14 offenses resulting in conviction, not a separate  
15 punishment for each offense. And under current  
16 law, the accused does not have a choice of  
17 sentencing forum.

18           In contrast to civilian life where  
19 judicial sentencing is the norm in most  
20 jurisdictions, the military accused cannot have  
21 judicial sentencing unless the accused forfeits  
22 that opportunity to have a court-martial decide

1 the issues of guilt or innocence. That is our  
2 current system.

3 Now, our group recommended replacing  
4 the current system with judicial sentencing based  
5 upon published parameters and criteria and with  
6 segmented sentencing for each offense rather than  
7 unitary sentencing for all offenses. The  
8 implementation of parameters and criteria, we  
9 have drawn upon the best practices at state and  
10 federal level, and we have replaced the current  
11 practice. And there would have been a group  
12 headed by the chief judges of each service to  
13 develop those parameters and criteria.

14 The Military Sentencing Parameters and  
15 Criteria Board made up of those chief judges  
16 would have collected and analyzed sentencing data  
17 to inform the determination of the parameters and  
18 criteria that would be used at trial. And those  
19 procedures would have been developed with public  
20 notice and comment.

21 They would have been -- the parameters  
22 and criteria would have been published in the

1 Manual for Courts-Martial, establishing an  
2 appropriate range for each offense. And the  
3 purpose of the guidance was to focus the  
4 discretion of the military sentencing on an  
5 appropriate range with limited authority of a  
6 judge as in federal law to go above or below, so  
7 long as the judge gave reasons on the record that  
8 would be subject to appeal.

9 We also proposed a system of segmented  
10 sentencing where the sentencing would take place  
11 where the judge would adjudge a sentence for each  
12 offense of which the person was convicted rather  
13 than a unitary offense for all. And then the  
14 judge would decide whether those sentences would  
15 run concurrently or consecutively.

16 The conference report did not adopt  
17 the concept of using sentencing parameters and  
18 criteria. So that is not in the conference bill.  
19 So we will not have sentencing parameters and  
20 criteria at this time, as the legislation was  
21 adopted.

22 And the conference report also did not

1 adopt the concept of using -- mandating judicial  
2 sentencing only in all non-capital cases.

3 Instead, while the conference report established  
4 judicial sentencing as the norm, the default  
5 practice, the accused will have the option of  
6 electing sentencing by members of the court-  
7 martial panel. So that is kept as an option.

8 Under the statute that has passed both  
9 Houses, what will happen is the court-martial  
10 will conduct the trial. There will be findings  
11 and sentence. And after the sentence, if it's --  
12 if the accused has chosen at the beginning to  
13 have a panel of members for the merits portion of  
14 the trial, then the accused will have an  
15 opportunity after findings to decide whether  
16 there is a sentencing by members. If not, the  
17 default goes to sentencing by a judge.

18 So to recap, at the beginning of the  
19 trial, the accused decides whether or not to  
20 select a judge-alone proceeding for the entire  
21 proceeding. If the accused does not choose a  
22 judge-alone proceeding at that time but goes with

1 members for the trial on the merits, then the  
2 accused will be sentenced by the judge, unless  
3 the accused chooses to have sentencing by the  
4 members at that point.

5 Under the conference report, the  
6 conference retained segmented sentencing but only  
7 when the judge does the sentencing. So when the  
8 judge does the sentencing, the judge will adjudge  
9 a sentence for every offense, and then decide  
10 whether it runs concurrently or consecutively.

11 When the members do the sentencing,  
12 they will do a unitary sentence. That is  
13 something that was different from what was in the  
14 legislation as it moved earlier through the  
15 legislative process, and so it will be an  
16 interesting task for the Joint Service Committee  
17 to put together recommendations in the Manual for  
18 Courts-Martial to the President as to how that  
19 will be implemented. But I'm confident that that  
20 system can be made to work.

21 Under the legislation, the government  
22 will be able to appeal a sentence on the ground

1 that a sentence violates the law or is plainly  
2 unreasonable. That is new. In the Military  
3 Justice Review Group recommendations, the ability  
4 of the government to appeal was tied to the  
5 concept of parameters and criteria.

6 Now it's not tied to parameters and  
7 criteria. It is tied to a plainly unreasonable  
8 standard and, again, opportunity in the Manual  
9 for Courts-Martial for the President to give  
10 guidance as to how that practice will be  
11 implemented.

12 The accused retains the ability under  
13 the conference report to appeal any sentence as  
14 being inappropriately severe, so long as the  
15 sentence includes confinement for more than six  
16 months. For cases where the sentence of  
17 confinement of two years or greater, or a  
18 punitive discharge, the service courts must  
19 examine the appropriateness of every sentence  
20 regardless of whether the accused has raised this  
21 as an issue. That's the current system.

22 That is the -- for every sentence --

1 the difference there is that that now goes down  
2 to a six-month floor. But for every case that is  
3 over six months, the Court of Criminal Appeals  
4 will have an independent obligation to determine  
5 whether the sentence is appropriate or not.

6 The conference report retains the  
7 current mandatory sentencing minimums for certain  
8 offenses, including rape and sexual assault.

9 Pretrial agreements is another area  
10 that received significant attention in the  
11 legislation. The current UCMJ does not expressly  
12 address pretrial agreements. Pretrial agreements  
13 have grown up as a matter of practice in which  
14 the convening authority has agreed to limit his  
15 or her action on the sentence.

16 This will be a major change --

17 CHAIR HOLTZMAN: Excuse me. Judge,  
18 could you move the microphone closer to you?

19 HON. EFFRON: Sure.

20 CHAIR HOLTZMAN: Please. Thank you.

21 HON. EFFRON: Under current law -- is  
22 that better?

1 CHAIR HOLTZMAN: Yes. Thank you.

2 HON. EFFRON: Okay. Under current  
3 law, the court-martial does not see the  
4 punishment terms of the agreement before  
5 adjudging the sentence. That's a big difference  
6 between military and civilian life.

7 Instead, the judge only sees the  
8 quantum portion -- that is, the punishment level  
9 -- of the agreement after the sentence is  
10 adjudged. The court-martial is unaware of the  
11 punishment. And if the court-martial, being  
12 unaware of the punishment, adjudges a sentence  
13 below the ceiling in the deal, the accused has  
14 the benefit of the lower amount. That's the  
15 current system, colloquially known as "beat the  
16 deal."

17 If the sentence that comes in by the  
18 court-martial is above, then the convening  
19 authority has bound himself or herself to lower  
20 it. That's the current system.

21 Our group proposed changing that to a  
22 different process, to a more transparent

1 procedure, under which the sentencing details of  
2 the agreement are placed on the record before the  
3 sentence is adjudged. And the other change that  
4 we recommended is that the convening authority  
5 will not only be limited to a deal -- the  
6 accused, not only to a deal that sets the  
7 maximum, but they can set a range. That is, they  
8 can -- the deal could beat the sentence between a  
9 certain upper and lower limit. That is also  
10 authorized under what we proposed.

11 And the judge at trial, and the  
12 appellate court on review, would be able to  
13 reject an agreement if it was plainly  
14 unreasonable. That was based on the sentencing  
15 criteria, and that was part of the Military  
16 Justice Group recommendation.

17 The conference report largely followed  
18 our recommendations, except they did not  
19 authorize the military judge to reject the plea  
20 on a plainly or reasonable standard. That  
21 reflected their decision in the conference to not  
22 authorize the use of sentencing parameters or

1 criteria.

2           So, to summarize, under the new  
3 system, the sentencing authority, which in most  
4 cases will be the judge, will see the terms of  
5 the deal. The judge will then, if the judge  
6 agrees that it's a lawful agreement, the judge  
7 will then adjudicate the sentence within those  
8 terms. And it's not simply setting a ceiling,  
9 but it can be -- the judge can act within a  
10 range, if that's what the agreement is.

11           So that's a major change in military  
12 practice, changing our pretrial agreement to be  
13 somewhat more similar to civilian practice but  
14 still within the unique military system.

15           In terms of appellate access, this is  
16 another area of change. Under current law, the  
17 Courts of Criminal Appeals automatically review  
18 every case in which the sentence extends to  
19 confinement for one year or more, a punitive  
20 separation, or death. That is automatic appeal,  
21 whether the accused wants it or not, unless the  
22 accused affirmatively waives it in a non-capital

1 case.

2 In those cases, the Court of Criminal  
3 Appeals must affirmatively determine whether the  
4 findings and the sentence should be approved.  
5 That requires the CCA to review the entire record  
6 and, in effect, look at the case with fresh eyes  
7 based on the record.

8 The Court of Criminal Appeals must be  
9 convinced under current law, beyond a reasonable  
10 doubt, that the admissible evidence proves every  
11 element of every offense beyond a reasonable  
12 doubt. That's a unique aspect with the military  
13 justice system.

14 It also must engage in review of the  
15 sentence to ensure that the accused has not  
16 received an inappropriate sentence. Then, cases  
17 that don't fall within that automatic review --  
18 that is, cases primarily that -- under current  
19 law that are a year or less -- would go to the  
20 Judge Advocate General if requested by the  
21 individual for review, for an office review  
22 within the Office of the Judge Advocate General.

1 And those cases could only get judicial review  
2 under current law if the Judge Advocate General  
3 sends it to the Court of Criminal Appeals.

4 Our proposals would have replaced  
5 automatic review with appeal of right. That is,  
6 the right to file appeal but not an automatic  
7 appeal in non-capital cases, lowering the  
8 threshold for getting to the CCAs to everything  
9 that involved a sentence of more than six months,  
10 and for sentences less than six months allowing  
11 anyone who went to the Judge Advocate General to  
12 appeal TJAG's decision to the Court of Criminal  
13 Appeals. So, in effect, our proposal was to let  
14 everybody get to the Court of Criminal Appeals,  
15 to have it primarily an appeal that the accused  
16 would have to file.

17 Congress -- the other thing that we  
18 recommended was to have statutory standards of  
19 review. Instead of having the Court of Criminal  
20 Appeals in effect have to redo the case by  
21 finding every element of every offense, and by  
22 finding the sentence to be appropriate, what we

1 proposed was that it would be up to the parties  
2 to raise the issues before the Court of Criminal  
3 Appeals, and the Court would only review the  
4 issues raised by the parties or noticed by the  
5 Court under a plain error standard, fairly  
6 similar to the federal process now.

7           The conference report adopted some,  
8 but not all, of those changes. It retains  
9 automatic review by the Courts of Criminal  
10 Appeals in every case in which the sentence  
11 extends to confinement for more than two years or  
12 which includes a punitive discharge. So if  
13 there's confinement for more than two years, or a  
14 punitive discharge, there is automatic review as  
15 there is in capital cases.

16           The conference report expands the  
17 opportunity for all service members to request  
18 review by the Court of Criminal Appeals in cases  
19 where the accused must first seek relief from the  
20 Judge Advocate General under Article 69, when the  
21 accused can get that type of review, the Article  
22 69 TJAG review, further considered by the Court

1 of Criminal Appeals.

2 In cases in which there is no punitive  
3 discharge, this is a very complex set that we are  
4 still working through. No punitive discharge and  
5 a sentence between six months and two years, then  
6 the accused would have to file an appeal.

7 So to review that again, if it's a  
8 punitive discharge and more than two years, there  
9 is automatic review. If it's less than that,  
10 that is six months to two years with no punitive  
11 discharge, the accused has to file an appeal with  
12 the Court of Criminal Appeals. And if it's less  
13 than six months with no punitive discharge, they  
14 go to the Office of the Judge Advocate General  
15 first, and then can go from there to the Court of  
16 Criminal Appeals.

17 So it's an improvement over the  
18 current system from the perspective of appellate  
19 access by giving everybody access, but it's a  
20 little bit different from the way that we had  
21 recommended it, main difference being retention  
22 of the automatic review at the two-year or

1 punitive discharge mark, and basically removing  
2 the standards of review that we had proposed for  
3 appellate review.

4           Depositions is another area that I  
5 know that you all are interested in. Our group  
6 proposed amending Article 49 to better align  
7 military deposition practice with federal  
8 civilian deposition practice and ensuring that  
9 they are ordered in military criminal cases to  
10 focus on the use of a deposition at trial, so  
11 that a deposition could be ordered only when it's  
12 likely that the prospective witness' trial  
13 testimony at trial would otherwise be lost.

14           Also, clarify that depositions could  
15 not be used specifically for use at Article 32  
16 proceedings. In other words, depositions are  
17 permitted only at that point to preserve  
18 testimony for trial, not for pretrial discovery  
19 purposes. The conference report adopted without  
20 change that proposal.

21           Now that's a lot, and that's only a  
22 small portion of what Congress did. And we,

1 frankly, are still in the process of working  
2 through this because we had our report, our  
3 report was adopted by -- in large measure by the  
4 Senate, the House had adopted many but not all of  
5 those provisions, and the conference report  
6 didn't necessarily choose between the House and  
7 the Senate provision, but in many of those areas  
8 where there are differences, they came up -- as  
9 Congress is absolutely appropriately entitled to  
10 do under Article 1 of the Constitution, they came  
11 up with their own ideas as to how those issues  
12 should be dealt with.

13           So particularly in the area of  
14 sentencing and appellate access, it is going to  
15 take us some time to work through the  
16 implementing rules to develop a positive approach  
17 to what the Congress has proposed here for the  
18 legislation that will be before the President.

19           So in terms of timing, which I know  
20 would be of interest to you, the legislation  
21 gives up to two years for implementation. At the  
22 end of the one-year period, the President has to

1       prescribe the new Manual for Courts-Martial,  
2       implementing the new legislation, and setting  
3       forth the precise dates at which it will apply to  
4       ongoing cases and to cases that are in  
5       development or cases that are on review, and how  
6       it will apply to specific offenses and when.

7               There is some statutory guidance  
8       there, and also authority for the President to  
9       address that in the manual. But I think for your  
10      purposes to say, "When will this take effect?"  
11      sometime -- assuming the President assigns --  
12      signs this in December of 2016, sometime in  
13      December of 2018 is when this legislation will  
14      start applying to courts-martial, with all the  
15      variations that you always have as to ongoing  
16      cases and new and old offenses.

17              That pretty much concludes the  
18      overview. And, as I said, that's a lot to take  
19      in because we are still trying to take it in  
20      ourselves. But we would be glad to answer any of  
21      the questions you have about this or any other  
22      matters.

1 CHAIR JONES: Tom?

2 MR. TAYLOR: Yes. Well, first of all,  
3 Judge Effron, thank you very much for this  
4 wonderful service that you perform for the entire  
5 community, and to you also, Mr. Sullivan, for  
6 your longstanding contributions in this area.

7 Judge Effron, how would you describe  
8 the philosophy that is represented by the changes  
9 that Congress made to your recommendations? Is  
10 there an underlying philosophy to do more or less  
11 to change more quickly or more slowly, to move  
12 the pendulum one way or the other? How -- I know  
13 you've thought about this, and I don't know how  
14 much you want to say about it, but how would you  
15 describe the philosophy?

16 HON. EFFRON: The conference report is  
17 fairly sparse in terms of setting forth any  
18 philosophy. It is very descriptive of what was  
19 done. And so I think that would be up to  
20 everyone -- the eyes of the beholder to decide  
21 what the philosophy might be behind it.

22 But I feel very confident in saying,

1 as I did at the outset, that Congress has  
2 provided counsel and judges -- or, actually, to  
3 start out even before that, the people who are --  
4 the Joint Service Committee and those that are  
5 going to be working on the Manual for Courts-  
6 Martial provided tremendous tools to enhance the  
7 fairness and efficiency of the military justice  
8 system.

9 MR. TAYLOR: Going just to a couple of  
10 the points that you made in terms of the  
11 recommendations of your group, when you talk  
12 about the disposition decisions and requiring the  
13 Secretary of Defense to issue what I think I  
14 heard you say is the non-binding guidance, why  
15 have non-binding guidance so long as your  
16 guidance is general enough to include factors or  
17 criteria which I would suspect would be the kind  
18 of guidance about which you are thinking?

19 HON. EFFRON: The experience and the  
20 tradition in the federal sector -- and I can't  
21 speak to all of the states -- has been that the  
22 concept of prosecutorial discretion is very broad

1 to take in a wide variety of circumstances and  
2 applying it to individual cases. And there has  
3 been reluctance to write down factors that would  
4 guide people in making those decisions, lest the  
5 trial become a trial about -- whether the  
6 prosecutorial discretion authority, whether it be  
7 a prosecutor or any other authority, properly  
8 exercised that discretion in bringing a case to  
9 trial. And so that's why the federal civilian  
10 guidance -- and I believe the guidance in most  
11 states -- is considered to be non-binding. If it  
12 were treated as binding, there would have been a  
13 reluctance to write those things down.

14 MR. TAYLOR: Yes. I understand that.  
15 But is there an argument -- and I'm not sure your  
16 committee thought about it, or your group thought  
17 about it, that when you have relatively less  
18 experienced commanders vested with that kind of  
19 prosecutorial discretion, they don't have the  
20 basis of experience that an elected or presumably  
21 an appointed prosecutor might have.

22 Was there an argument that maybe it's

1       okay to have more binding criteria just because  
2       they don't bring to bear the experience that a  
3       prosecutor would have in a civilian context?

4               HON. EFFRON: I think there is a  
5       tendency these days to look at military justice  
6       through the lens of common law, common law  
7       offenses. And I know that is certainly what your  
8       group is charged with and making important  
9       recommendations on. But traditionally most of  
10      what takes place in courts-martial are matters  
11      that have a direct impact on the good order and  
12      discipline of military units. And that's  
13      something that commanders have a lot of  
14      experience on.

15              They have a lot of experience in  
16      determining what the impact is of a particular  
17      form of behavior on the functioning of that unit  
18      in the highly critical areas of morale and  
19      discipline that are essential to having a  
20      military unit perform its combat functions.

21              Deciding in a particular case does  
22      something warrant a general court-martial or

1 special court-martial is not the only set of  
2 options. Maybe this can be handled through non-  
3 judicial punishment, get somebody's attention.  
4 You know, we were talking about absences,  
5 disrespects, those sorts of things, or even some  
6 of the common law offenses that aren't  
7 necessarily going to be prosecuted a civilian  
8 way.

9 We prosecute a fair amount of barracks  
10 larcenies for things that many civilian  
11 prosecutors would say, "This is far below our  
12 threshold. That's not particularly important to  
13 us, whether somebody takes \$5 out of someone  
14 else's wallet in a gym down here in Ballston."  
15 I'm not suggesting that the Arlington prosecutors  
16 would or would not approach it that way, but I  
17 think you get the drift of what I'm saying.

18 For a military commander, in the  
19 cohesion that they need in that unit, when  
20 somebody takes \$5 out of the wallet of somebody  
21 in a barracks, that is a very disruptive offense.  
22 Now, it may need a court-martial. It may just be

1 handled by non-judicial punishment or even a  
2 counseling session. That's what commanders are  
3 expert at.

4 MR. TAYLOR: Did you consider it  
5 within your general charter to take a look at the  
6 fundamental issue that Senator Gillibrand and  
7 others have raised about the right place for this  
8 discretion when it comes to sexual assault  
9 crimes?

10 HON. EFFRON: Yes. It was within our  
11 charter, and the group made the decision based  
12 upon the recommendations of the RSP, that we  
13 would not make any recommendations in that area.  
14 We decided not to replot that ground. So it's  
15 not something that we made an independent,  
16 comprehensive study of.

17 MR. TAYLOR: So just one final  
18 question that certainly reveals my ignorance  
19 about the sentencing practice. But when the  
20 government can appeal a sentence that they  
21 consider plainly unreasonable, is plainly  
22 unreasonable a well-understood and defined term

1 in terms of civilian or military practice?

2 HON. EFFRON: In civilian practice, it  
3 is tied primarily to the sentencing guidelines in  
4 the federal system. In the absence of the  
5 parameters and criteria that were going to  
6 emulate those guidelines, it will be up to those  
7 who are working on the Manual for Courts-Martial  
8 to put together a useful set of criteria that  
9 will make that a positive tool rather than a  
10 source of constant litigation.

11 MR. TAYLOR: Thank you very much,  
12 Judge Effron.

13 CHAIR JONES: Admiral?

14 VADM TRACEY: Thank you, Judge. This  
15 may be similar to Mr. Taylor's questions, but --  
16 and I realize we haven't had a chance to digest  
17 everything that is in the conference report, but  
18 of the things that you have looked at that were  
19 either recommendations were not accepted or they  
20 were modified, what things concern you the most  
21 either in terms of their impact in and of  
22 themselves or the complexity they represent to

1 the practitioners?

2 HON. EFFRON: When I was asked this  
3 the other day, I will draw, like Dwight, my  
4 fellow baseball fan, on a baseball analogy. If  
5 we are -- we got about 85 percent of the specific  
6 recommendations we made and -- people vary on  
7 this -- I'd say somewhere between 50 and 60  
8 percent of the substance of -- you know, the  
9 important substance for what we're doing.

10 Now, in baseball terms, if you are  
11 hitting .500, you're doing really great. If  
12 you're fielding .500, you're terrible. Well, we  
13 look upon this as we're on the offense. We are  
14 making a recommendation to Congress as opposed to  
15 playing defense. So I'm going to take the  
16 position now that we're very happy with  
17 everything that was done, that we -- that there  
18 is very good progress made, new tools out there.

19 As I mentioned, figuring out how to  
20 write the rules for the sentencing procedure and  
21 for the appellate process, where Congress has  
22 added words in there that weren't in either bill,

1 will be a bit of a challenge. I don't see those  
2 as monumental challenges, and that's the type of  
3 thing that we normally expect out of the  
4 legislative process. That is, you don't get  
5 everything that you want, and you don't  
6 necessarily see coming out of conference  
7 something that was in either the House or the  
8 Senate bill. We sometimes see that blending.

9 So I'm not particularly concerned  
10 about any aspect of the legislation at this time.  
11 I think it is a positive step forward that the  
12 Congress has made here.

13 CHAIR JONES: I am wondering a little  
14 bit about Article 32, and I was wondering if you  
15 could put a little more flesh on the bones for  
16 us. I mean, we were all here today and heard  
17 that -- what the Subcommittee heard was that they  
18 are all just paper exercises now. How is this  
19 going to change, or is it, with your proposal?  
20 Well, it's not a proposal anymore.

21 HON. EFFRON: Right. One of -- as you  
22 may recall from my presentation before the

1 subcommittee, one of the -- we were given a year  
2 to put together an analysis of every aspect of  
3 the Code. So we had to make some decisions at  
4 the beginning on how we were going to do that.

5 One of the decisions we made at the  
6 beginning is that we were not going to revisit  
7 any recent legislation -- that is, legislation  
8 that has been passed in the last two or three  
9 years -- with two caveats. One is if we were  
10 doing something with another part of the UCMJ  
11 that would affect, let's say, Article 32. We'd  
12 look to make sure they were reconciled.

13 Secondly, in looking at something  
14 recent, if there were some clarifications that  
15 would be important, we would look at that. So  
16 that's the way we looked at Article 32. We did  
17 not revisit the fundamental decision to -- that  
18 Congress made to remove the longstanding, open-  
19 ended discovery type hearing that the Article 32  
20 had been, and change it more to the preliminary  
21 hearing.

22 We just worked on how we could make

1 that preliminary hearing more useful to the SJA  
2 and the Convening Authority and the process.

3 So --

4 CHAIR JONES: And how did -- did that  
5 consist of your guidance with respect to what the  
6 duties of the hearing officer were?

7 HON. EFFRON: Yes.

8 CHAIR JONES: Was that pretty much it?

9 HON. EFFRON: That's pretty much it.  
10 We were focused on getting the hearing officer  
11 not to simply conduct this hearing and create a  
12 record and then turn it over to the SJA and the  
13 convening authority with a thumbs up or thumbs  
14 down, but with a requirement to organize that  
15 material in a way that focused on the specific  
16 offense and the elements and focused particularly  
17 on the matters that are going to bear on a  
18 disposition decision, because the hearing officer  
19 is not the person who makes the disposition  
20 decision. It is only a recommendation at that  
21 point.

22 CHAIR JONES: Is it safe to assume

1 that if a hearing officer has those duties they  
2 are going to start wanting more information from  
3 the parties? I mean, can they order more? I  
4 assume they can. Order the defense or the  
5 government? Well, not the defense but the  
6 government to present them with more?

7 HON. EFFRON: That's part -- yes, and  
8 that's part of what is going to go on with the  
9 development of the rules in the Manual for  
10 Courts-Martial is to see what additional guidance  
11 needs to be given at that point to the hearing  
12 officers in light of these new requirements.

13 CHAIR JONES: So that's where more  
14 information will come.

15 HON. EFFRON: Yes. But I can't -- I  
16 listened to the discussions this morning, and I  
17 don't want to leave the impression that what we  
18 have done has addressed the depth of the issues  
19 that you were concerned with about the Article 32  
20 here. We didn't do a stealth return to the old  
21 Article 32 in the process.

22 CHAIR JONES: Excuse me, Mr. Stone.

1 I did have one more question.

2 I think you said you expected more  
3 sentencings to be done by judges?

4 HON. EFFRON: Well, the process now  
5 under current law is that you don't get  
6 sentencing by a judge unless at the beginning you  
7 request a judge for the entire proceeding,  
8 findings and sentence.

9 CHAIR JONES: Right.

10 HON. EFFRON: Under the new system,  
11 you can proceed with a trial by members, and then  
12 you will be sentenced by the judge, unless you  
13 make a separate request at that time for  
14 sentencing by members.

15 And I have been a defense counsel, you  
16 know, Dwight has been a defense counsel, and one  
17 of the hardest discussions you have with a client  
18 is to say, "in this case, we might have a good  
19 chance of beating the charge at trial. But if  
20 you lose, you're going to have -- if you go  
21 before members. But if you lose, those members  
22 are going to sentence you." That will no longer

1 be the case.

2 It will be just like in civilian  
3 society where you have -- with this one caveat at  
4 the end, you could choose members. But other  
5 than that, you have the opportunity for, in  
6 effect, your military jury trial and then  
7 sentencing by the judge. How that will actually  
8 work in practice in terms of the numbers, only  
9 time will tell.

10 CHAIR JONES: I don't know why I have  
11 this impression -- I'm sure it's something I  
12 heard along the way over these hearings -- was  
13 that basically most members choose panels, and I  
14 think even through the sentencing stage. Well,  
15 maybe they never had the opportunity to switch to  
16 the judge sentence for --

17 HON. EFFRON: Number one, they didn't  
18 have the opportunity to switch. And, secondly, I  
19 don't know what the breakout is in the types of  
20 sexual assault cases they have, but the military  
21 justice system has been consistently running at a  
22 70 percent or higher judge-alone proceeding.

1 That is, the --

2 CHAIR JONES: So you mean the whole  
3 proceeding.

4 HON. EFFRON: The whole proceeding,  
5 they have been -- because that is their only  
6 choice now, and they have been choosing between  
7 70 and 80 percent consistently over several  
8 decades. There has never been a study as far as  
9 I know of what influences that. Certainly one  
10 factor will be that in many of the Services there  
11 is a de facto requirement that somebody waived  
12 the right to trial by members in order to plead  
13 guilty in a case.

14 So many of our guilty plea cases are  
15 judge-alone cases because that's a condition of  
16 the pretrial agreement. Again, how all of this  
17 will change, I don't know, but I think the  
18 practical matter is we know there will be some  
19 subset of cases in which the accused now has to  
20 forfeit trial by members in order to get judge  
21 sentencing. The accused will no longer have to  
22 do that. The accused can have a trial before the

1 military jury, and then have judge sentencing.

2 CHAIR JONES: Thank you. I think I  
3 understand it now.

4 Mr. Stone?

5 MR. STONE: Thank you. Let's stay  
6 with this -- some of these changes to sentencings  
7 for a minute. I understood from prior testimony  
8 we had heard that when a trial was done before  
9 the members, typically they sentenced before they  
10 left, right after they reached a verdict, because  
11 they were all going off to different assignments  
12 and they were only temporarily convened.

13 I don't know if that is correct, but  
14 it -- the reason it came up is because when we  
15 discussed restitution, I know that we had  
16 testimony that said, "Well, they're not coming  
17 back to decide on restitution. Everybody has  
18 moved on, including often the trial judge and the  
19 parties."

20 And you talked here about there being  
21 a break, I thought you said, where the procedures  
22 are a little different, and they can decide to

1 opt for the judge, or vice versa. Is there a  
2 temporal break between the finding and the  
3 sentencing now that is going to change what was  
4 existing practice that the sentence used to  
5 follow almost immediately? Or is that still  
6 going to be the practice?

7 HON. EFFRON: Not as a matter of law.  
8 There is nothing -- Dwight, correct me if I'm  
9 wrong on this -- there is nothing in the statute  
10 that we proposed or that Congress enacted that  
11 requires anything more than the judge saying to  
12 the accused, "We'll proceed with my sentencing  
13 you. You have the right to -- unless you choose  
14 to be sentenced by members." And there will be a  
15 more formal way of saying that, and you could go  
16 right into either one.

17 Now, whether as a matter of practice,  
18 once we have -- if we do have, as Judge Jones  
19 asked, whether we do have a system in which we  
20 have even more judge sentencing, judges, as a  
21 matter of practice, will want to have some kind  
22 of break at that point, is another matter. But

1 as a matter of the law, as it was passed by  
2 Congress, there is no requirement for any kind of  
3 break at that point.

4 MR. STONE: I guess I'm asking because  
5 I'm trying to find out if there's time for a  
6 presentence report to be done, because the cases  
7 we're talking about determine a person's career  
8 or even a victim's career, and maybe the cohesion  
9 of the whole unit, when there is a sexual assault  
10 charge that has been tried. It's a big deal.  
11 It's not one of your larceny-in-the-barracks type  
12 cases.

13 So I'm wondering, did you recommend  
14 anything or is there any understanding of yours  
15 whether there will be a presentence report with -  
16 - at the opportunity for input from the victim?

17 HON. EFFRON: There is not a  
18 presentence report required in the statute.  
19 There wasn't one required previously. What  
20 practices will develop now that we have judge  
21 sentencing will develop more over time.

22 Once Congress decided not to go with

1 parameters and criteria, then we have a very  
2 different environment in which the sentencing is  
3 taking place. It's going to be the type -- or  
4 not a different environment, it will be more like  
5 the current environment, which is primarily an  
6 adversarial environment with the development of  
7 sentencing information.

8 That is, every case that is now tried  
9 is tried in which the parties present information  
10 under rules of evidence, somewhat relaxed rules  
11 of evidence and sentencing. That's the  
12 sentencing system we have now, and that's the  
13 sentencing system that Congress had re-endorsed  
14 in this legislation. So it does not have a  
15 presentence report.

16 We don't have a probation service. We  
17 don't have a system to develop that. It's up to  
18 the parties to bring that information to bear.

19 Now, there are opportunities for the  
20 accused -- Article 6(b) specifically recognizes  
21 that -- to make an input in the -- excuse me, the  
22 victim -- the victim to make input in the

1 sentencing process and to be heard in the  
2 sentencing process. So the victim will have an  
3 opportunity to make that presentation at trial.

4 MR. STONE: So that will now be in the  
5 procedure that -- in the break between verdict  
6 being returned and sentence, the victim will get  
7 a specific opportunity. Somebody will say, "Does  
8 the victim wish to make a statement?"

9 HON. EFFRON: Yes.

10 MR. SULLIVAN: That's already in the  
11 system.

12 MR. STONE: That's already in there?  
13 Okay. But did your group consider requiring  
14 probation -- pretrial sentencing reports, or a  
15 group to work them up? Because a lot of times  
16 that may involve the person's family situation.  
17 It may involve -- even for the defendant, he may  
18 want to offer factors that are sympathetic but  
19 have nothing to do with the trial, so they  
20 wouldn't have been introduced.

21 HON. EFFRON: We gave some brief  
22 consideration to that. And, again, considering

1 the underlying purposes of the military justice  
2 system in terms of trying for prompt disposition  
3 of offenses, taking into account the factors of  
4 military good order in effect in the process, and  
5 the need -- whether you have members sitting on  
6 the panel or otherwise involved in the case, to  
7 proceed rapidly to their duties, we did not see  
8 the -- in RAND the balance weighing in favor of  
9 creating a probation service to put this kind of  
10 information together, but instead recommended  
11 continuing with the current system in which the  
12 judge would be the one working with the parties  
13 to develop that information.

14 In most military cases, the  
15 information on sentencing is readily available.  
16 The information on sentencing with respect to an  
17 individual's military record is available to the  
18 unit. You are dealing mostly with first-time  
19 offenders. Most of the people who are involved  
20 in the offense are nearby, and they can be called  
21 as witnesses or their statements, if they can  
22 otherwise be produced in admissible form, are

1 available.

2           So we felt that with the -- we viewed  
3 it as -- with a vast majority of cases that we  
4 are likely to have over time, that the current  
5 system can provide sentencing authority with the  
6 information that it needs to decide. But it's  
7 not an open and shut case. There is a great  
8 value to the presentencing report that exists in  
9 the federal system and in many -- and many  
10 states. To have that, you've got to make a big  
11 investment. That's a big investment in people to  
12 go around and track down that information. They  
13 have to be skilled in doing it. They have to be  
14 sensitive in doing it. And they have to be good  
15 writers as well.

16           Again, given the nature of the  
17 military justice system and the full offense of  
18 offenses that are considered, we did not see that  
19 as a place to put investment at this time.

20           MR. SULLIVAN: And if I could follow  
21 up on that a little bit, Mr. Stone, you  
22 mentioned, you know, evidence that might not have

1       been relevant on the merits, might be relevant in  
2       sentencing, and that's exactly right.

3               And so what you have in this system is  
4       -- it's important to understand it's not that you  
5       go right from the verdict to deliberation on  
6       sentencing. There is a lengthy procedure that  
7       happens there. In fact, it's often said that  
8       courts-martial are tried much like civilian death  
9       penalty cases where you have a bifurcated  
10       adversarial proceeding. So once the sentence is  
11       done, the judge will typically give the parties  
12       some break. It might be overnight depending on,  
13       you know, when it's done.

14              And then they will come back, and then  
15       the prosecutor, the trial counsel, will present  
16       evidence in aggravation. And the trial counsel  
17       will -- if there is certain information they have  
18       to present, they will typically present  
19       additional documentary evidence. It's not at all  
20       uncommon for the prosecution to call witnesses at  
21       that proceeding, and then -- and it's an  
22       adversarial proceeding, so the defense then

1 cross-examines those witnesses, and the members  
2 are allowed to ask questions of those witnesses,  
3 if it's a member sentencing case.

4 And then after that, the victim is  
5 provided with an opportunity to give input, and  
6 then after that the defense counsel is provided  
7 an opportunity. And the rule -- and so you  
8 mentioned -- you know, you raised a very good  
9 point about, hey, there might be evidence that is  
10 very relevant to sentencing that had nothing to  
11 do with guilt or innocence.

12 Well, the aperture is very broad for  
13 the defense at that point to bring in any  
14 evidence in either extenuation or mitigation of  
15 the proceeding. It can include an unsworn  
16 statement from the accused, and then -- and so at  
17 that point the defense puts on documents, almost  
18 invariably the defense puts on witnesses.

19 In many courts-martial you have family  
20 members testifying, you have, you know, fellow  
21 service members testify, and then the government  
22 gets a case to put -- gets an opportunity to

1 present a case in rebuttal. And then after that  
2 each party gets to make an argument to the  
3 sentencing authority, be it military judge or  
4 members.

5 So the government makes a sentencing  
6 argument, the defense makes a sentencing  
7 argument. If it's a member's trial, the military  
8 judge then gives instructions on sentencing, but  
9 they'll give some instructions before arguments,  
10 but then a lot of procedural instructions on how  
11 you get the sentence afterwards. There are  
12 different voting requirements based on the  
13 severity of the sentence.

14 And then if it's a member's case, the  
15 members go off and they deliberate, and then they  
16 hold votes in closed session, and then come back  
17 and deliver the sentence. And then if there's a  
18 pretrial agreement after the sentencing authority  
19 makes the sentence, the military judge will then  
20 review the sentence under the terms of the  
21 pretrial agreement.

22 So there is -- many times, literally,

1 the sentencing proceeding takes as long as the  
2 court-martial, I mean literally. So there is a  
3 very involved process and an opportunity to  
4 provide that sentence or a lot of information but  
5 within the context of an adversarial hearing.

6 MR. STONE: And that occurs after the  
7 finding of guilt, for instance.

8 MR. SULLIVAN: Correct.

9 HON. EFFRON: Right. One thing that's  
10 -- Dwight has given a terrific explanation of how  
11 that works. In terms of the timing issue, this  
12 might be helpful. In civilian life, there is an  
13 expectation that there will be time after the  
14 trial to prepare more information on sentencing  
15 and to react to the presentencing report.

16 In military life, counsel will go into  
17 trial, a contested trial, knowing that they have  
18 to be prepared for sentencing afterwards. So  
19 they are developing that information as part of  
20 their pretrial preparation as well. So it's not  
21 as if the trial ends and they say, "Oh, my  
22 goodness, now I've got to figure out how to deal

1 with sentencing on the case." But is going to --  
2 counsel should be ready for sentencing at the end  
3 of the trial.

4 MR. STONE: And when you were telling  
5 us before about new changes to pretrial  
6 agreements, I presume -- and correct me if I'm  
7 wrong -- you're talking about situations where  
8 there is a guilty plea to the crime, but their  
9 second sentencing hearing is what is going to  
10 follow that is going to be contested. Is that  
11 right?

12 HON. EFFRON: It depends on the nature  
13 -- yes, the sentencing hearing will be within the  
14 framework of the pretrial agreement, yes. But  
15 that will be contested.

16 MR. STONE: But it's a guilty plea.  
17 It's not just an agreement. It's a guilty plea,  
18 right?

19 HON. EFFRON: Oh, yes. You only have  
20 pretrial agreements of the nature we're talking  
21 about when there has been a guilty plea to at  
22 least one offense. It is not common, but it is

1 not all that unusual to have mixed pleas as well.  
2 So you may have a mixed plea, and you may even  
3 have some kind of agreement related to it that  
4 then is -- results in a proceeding on the  
5 findings after that, findings of guilt or  
6 innocence on those issues to which the person did  
7 not plead guilty.

8 And then the sentencing, that takes  
9 into account both the offenses to which the  
10 individual has pled guilty and whatever findings  
11 the court-martial made on the contested offenses.

12 MR. STONE: On a somewhat different  
13 issue that has concerned this panel since you  
14 reviewed everything, and you can tell me whether  
15 your group considered it or steered clear of it,  
16 one of the questions was whether material that  
17 has been considered confidential and not provided  
18 at the military trial level -- typically 513  
19 material, psychological reports of the victim  
20 that only the judge saw -- whether that should  
21 continue to be discovered basically as long as  
22 that defendant appeals, routinely handed over to

1 the defense service on appeal. Did you look at  
2 that at all?

3 HON. EFFRON: That's a matter we  
4 looked at. It's not covered in the statute right  
5 now. It's covered in the Manual for Courts-  
6 Martial. So that will be addressed by the Joint  
7 Service Committee as it is developing the rules  
8 for the Manual for Courts-Martial that will  
9 follow on through the legislation. So we did not  
10 make a specific recommendation as part of this  
11 report on the issue of the disclosure of that  
12 information.

13 MR. STONE: Well, I gather that is  
14 governed by the Rule 1103(a), and I don't  
15 understand from what you just said why that would  
16 need to be reconsidered. I would be delighted if  
17 it's reconsidered, but why do you think that will  
18 be reconsidered in light of your changes?

19 HON. EFFRON: Well, one of the  
20 charters of this process is to look at the entire  
21 Manual for Courts-Martial as the legislation is  
22 being implemented, so -- it's so comprehensive --

1 so that every rule will get a fresh look as part  
2 of this.

3 Now, the rules that are not affected  
4 directly by the legislation, maybe get a -- not-  
5 as-detailed a look. Whether they're going to  
6 take another fresh look at 1103 will be up to the  
7 Joint Service Committee as it looks through it.

8 MR. SULLIVAN: If I could jump in  
9 there. The Joint Service Committee recently  
10 proposed a change to that rule. It's out for  
11 public comment right now. On Thursday, there  
12 will actually be a public hearing on that  
13 proposed rule change, and it would basically  
14 adopt a multiple-track system where, if there is  
15 sealed evidence -- and this deals with any sealed  
16 evidence.

17 You know, it might be 513, or it might  
18 be 412, there might be classified information.  
19 And typically in a case you might have sealed --  
20 if it's a child pornography case, which a  
21 disconcerting percentage of our cases are, you  
22 will have sealed exhibits in such a case as well.

1 And so the -- and you may have sealed matters in  
2 discovery in other types of cases as well.

3 So the proposal from the Joint Service  
4 Committee -- and, again, this is just a proposal  
5 out for public comment, we're hoping to get a lot  
6 of comments to further inform the decision. The  
7 proposal is to say, look, if the material was  
8 released to the counsel at trial, and the  
9 appellate counsel want to see it, the appellate  
10 counsel will have to go to the judge and say --  
11 or go to the appellate court -- I'm sorry -- go  
12 to the appellate court and say, "Hey, we want to  
13 see it."

14 And in such a case there would be  
15 pretty low bar or, again, where this was seen by  
16 the trial defense counsel, pretty low bar to the  
17 appellate counsel seeing it as well. And, as you  
18 probably know, the current rule, if you've  
19 followed the plain language of the current rule,  
20 an appellate counsel automatically gets access to  
21 it.

22 Now, in practice, that's now how the

1 rule was carried out in the Air Force, but I  
2 think the plain language of the rule is clear  
3 that an appellate counsel is automatically  
4 entitled to this.

5 So but then you would have a system  
6 sometimes where you have material that is sealed  
7 that was not seen by the trial defense counsel.  
8 It's going to erect the -- this proposal erects a  
9 higher bar that must be cleared by the appellate  
10 counsel to say, "Why is it necessary for the  
11 appellate counsel to see this material on appeal  
12 where it wasn't seen by the counsel at trial?"

13 So, again, it's going to -- the  
14 proposal is to have this two-tier system, and  
15 that's under consideration. But certainly, you  
16 know, it isn't a DoD recommendation at this  
17 point.

18 MR. STONE: Great. I'm glad to hear  
19 that.

20 HON. EFFRON: And I can just -- just  
21 so that I'm clear on the record, our group looked  
22 at all the provisions of the manual for courts-

1 martial and going through the process to  
2 determine which ones might be better articulated  
3 in statute than in the manual.

4 In the course of doing that, we  
5 prepared a very rudimentary set of suggestions  
6 for the Manual for Courts-Martial, which we have  
7 provided to the Joint Service Committee. So that  
8 is -- I just want to make clear, it's not that we  
9 didn't look at the Manual for Courts-Martial, it  
10 just came out in a different product than our  
11 legislative report.

12 MR. SULLIVAN: And if I may follow up  
13 on that point, because there is something very  
14 important to note, and that is Mr. Effron noted  
15 before that the deadline -- most of these rules  
16 will take effect within -- or the statutory  
17 amendments will take effect within two years.

18 But there is a proposal, as Mr. Effron  
19 mentioned, for the President to promulgate  
20 implementing rules a year out. So it envisions  
21 that you will have, you know, somewhere  
22 approaching a year where the rules exist but they

1 aren't yet enforced, which obviously allows for a  
2 training period, which you're going to need to  
3 implement this.

4 So the Joint Service Committee is  
5 working on the -- on this proposed manual to  
6 implement these rules along with the Military  
7 Justice Review Group. And, unfortunately, in the  
8 case of the legislative proposals, we were  
9 constrained by an OMB Circular. We weren't  
10 allowed to release that to the public until it  
11 was transmitted to Congress. That is not the  
12 case with the proposed implementing rules.

13 So DoD will be putting those  
14 implementing rules out. Just like we have the  
15 proposal to change 1103(a) for public comment,  
16 the proposed manual changes, which are about  
17 literally half the size of this report right now,  
18 so about that much, will be put out for public  
19 comment, and obviously we would love to have the  
20 expertise of the JPP in evaluating those  
21 proposals when they are promulgated in notice  
22 form.

1 MR. STONE: Great. I have one other  
2 area I'd like to ask if Judge Efron's group  
3 looked at, and it's one that we are continuing to  
4 discuss because it wasn't decided in this NDAA  
5 Committee report. And that is the question of,  
6 well, let's start with, how -- and this is a  
7 question I don't know the answer to. If the --  
8 on appeal, the Appeals Court can look at every  
9 element and the admissible evidence as to every  
10 element as required to. How does the prosecutor  
11 know what it is he is defending in his brief on  
12 appeal, or does he routinely have to defend the  
13 admissibility of the -- each piece of evidence on  
14 every element to show that it was there beyond a  
15 reasonable doubt?

16 HON. EFFRON: As a practical matter,  
17 there are very few cases where the accused does  
18 not raise an issue in which the Court of Criminal  
19 Appeals nonetheless finds a problem in the case.  
20 So in terms of what the party has -- the  
21 government has to defend against, they will  
22 typically know that from the issues that are

1 raised by the accused on appeal.

2 With respect to issues that are raised  
3 by the Court, it is up to each Court's practice  
4 to decide what to do. But in most cases, if they  
5 identify a problem, they will give the parties an  
6 opportunity to brief that issue.

7 MR. STONE: That's what I was looking  
8 at. So the prosecutor knows either from the  
9 Court giving him an opportunity to discuss an  
10 issue that it's concerned about or from the  
11 defense's brief what issues are on appeal.

12 HON. EFFRON: Yes. With the important  
13 caveat that the Court itself has the authority to  
14 raise issues, it has the authority to decide  
15 them, and it is not required -- even though it's  
16 good practice, it is not required as a matter of  
17 practice to notify the parties that it is  
18 considering another issue.

19 That happens in civilian life as well.  
20 It is -- you know, it is a matter, certainly,  
21 that is debated among appellate practice experts  
22 whether that is a good idea. But in general it's

1 good practice for an appellate court to get the  
2 views of the parties on an issue, but it's not  
3 unheard of for appellate courts to decide a case  
4 on issues that have -- on which the parties  
5 haven't had an opportunity to brief.

6 MR. STONE: Okay. Now, going to the  
7 specific issue that concerns me, if either the  
8 Court or the defense counsel, who we'll assume  
9 for my hypothetical has now met the bar and  
10 gotten access to the victim's psychological  
11 reports, which the trial counsel -- trial defense  
12 counsel never saw, feels an obligation to be  
13 diligent, having seen those, and create or make  
14 some kind of an argument that they were  
15 improperly denied the trial defense counsel.

16 I presume he is going to raise that or  
17 the Court is going to raise that in most of the  
18 cases, that that's not something that is going to  
19 slide by. And I guess my question is, is there  
20 some reason that the victim's counsel, who never  
21 got to defend against that argument at the trial  
22 level, because the defense counsel couldn't have

1 made it, because he didn't have those documents,  
2 whether this first-time litigation on these new  
3 arguments, whether there is some reason why  
4 victims' counsel shouldn't participate after an  
5 Article 6(b) issue has been raised in the  
6 appellate court by the defense or the Court?

7 HON. EFFRON: There are two types of  
8 issues that arise in that context that you have  
9 identified. The first, which would arise  
10 beforehand, is where there is an issue at trial,  
11 and then the victim, under a theory -- for  
12 example, under the LRM case, seeks a writ and  
13 addresses that issue on appeal.

14 I just wanted to clarify that that's  
15 different. You're talking about a case in which  
16 now the case is on appeal, and the issue on  
17 appeal is not whether -- the underlying issue is  
18 not whether the information should or should not  
19 have been examined by the judge. The issue is  
20 whether the conviction should or should not be  
21 affirmed.

22 MR. STONE: No, that's not quite what

1 I'm asking.

2 HON. EFFRON: No, I understand. But  
3 that's the underlying -- then, as part of that  
4 issue, whether the conviction should or should  
5 not be affirmed, now, as I understand it, you are  
6 raising the issue -- the legal issue of whether  
7 the trial court erred by not examining the 513  
8 issue. That's my understanding of what you're --

9 MR. STONE: Well, it's not clear by  
10 not turning over -- the 513 material over to the  
11 defense counsel.

12 HON. EFFRON: Or by not turning it  
13 over to the defense counsel.

14 MR. STONE: Yes.

15 HON. EFFRON: And so, at that point,  
16 or it could be -- it could be one of not  
17 examining it. Could be either one. Could be not  
18 examining it or examining it and not turning  
19 over. Either one of those could be raised.

20 That issue may or may not have a  
21 bearing on whether the conviction should or  
22 should not be affirmed. The appellate court

1 might look at it and say, "No error." Court  
2 might look at it and say, "Error but harmless"  
3 and still go ahead and affirm the conviction. So  
4 it's in a different posture than it is at the  
5 trial level.

6 I think the question there is, and one  
7 that we did not examine, so I just raise this as  
8 the thought as to what would be looked at here,  
9 is can that issue be dealt with by, number one,  
10 making sure that there is public notice that that  
11 issue is under examination.

12 Hopefully, the amendments that we have  
13 proposed for Article 140A in terms of publication  
14 and timely availability of notice of proceedings  
15 will mean that that -- when those issues are  
16 raised, there will be public notice of it. And,  
17 secondly, the question being, is it sufficient to  
18 provide a victim with an opportunity to act as an  
19 amicus in that case and bring the information to  
20 the Court?

21 We did not examine that, and so I  
22 simply say that -- raise that as a thought

1 process if that is viewed as something that  
2 should be addressed, then the question is, is the  
3 appellate process different from the trial  
4 process, and does the amicus process or a  
5 modification of the amicus process provide an  
6 adequate opportunity for the victim's views to be  
7 before the Court?

8 Dwight, did you have anything you  
9 wanted to add on that?

10 MR. SULLIVAN: I don't think DoD has  
11 a position on that.

12 HON. EFFRON: Yes.

13 MR. STONE: Well, I gather the short  
14 is that you did not examine it, but I just want  
15 for the record to say that is not the  
16 hypothetical I was suggesting.

17 HON. EFFRON: I'm sorry.

18 MR. STONE: I was not suggesting that  
19 the victim comes in as an amicus, because an  
20 amicus brief may be denied, and an amicus brief  
21 typically is not on behalf of a particular  
22 client. It's on behalf of a policy.

1 I'm talking about the victim's counsel  
2 having a right to say, "I never got to hear this  
3 brand-new argument on appeal," and my client has  
4 a particular position, which, frankly, may not be  
5 the same as the government's, because the  
6 government can file their own reply. I want a  
7 right to reply in the first instance to an  
8 argument I have never heard that is brand new,  
9 because this is the first time they have seen the  
10 513 material. That's the issue, and it's  
11 different than as you --

12 HON. EFFRON: I apologize if I  
13 misstated your issue. I thought I had, and then  
14 said that in analyzing -- I was not trying to put  
15 words in your mouth, but, rather, to explain what  
16 I thought would be one way of analyzing it would  
17 then be to say, "Okay. First, take a look at the  
18 amicus process, determine whether the amicus  
19 process is sufficient or not to provide that  
20 opportunity."

21 If it's not sufficient, are there  
22 changes that should be made in the amicus process

1 that would make it more useful for the parties,  
2 make it more useful for the victim and the Court  
3 than it is now, without necessarily making the  
4 victim a party at that proceeding? I was simply  
5 suggesting that as a thought process, as a way of  
6 doing it. I apologize if it sounded like I was  
7 attributing to you the amicus suggestion.

8 CHAIR JONES: Anything else, Mr.  
9 Stone?

10 MR. STONE: No, that's fine. Thank  
11 you.

12 CHAIR JONES: Ms. Holtzman, did you  
13 have some questions you wanted to ask?

14 CHAIR HOLTZMAN: No. I just wanted to  
15 thank the presenters for their presentations and  
16 for their service.

17 CHAIR JONES: Okay. I could barely  
18 hear you. Thank you, though.

19 CHAIR HOLTZMAN: It was just a thank-  
20 you.

21 CHAIR JONES: Okay. Great.

22 HON. EFFRON: Thank you.

1 CHAIR JONES: Thanks, again, Judge  
2 Effron and Mr. Sullivan, very much.

3 All right. Is it possible that we are  
4 adjourned? I believe there is no public comment.  
5 Is that correct?

6 MS. FRIED: That's correct, Your  
7 Honor.

8 CHAIR JONES: All right. Then we're  
9 adjourned. And thanks again.

10 HON. EFFRON: Thank you.

11 (Whereupon, the above-entitled matter  
12 went off the record at 2:04 p.m.)

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<b>A</b>		
<b>a.m</b> 1:10 4:2 55:14,15 94:17,18 138:13	81:8	104:13 116:3 119:6,7 119:17 123:20 125:10 127:11 178:13
<b>ability</b> 17:19 77:10 160:3,12	<b>act</b> 3:13 4:20 6:15 22:5 130:8 138:18 139:19 142:13,15,19 143:4 143:13,18 144:2 145:19 146:21 164:9 211:18	<b>admissibility</b> 206:13 <b>admissible</b> 165:10 192:22 206:9
<b>able</b> 31:9 44:1,8 65:1 72:11 79:13,18 81:16 85:14 86:13 115:2 134:7 139:2,3 159:22 163:12	<b>acted</b> 133:8	<b>adopt</b> 14:3 71:7 157:16 158:1 201:14
<b>above-entitled</b> 55:13 94:16 138:12 215:11	<b>action</b> 97:19 117:13 161:15	<b>adopted</b> 70:15 142:17 154:8 157:21 167:7 169:19 170:3,4
<b>abroad</b> 67:19	<b>Acts</b> 4:22	<b>adoption</b> 143:1
<b>absence</b> 178:4	<b>actual</b> 66:2 70:17	<b>adult</b> 5:4
<b>absences</b> 176:4	<b>acute</b> 49:14	<b>adversarial</b> 190:6 194:10,22 197:5
<b>absolutely</b> 16:5 34:21 43:3 100:15 170:9	<b>add</b> 39:9 46:9 49:2,15 49:17 88:17 121:19 123:19 125:5 134:9 212:9	<b>adversary</b> 16:5,7
<b>abusive</b> 50:16	<b>added</b> 17:6 21:8 179:22	<b>adverse</b> 65:13
<b>Academic</b> 38:2	<b>adding</b> 76:9	<b>adversely</b> 63:12
<b>accept</b> 41:7 43:18 45:5 137:10	<b>addition</b> 15:2 20:2 22:10 29:11 32:1 96:7 128:1 143:17	<b>advertise</b> 41:12
<b>acceptable</b> 100:3	<b>additional</b> 11:4 17:11 20:4 21:15 22:6 37:18 64:2 71:9 73:7 74:7 85:18 96:8 126:2 137:22 142:5 152:6,9 183:10 194:19	<b>advice</b> 26:10
<b>accepted</b> 178:19	<b>additionally</b> 16:10 21:5 24:16	<b>advise</b> 9:2 33:13
<b>access</b> 13:4 22:19 23:13,15 82:16 92:10 95:18 97:2 98:11,12 99:20 124:9 148:15 150:11 164:15 168:19 168:19 170:14 202:20 208:10	<b>address</b> 20:8 23:13 63:17,19 73:18 125:1 136:20 148:8 161:12 171:9	<b>advised</b> 33:20
<b>accessibility</b> 149:5	<b>addressed</b> 19:14 21:9 104:5 183:18 200:6 212:2	<b>advising</b> 15:5
<b>accessing</b> 21:12	<b>addresses</b> 209:13	<b>advisor</b> 2:7,8 37:20
<b>accommodate</b> 116:6	<b>addressing</b> 12:4 64:4	<b>advisory</b> 42:11,11
<b>accomplished</b> 7:18	<b>adequate</b> 16:6 20:13 93:17 120:12 129:14 212:6	<b>advocacy</b> 144:21
<b>account</b> 153:22 154:4 192:3 199:9	<b>adequately</b> 41:9 107:22	<b>advocate</b> 32:5,5 34:6,7 76:9 128:5,5 136:7,7 151:17 152:12 165:20 165:22 166:2,11 167:20 168:14
<b>accounting</b> 84:22	<b>adjudge</b> 154:19 157:11 159:8	<b>advocates</b> 8:9 10:7 28:17 44:8 134:14 144:12 146:7 153:21 153:21 154:13
<b>accurate</b> 56:17 73:5 120:5	<b>adjudged</b> 162:10 163:3	<b>Affairs</b> 38:2
<b>accurately</b> 137:22	<b>adjudges</b> 155:13 162:12	<b>affect</b> 45:16 65:12,18 181:11
<b>accusations</b> 123:7	<b>adjudging</b> 162:5	<b>affirm</b> 211:3
<b>accused</b> 12:13 15:12 18:21 26:3,6 33:16 50:5,12 78:17 155:16 155:20,21 158:5,12 158:14,19,21 159:2,3 160:12,20 162:13 163:6 164:21,22 165:15 166:15 167:19 167:21 168:6,11 186:19,21,22 188:12 190:20 195:16 206:17 207:1	<b>adjudicate</b> 164:7	<b>affirmatively</b> 164:22 165:3
<b>ace</b> 82:2	<b>administration</b> 8:19 22:15 95:14 107:14 142:8,9	<b>affirmed</b> 209:21 210:5 210:22
<b>acknowledge</b> 137:7,11	<b>administrative</b> 23:3 85:5 86:7 111:4	<b>afraid</b> 123:16
<b>acquittal</b> 11:18 20:6,10 45:11,14 81:21	<b>Admiral</b> 87:18 95:22	<b>afternoon</b> 6:14 139:16
<b>acquittals</b> 52:4,5,13,16		<b>age-old</b> 49:4
		<b>agencies</b> 25:11 93:8 115:7 122:2
		<b>agency</b> 44:12 117:1,3 117:17
		<b>aggravation</b> 194:16
		<b>ago</b> 19:14 40:11 96:21
		<b>agree</b> 40:7 43:5 54:7 65:15 79:22 86:1,3 96:22 97:9 98:9 122:8 125:4,9 127:10,12 128:18 137:19
		<b>agreed</b> 18:1 84:1 87:3,7
		140:7 161:14
		<b>agreement</b> 123:13 162:4,9 163:2,13 164:6,10,12 186:16 196:18,21 198:14,17 199:3
		<b>agreements</b> 148:5 161:9,12,12 198:6,20
		<b>agrees</b> 71:13 105:7 112:9 164:6
		<b>ahead</b> 12:2 58:17 73:20 78:20 79:8 80:20 116:16 123:17 128:8 211:3
		<b>ahold</b> 77:1
		<b>Aid</b> 46:15
		<b>Air</b> 43:21 44:4,6,7 203:1
		<b>Ake</b> 26:15
		<b>akin</b> 154:11
		<b>alcohol</b> 50:17,17
		<b>align</b> 169:6
		<b>allegations</b> 144:15
		<b>alleged</b> 36:16 151:1
		<b>alleviate</b> 23:4 111:5
		<b>allow</b> 16:13 17:14 32:20 51:2
		<b>allowed</b> 95:2 195:2 205:10
		<b>allowing</b> 57:18 166:10
		<b>allows</b> 26:7 80:11 205:1
		<b>alluded</b> 64:18
		<b>alternate</b> 124:8
		<b>amazing</b> 103:9
		<b>amended</b> 4:21 8:15
		<b>amending</b> 169:6
		<b>amendment</b> 5:6 20:2
		<b>amendments</b> 204:17 211:12
		<b>American</b> 93:11
		<b>amicus</b> 211:19 212:4,5 212:19,20,20 213:18 213:18,22 214:7
		<b>amount</b> 32:11 103:9 162:14 176:9
		<b>analogy</b> 179:4
		<b>analysis</b> 117:20 119:22 146:14 181:2
		<b>analyze</b> 72:17 152:16
		<b>analyzed</b> 141:13 156:16
		<b>analyzing</b> 213:14,16
		<b>and/or</b> 112:5
		<b>Andrew</b> 1:17 6:16 140:17
		<b>anecdotal</b> 97:5 129:8
		<b>announcement</b> 86:6
		<b>answer</b> 26:2 44:20 72:20 91:5 106:9 117:7 171:20 206:7

- answered** 109:22  
**answers** 110:7  
**anticipate** 11:12 74:3  
**anxious** 139:8  
**anybody** 56:4 60:15  
 78:4 114:1  
**anymore** 15:19 51:19  
 180:20  
**anyway** 124:1  
**aperture** 195:12  
**apologize** 8:22 86:22  
 87:20 213:12 214:6  
**apparently** 59:4  
**appeal** 46:6 82:10,21  
 157:8 159:22 160:4  
 160:13 164:20 166:5  
 166:6,7,12,15 168:6  
 168:11 177:20 200:1  
 203:11 206:8,12  
 207:1,11 209:13,16  
 209:17 213:3  
**appeals** 37:14 144:9  
 161:3 164:17 165:3,8  
 166:3,13,14,20 167:3  
 167:10,18 168:1,12  
 168:16 199:22 206:8  
 206:19  
**appear** 65:20  
**appearance** 15:13  
 139:4  
**appellate** 3:9 6:13  
 20:16 37:13,17 82:22  
 138:21 147:10 148:5  
 148:16 163:12 164:15  
 168:18 169:3 170:14  
 179:21 202:9,9,11,12  
 202:17,20 203:3,9,11  
 207:21 208:1,3 209:6  
 210:22 212:3  
**applies** 145:15  
**apply** 108:10 120:16  
 135:21 171:3,6  
**applying** 171:14 174:2  
**appoint** 113:6  
**appointed** 9:15 37:17  
 51:12 174:21  
**appointment** 15:8  
**appreciate** 32:17 39:14  
 97:20 133:4 138:7  
**appreciation** 94:5  
**apprenticeship** 61:1  
**apprised** 11:22  
**approach** 104:18  
 170:16 176:16  
**approaches** 14:4  
**approaching** 204:22  
**appropriate** 16:9 21:18  
 26:10 83:11 88:22  
 114:13 117:20 152:8  
 154:6 155:3 157:2,5  
 161:5 166:22  
**appropriately** 170:9  
**appropriateness**  
 160:19  
**approval** 28:1 109:6  
 125:17,20 126:10,21  
**approved** 19:22 24:7,17  
 32:4 128:4 136:6  
 165:4  
**area** 29:7 38:16 73:8  
 107:3 148:1 154:15  
 161:9 164:16 169:4  
 170:13 172:6 177:13  
 206:2  
**areas** 21:8 67:4,5,7  
 148:3 170:7 175:18  
**argument** 53:10 96:2  
 174:15,22 196:2,6,7  
 208:14,21 213:3,8  
**arguments** 83:2 196:9  
 209:3  
**Arlington** 1:10,10  
 176:15  
**armed** 142:12 144:9  
 147:20  
**Army** 19:19 28:16 30:11  
 33:3 37:5,8 53:8,11  
 61:15  
**Army's** 53:3  
**arriving** 91:8  
**art** 31:11  
**article** 5:6 6:4 10:12  
 11:16 15:16 16:10,22  
 22:1 29:6 49:8 51:10  
 96:2,4,11,13 104:16  
 122:21 141:14 150:18  
 150:20 151:5,10  
 153:16,17 154:22  
 167:20,21 169:6,15  
 170:10 180:14 181:11  
 181:16,19 183:19,21  
 190:20 209:5 211:13  
**articles** 118:15 141:16  
 147:11  
**articulated** 58:10 204:2  
**as-detailed** 201:5  
**Asia** 6:7 9:21  
**aside** 64:16 123:14  
**asked** 4:7 10:10 18:14  
 76:19 111:22 139:22  
 140:6 147:14 179:2  
 188:19  
**asking** 45:20,20,20  
 46:1 52:16 57:8 189:4  
 210:1  
**aspect** 165:12 180:10  
 181:2  
**aspects** 64:2 148:7  
**aspirational** 28:13  
**assault** 5:4 6:9 10:2,14  
 11:18 19:22 20:6  
 28:20 29:6,7 31:17,22  
 33:20,21 35:15 37:21  
 46:12 47:15 48:10,17  
 49:19 50:1,9,14 57:18  
 60:10 61:17 63:11  
 64:9 79:14,17 82:15  
 82:17 113:9 127:18  
 127:22 129:10,20  
 144:16 145:6 161:8  
 177:8 185:20 189:9  
**assaulted** 102:3  
**assaults** 12:12  
**assessing** 115:9  
**assessment** 5:2 26:9  
 119:15  
**assessments** 122:3  
**assigned** 18:6 28:18  
 30:12  
**assignment** 53:9 59:1  
**assignments** 187:11  
**assigns** 171:11  
**assist** 27:15 77:16  
 90:17 152:18  
**assistance** 18:20 25:6  
 26:15 43:10  
**assistant** 37:10 61:18  
**associate** 1:20 6:20  
 36:21 38:1  
**Association** 19:13  
 93:12  
**assume** 66:10,11 72:1  
 131:8 182:22 183:4  
 208:8  
**assuming** 117:7,14  
 171:11  
**attempt** 63:14  
**attempts** 92:16  
**attend** 85:2 86:9,10,20  
**attendance** 4:11 56:13  
 57:5 84:16  
**attended** 9:13 56:19,19  
 85:5 86:17  
**attention** 28:7 45:7 92:2  
 98:2 130:3,17 154:16  
 154:17 161:10 176:3  
**attorney** 2:7,8 5:21  
 10:14 13:3 37:10  
 46:13 48:12  
**Attorney's** 35:4 150:13  
 154:6,12  
**attorney-client** 13:17  
 101:20  
**attorneys** 14:16,17 22:8  
 30:11 31:9 46:17 92:9  
 92:19 93:9  
**attributing** 214:7  
**attribution** 75:10 85:16  
 86:15  
**audience** 6:17  
**audit** 23:7 111:8 112:15  
 113:4 115:19 116:7  
 116:13 117:11 118:22  
 121:17 123:14 124:9  
 124:12,12  
**auditing** 92:3 115:7  
 118:21  
**auditors** 118:17,20  
**augment** 23:3 111:4  
 117:9  
**authored** 38:4  
**authorities** 89:6,15,22  
 90:7  
**authority** 17:17 23:18  
 28:1 109:7,17 125:20  
 126:10,19,21 151:18  
 152:12,18 153:5  
 157:5 161:14 162:19  
 163:4 164:3 171:8  
 174:6,7 182:2,13  
 193:5 196:3,18  
 207:13,14  
**Authorization** 4:20,22  
 130:8 142:15  
**authorize** 163:19,22  
**authorized** 154:19  
 155:4 163:10  
**automatic** 164:20  
 165:17 166:5,6 167:9  
 167:14 168:9,22  
**automatically** 164:17  
 202:20 203:3  
**availability** 21:2 78:7  
 211:14  
**available** 7:5 13:8,18  
 59:3 75:5,11 77:4,5  
 77:15,20 78:8,9,10,19  
 79:21 90:16 192:15  
 192:17 193:1  
**avenues** 15:10  
**await** 74:9  
**awaiting** 147:3  
**aware** 45:2,19 93:13  
 115:17 118:14
- 
- B**
- 
- b** 134:9  
**baby** 131:22  
**back** 11:5 35:5 55:11  
 59:21 66:15 74:5  
 94:14 101:18 117:7  
 187:17 194:14 196:16

**background** 5:15 9:6  
32:12 33:3,9 35:9  
41:1 66:20 115:21  
118:7  
**backgrounds** 7:17  
**backs** 50:3  
**backup** 34:17  
**bad** 81:11 96:22 132:21  
**balance** 192:8  
**Ballroom** 1:9  
**balls** 119:12  
**Ballston** 1:10 176:14  
**bang-** 82:3  
**bar** 93:11 202:15,16  
203:9 208:9  
**Barbara** 1:11,13 4:6  
103:16  
**barely** 214:17  
**barracks** 176:9,21  
**base** 5:17 9:11 90:8  
**baseball** 140:11,18  
179:4,4,10  
**based** 67:9 119:13  
122:18 123:18 124:17  
131:6 156:4 163:14  
165:7 177:11 196:12  
**bases** 6:6 67:18 72:3  
**basic** 150:14  
**basically** 36:13 135:5  
169:1 185:13 199:21  
201:13  
**basis** 16:21 99:2 174:20  
**bear** 175:2 182:17  
190:18  
**bearing** 210:21  
**beat** 162:15 163:8  
**beating** 184:19  
**beginning** 158:12,18  
181:4,6 184:6  
**begun** 105:19  
**behalf** 212:21,22  
**behave** 36:13  
**behaved** 36:16  
**behavior** 36:10 175:17  
**beholder** 172:20  
**believe** 43:14 45:9 61:4  
64:14 85:2 88:14  
93:11 101:8 115:4  
131:4 133:8 147:22  
174:10 215:4  
**believes** 105:12  
**bench** 37:13  
**beneficial** 130:14  
**benefit** 8:6,19 24:10  
25:7,19 103:20 104:9  
120:15 162:14  
**benefits** 27:10  
**benefitted** 146:11,13,14

**best** 42:22 90:21 145:3  
148:17 156:9  
**better** 26:8 38:22 74:22  
134:6 149:11,19  
152:18 161:22 169:6  
204:2  
**beyond** 83:11 106:1  
133:3 165:9,11  
206:14  
**BG** 34:3 40:20 78:5  
79:9 80:2,19 81:18  
88:3 91:4 94:10,12  
115:4  
**BG(R)** 1:20  
**bifurcated** 194:9  
**big** 35:14 43:20 44:7  
53:22 162:5 189:10  
193:10,11  
**bigger** 96:10  
**bill** 93:3 142:9 144:17  
144:22 145:1 157:18  
179:22 180:8  
**billet** 30:12 34:19 59:1  
**billets** 28:18 42:8 62:2  
**binding** 174:12 175:1  
**bit** 33:8 37:2 59:6 61:13  
168:20 180:1,14  
193:21  
**black** 135:10  
**blending** 180:8  
**blunt** 135:6  
**board** 99:21 129:19  
131:21 156:15  
**bodies** 44:2 76:17  
**body** 121:20,22  
**bones** 180:15  
**book** 38:4  
**born** 111:14  
**borne** 48:1  
**boss** 41:21 54:17  
**bosses** 43:1  
**bothering** 46:5  
**bottom** 130:4  
**bound** 102:14 162:19  
**box** 132:8  
**boy** 43:2  
**boyfriends** 102:4  
**Brady** 102:14  
**branch** 142:4  
**branches** 64:11,16  
**brand** 64:22 129:9  
213:8  
**brand-new** 213:3  
**break** 55:11 94:12,14  
94:14 187:21 188:2  
188:22 189:3 191:5  
194:12  
**breakout** 185:19

**brief** 139:11 146:21  
191:21 206:11 207:6  
207:11 208:5 212:20  
212:20  
**Brigadier** 7:14  
**bring** 45:7 175:2 190:18  
195:13 211:19  
**bringing** 8:18 73:2  
114:4 174:8  
**broad** 74:16 151:1  
153:14 173:22 195:12  
**broadening** 145:13  
**broader** 64:4 89:19  
**brought** 28:6 115:13  
**buckets** 100:22  
**budget** 17:14 25:12  
109:16 142:2  
**business** 33:6 119:9  
**businesses** 35:22  
**busy** 18:10  
**buy** 119:21

---

### C

---

**c** 132:17  
**call** 50:7 76:18 78:20  
119:12 131:22 194:20  
**called** 36:9 51:15,15  
87:2 192:20  
**calling** 130:16 131:20  
131:22 132:5  
**callous** 43:14  
**calls** 131:17 132:2  
145:1  
**candid** 10:19 11:1 26:9  
**capability** 5:21 101:2  
**capacity** 39:2  
**capital** 167:15  
**capitalize** 120:9  
**Captain** 2:5  
**captured** 75:13  
**captures** 68:6  
**cards** 24:19  
**career** 40:8 47:17 59:5  
61:3 189:7,8  
**careers** 12:14  
**carried** 203:1  
**carry** 132:9  
**case** 13:10 14:7,13,20  
15:10 18:16,22 20:10  
22:9 24:1,6,9,10,15  
24:18 25:7 26:10  
28:20 29:5 30:1,14  
31:3,17,22 48:10  
51:22 52:6 54:16,20  
63:11 79:14,17,19  
80:1 81:20,22 82:1,5  
82:21 92:20 93:1  
101:16 113:13 117:14

117:15 127:18,22  
129:5,11 130:21  
132:13 135:15 149:4  
150:16 152:14 161:2  
164:18 165:1,6  
166:20 167:10 174:8  
175:21 184:18 185:1  
186:13 190:8 192:6  
193:7 195:3,22 196:1  
196:14 198:1 201:19  
201:20,22 202:14  
205:8,12 206:19  
208:3 209:12,15,16  
211:19  
**caseload** 92:12  
**caseloads** 92:5,7  
**cases** 8:12 19:22 20:6  
20:16,21 23:20 28:20  
28:22 29:2,12,21  
30:21 33:20,22 35:15  
48:4 49:18,19 50:1,6  
50:7,9,14,16 51:6,11  
51:12 52:5,9 54:2  
57:18 58:1,6,6 59:15  
59:19 60:10 61:17  
63:6,15 64:9 77:6  
81:7,14 82:15,17,20  
129:19,20,22 144:13  
158:2 160:16 164:4  
165:2,16,18 166:1,7  
167:15,18 168:2  
169:9 171:4,4,5,16  
174:2 185:20 186:14  
186:15,19 189:6,12  
192:14 193:3 194:9  
201:21 202:2 206:17  
207:4 208:18  
**caught** 129:12  
**cause** 16:13 49:22  
51:20  
**caused** 18:4  
**causing** 20:17 27:16  
**caveat** 185:3 207:13  
**caveats** 181:9  
**CCA** 165:5  
**CCAs** 166:8  
**ceiling** 162:13 164:8  
**cell** 30:21  
**Center** 53:4 119:22  
**certain** 84:10 108:16  
113:19 155:7 161:7  
163:9 194:17  
**certainly** 11:7,13 25:14  
32:16 40:14 60:8 64:5  
97:16,20 98:3 101:9  
107:15 117:18 135:20  
175:7 177:18 186:9  
203:15 207:20

- certified** 61:3  
**cetera** 134:14,15  
**chain** 126:22  
**chains** 39:21 40:18  
**chaired** 54:16  
**chairing** 29:5  
**Chairman** 139:21  
**challenge** 180:1  
**challenged** 14:14  
**challenges** 180:2  
**chance** 71:15 103:6  
 108:8 178:16 184:19  
**change** 30:2 44:4 48:16  
 96:8,16 97:6 99:12  
 104:16 131:21 153:2  
 161:16 163:3 164:11  
 164:16 169:20 172:11  
 180:19 181:20 186:17  
 188:3 201:10,13  
 205:15  
**changed** 48:13 49:6,14  
 109:11,19 130:22  
**changes** 6:3 15:16 16:2  
 22:2 96:2 97:5 133:12  
 151:13 154:10 167:8  
 172:8 187:6 198:5  
 200:18 205:16 213:22  
**changing** 162:21  
 164:12  
**characterize** 89:10  
**charge** 34:10 83:16  
 92:20 184:19 189:10  
**charged** 9:12 175:8  
**charges** 13:1,12 29:13  
 89:21 152:8 154:1  
**Charlottesville** 53:3  
 83:18 102:18 126:12  
 129:9  
**charter** 177:5,11  
**charters** 200:20  
**check** 56:16  
**chief** 19:19 35:12,13  
 37:12 156:12,15  
**Chiefs** 139:22  
**child** 24:2,4 201:20  
**choice** 155:16 186:6  
**choose** 158:21 170:6  
 185:4,13 188:13  
**chooses** 159:3  
**choosing** 186:6  
**chops** 114:19  
**chosen** 158:12  
**Circular** 205:9  
**circulated** 141:7,20  
**circumstance** 150:22  
**circumstances** 136:10  
 174:1  
**civil** 93:19
- civilian** 13:19 16:5  
 24:21 25:18 31:16  
 33:22 34:15 38:18  
 41:3 46:10 47:13,20  
 48:2 53:22 82:9 113:8  
 127:16 135:7 154:8  
 155:18 162:6 164:13  
 169:8 174:9 175:3  
 176:7,10 178:1,2  
 185:2 194:8 197:12  
 207:19  
**civilian-type** 151:7  
**claim** 101:1  
**clarification** 106:14  
**clarifications** 181:14  
**clarify** 169:14 209:14  
**clarity** 147:10  
**class** 41:10 54:14  
**classified** 201:18  
**Clayton** 34:9  
**clear** 39:1 62:17 91:19  
 94:6 97:19 98:1  
 101:11 104:2 118:19  
 199:15 203:2,21  
 204:8 210:9  
**cleared** 203:9  
**clearly** 96:6 113:16  
**client** 18:15 26:11  
 78:17 93:1,4 126:16  
 184:17 212:22 213:3  
**clients** 15:6 18:14 25:1  
 35:21  
**closed** 82:13 196:16  
**closer** 161:18  
**co-** 38:3  
**co-chair** 61:18  
**co-director** 38:5  
**coaches** 36:11  
**Code** 5:3 141:14 181:3  
**coherent** 24:15 31:10  
**cohesion** 176:19 189:8  
**COL(R)** 1:19  
**colleague** 39:3  
**colleagues** 32:7 38:8  
 38:13  
**collect** 64:5 66:4 73:21  
 149:15  
**collected** 66:8 156:16  
**collecting** 60:1 93:7  
**collection** 145:17 149:5  
**colleges** 47:14  
**colloquially** 162:15  
**Colorado** 7:11 33:12,14  
**combat** 175:20  
**come** 30:7,17 41:16  
 42:6,6,13,14 51:3  
 53:4 71:15 74:5 77:16  
 94:14 124:16 139:2  
 140:21 152:11 183:14  
 194:14 196:16  
**comes** 13:1 16:10  
 78:13 79:2 117:7  
 162:17 177:8 212:19  
**coming** 93:20 180:6  
 187:16  
**command** 126:22  
**Commandant** 32:6  
 128:6 136:8  
**commander** 176:18  
**commanders** 6:1 10:7  
 45:1 51:12 153:20  
 154:12 174:18 175:13  
 177:2  
**commanding** 46:2  
**comment** 3:15 7:3  
 44:18 48:20 78:4  
 99:11 126:9 156:20  
 201:11 202:5 205:15  
 205:19 215:4  
**commentary** 96:17  
**commented** 54:9  
**comments** 4:8 57:20  
 58:3 95:12,21 110:4  
 114:10 126:6 128:8  
 202:6  
**Commission** 37:18  
**Commissioned** 34:4  
**commitment** 35:6  
**committee** 60:4 142:12  
 143:6,7 159:16 173:4  
 174:16 200:7 201:7,9  
 202:4 204:7 205:4  
 206:5  
**committees** 42:12  
**common** 59:2 82:15  
 175:6,6 176:6 198:22  
**communication** 21:17  
**communities** 92:19  
**community** 40:3 59:7  
 172:5  
**company** 103:15  
**Comparable** 108:4  
**compare** 66:5 137:21  
**compelled** 96:1  
**compensate** 53:14  
**complain** 62:3  
**complainant** 21:12  
**complaint** 112:7  
**complaints** 40:10 41:6  
 62:5  
**complete** 21:16 39:1  
**completely** 19:10 54:7  
 96:22 104:7  
**complex** 29:9 58:6  
 168:3  
**complexities** 22:1
- complexity** 178:22  
**complicated** 21:10,13  
 29:22  
**component** 76:10  
**composed** 118:21  
**comprehensive** 132:6  
 132:19 140:1,6  
 141:13 151:14 177:16  
 200:22  
**computers** 30:22  
**concept** 145:15 157:17  
 158:1 160:5 173:22  
**concepts** 123:20  
**concern** 8:12 19:7  
 20:12 28:15 65:19  
 68:12 69:1 83:6 87:6  
 106:2 116:6,17 140:2  
 178:20  
**concerned** 26:1 132:9  
 180:9 183:19 199:13  
 207:10  
**concerning** 74:1  
**concerns** 23:13 102:13  
 208:7  
**concluded** 93:22 96:21  
**concludes** 171:17  
**conclusion** 152:7  
**concurrently** 157:15  
 159:10  
**condition** 84:1 186:15  
**conduct** 5:1,12,16  
 13:21 17:11 24:20  
 36:9,10 158:10  
 182:11  
**conducted** 5:3 14:10  
 94:9 141:7  
**conducting** 39:18  
 122:3  
**conference** 143:6,7,8  
 143:10,11 154:8  
 157:16,18,22 158:3  
 159:5,6 160:13 161:6  
 163:17,21 167:7,16  
 169:19 170:5 172:16  
 178:17 180:6  
**confidences** 126:16  
**confident** 159:19  
 172:22  
**confidential** 24:21  
 199:17  
**confinement** 155:8  
 160:15,17 164:19  
 167:11,13  
**confirm** 90:12  
**confrontational** 14:4  
**confuse** 88:3  
**Congress** 136:19,22  
 137:13 142:9 147:22

151:4 153:1,3 154:17  
 166:17 169:22 170:9  
 170:17 172:9 173:1  
 179:14,21 180:12  
 181:18 188:10 189:2  
 189:22 190:13 205:11  
**congressional** 151:13  
**Congresswoman** 49:17  
**consecutively** 157:15  
 159:10  
**consequence** 20:15  
**consequential** 12:11  
**consider** 56:2 137:16  
 177:4,21 191:13  
**considerably** 135:13  
**consideration** 138:1  
 147:4 152:13 191:22  
 203:15  
**considered** 167:22  
 174:11 193:18 199:15  
 199:17  
**considering** 11:20  
 88:21 191:22 207:18  
**consist** 182:5  
**consisted** 150:21  
**consistent** 67:10  
**consistently** 185:21  
 186:7  
**constant** 178:10  
**constitute** 84:14  
**Constitution** 170:10  
**constitutional** 18:18  
 19:7 26:14 37:11  
 65:22 66:2  
**constrained** 205:9  
**consult** 25:21  
**consultant** 36:1,5  
**consulting** 25:19 35:18  
 35:20 116:20 118:6  
**contact** 50:16  
**contacted** 87:1  
**contains** 155:5  
**contested** 197:17  
 198:10,15 199:11  
**context** 26:17 33:22  
 85:17 97:15 175:3  
 197:5 209:8  
**continue** 6:12 20:4 22:4  
 123:21 124:1 199:21  
**continued** 138:7  
**continuing** 98:8 192:11  
 206:3  
**continuity** 29:18 30:8  
**contract** 121:11  
**contrast** 25:2 155:18  
**contributions** 172:6  
**control** 22:18 95:17  
**controversial** 72:6

**convened** 187:12  
**convening** 17:16 23:18  
 89:6,14,21 90:7 99:1  
 109:17 151:18 152:12  
 152:18 153:5 161:14  
 162:18 163:4 182:2  
 182:13  
**conversation** 123:18  
**conversations** 86:18  
**conveyed** 102:6  
**convicted** 33:16 157:12  
**conviction** 11:17 20:10  
 66:3 155:14 209:20  
 210:4,21 211:3  
**convictions** 20:20  
**convinced** 44:5 165:9  
**coordinated** 142:3  
**coordination** 141:9,21  
 142:6  
**Corporation** 118:11  
 119:22 121:11  
**corporations** 33:5  
**Corps** 28:16 29:19 30:4  
 32:6 34:4 37:8 53:8  
 53:11 61:15 128:6  
 136:8  
**correct** 45:4 56:5 58:8  
 63:18 83:5 85:6  
 108:19 131:18 132:6  
 187:13 188:8 197:8  
 198:6 215:5,6  
**corrected** 86:2  
**correctly** 57:22 58:10  
**correlate** 113:10,11  
**Council** 69:18 87:6,13  
**counsel's** 34:13,16  
 71:12 73:15  
**counseling** 177:2  
**counsels** 23:14 50:1  
 73:16  
**counterfactual** 52:21  
**counterparts** 108:5  
**countries** 8:3  
**country** 19:15 92:1  
 103:10  
**couple** 28:5 29:4 34:7  
 47:16 55:11 61:21  
 173:9  
**course** 12:10 20:18  
 26:14 41:22 49:11  
 93:18 140:12 141:3  
 204:4  
**court** 26:13 37:14,16  
 54:12,13 82:11,12  
 144:9 161:3 163:12  
 165:2,8 166:3,12,14  
 166:19 167:2,3,5,18  
 167:22 168:12,15

202:11,12 206:8,18  
 207:3,9,13 208:1,8,17  
 209:6,6 210:7,22  
 211:1,20 212:7 214:2  
**Court's** 207:3  
**court-** 81:19 155:12  
 158:6  
**court-martial** 80:6  
 98:10 123:1 132:11  
 144:13 148:15 149:6  
 151:16 154:19 155:22  
 158:9 162:3,10,11,18  
 175:22 176:1,22  
 197:2 199:11  
**courtroom** 52:18 54:6  
 78:10  
**courts** 148:18 160:18  
 164:17 167:9 208:3  
**courts-** 11:18 153:13  
 173:5 200:5 203:22  
**courts-martial** 6:2 34:8  
 74:13 132:16 150:3  
 157:1 159:18 160:9  
 171:1,14 175:10  
 178:7 183:10 194:8  
 195:19 200:8,21  
 204:6,9  
**cover** 74:10 75:19  
 90:11 106:20 124:9  
**covered** 10:4 73:1  
 200:4,5  
**covering** 11:13 74:3,18  
 114:2  
**CPT** 55:7 75:6 130:2,6  
 131:4,11,14,19 132:3  
**create** 182:11 208:13  
**created** 4:20  
**creating** 15:13 130:10  
 192:9  
**creation** 131:17  
**credit** 39:6  
**crime** 14:11 31:7 54:1  
 198:8  
**crimes** 33:16 35:11  
 177:9  
**criminal** 13:9 19:13  
 31:16 37:13,14 41:3  
 42:15 46:20 50:19  
 64:17 81:20 127:16  
 135:8 161:3 164:17  
 165:2,8 166:3,12,14  
 166:19 167:2,9,18  
 168:1,12,16 169:9  
 206:18  
**criteria** 31:20 80:13  
 127:20 134:19 150:14  
 156:5,8,13,15,18,22  
 157:18,20 160:5,7

163:15 164:1 173:17  
 175:1 178:5,8 190:1  
**critical** 175:18  
**criticisms** 148:22  
**cross-** 52:12 54:17  
**cross-examination**  
 78:12  
**cross-examined** 52:10  
**cross-examines** 195:1  
**cross-Service** 115:14  
**cultural** 97:13  
**curious** 40:15  
**current** 12:6 14:2 23:4  
 28:19 73:12 100:3  
 110:14 111:5 113:7  
 128:11 151:8 153:11  
 153:17 154:18 155:12  
 155:15 156:2,4,10  
 160:21 161:7,11,21  
 162:2,15,20 164:16  
 165:9,18 166:2  
 168:18 184:5 190:5  
 192:11 193:4 202:18  
 202:19  
**currently** 14:16 23:15  
 112:2  
**curve** 78:18  
**cut** 83:14  
**cycle** 129:12

---

**D**

---

**D** 3:1  
**D.C** 42:9  
**DA's** 54:3 58:4  
**data** 66:14 93:8 145:17  
 149:5,10,16,19  
 156:16  
**date** 69:21  
**dated** 5:14 119:20  
**dates** 171:3  
**day** 179:3  
**days** 41:17 51:10 175:5  
**de** 82:9 186:11  
**deadline** 204:15  
**deal** 117:9 154:16,17  
 162:13,16 163:5,6,8  
 164:5 189:10 197:22  
**dealing** 144:14 192:18  
**deals** 144:18 145:7  
 201:15  
**dealt** 46:11 170:12  
 211:9  
**dean** 1:19 7:15 36:19  
 36:21,22 37:3,5 38:1  
 48:19 49:16 60:17,21  
 62:11 64:18 88:8,12  
**death** 164:20 194:8  
**debated** 207:21

- decades** 46:12 186:8  
**December** 1:7 73:6  
 142:7,10 143:9  
 171:12,13  
**decide** 50:11 74:15  
 83:19 102:10,21  
 155:22 157:14 158:15  
 159:9 172:20 187:17  
 187:22 193:6 207:4  
 207:14 208:3  
**decided** 15:11 34:9  
 37:19 44:4 74:21  
 138:16 139:6 177:14  
 189:22 206:4  
**decides** 158:19  
**deciding** 150:15 175:21  
**decision** 16:21 90:2,3  
 151:19 152:19 163:21  
 166:12 177:11 181:17  
 182:18,20 202:6  
**decision-maker** 152:1  
**decisions** 89:22 149:11  
 154:14 173:12 174:4  
 181:3,5  
**declares** 122:22  
**deepening** 69:9  
**default** 158:4,17  
**defend** 13:1 132:11,13  
 144:13 206:12,21  
 208:21  
**defendant** 54:18 191:17  
 199:22  
**defender** 7:12 25:11  
 33:12 90:20,22 91:18  
 93:8 122:4  
**Defender's** 33:14  
**defenders** 13:20 33:18  
 46:16 93:5,16 115:8  
**defending** 206:11  
**defense's** 207:11  
**defer** 105:5,8,10,13  
**defined** 177:22  
**definitely** 30:9 43:13  
 122:7  
**definition** 120:4 145:14  
**delay** 17:19  
**deliberate** 95:2 124:19  
 132:14 138:5 196:15  
**deliberated** 65:17 80:4  
 80:16 138:4  
**deliberation** 86:12 95:4  
 104:10 123:22 194:5  
**deliberations** 3:6,9  
 5:12 6:12 9:5 71:19  
 76:12 83:7,10 87:8  
 91:8 94:21 103:20  
 123:19 130:15 135:18  
 138:21 149:9
- delighted** 34:21 200:16  
**deliver** 196:17  
**demands** 15:4 30:17  
 120:12  
**Dempsey** 139:21  
**denied** 17:22 23:20  
 25:5 27:12 46:4  
 208:15 212:20  
**denies** 27:3  
**Department** 1:1,17,21  
 6:20 41:12 70:1 71:11  
 104:20 105:1,6,15  
 112:1 113:21 115:12  
 116:10 117:3,8,12,16  
 117:22 118:16 119:11  
 121:3 137:15 141:8  
 141:20 142:1,7  
 146:17  
**departures** 143:15,16  
**depending** 194:12  
**depends** 198:12  
**deployable** 22:17 95:16  
 99:17 107:11  
**deposition** 169:7,8,10  
 169:11  
**depositions** 148:6  
 169:4,14,16  
**depth** 183:18  
**deputy** 1:20 35:12  
**describe** 137:22 172:7  
 172:15  
**described** 12:19 14:5  
 16:16 20:5 40:6 73:8  
 88:11 96:18 118:3  
**description** 120:5  
**descriptive** 137:5  
 172:18  
**design** 21:13  
**designated** 2:12 56:1  
**designators** 130:12  
 134:12  
**desirable** 59:5  
**desperation** 68:6  
**despite** 84:18 87:12  
**detailed** 75:4,9,18  
 132:10  
**details** 163:1  
**detainees** 42:16  
**determination** 51:14  
 156:17  
**determine** 23:9 31:20  
 111:10 112:16 127:20  
 134:19 161:4 165:3  
 189:7 204:2 213:18  
**determined** 11:4  
**determining** 175:16  
**develop** 28:22 31:18  
 79:4 80:12 88:22  
 127:19 134:17,18  
 145:2 156:13 170:16  
 189:20,21 190:17  
 192:13  
**developed** 88:18 98:3  
 149:2 156:19  
**developing** 24:10 31:2  
 31:3,4 91:1 197:19  
 200:7  
**development** 17:3 25:9  
 33:6 132:14 144:12  
 171:5 183:9 190:6  
**devoted** 98:4  
**DFO** 2:13  
**Dial** 55:3  
**dictates** 36:10  
**differed** 45:1  
**difference** 101:18  
 133:15 161:1 162:5  
 168:21  
**differences** 53:7 91:14  
 142:22 143:1 154:7  
 170:8  
**different** 16:17 32:21  
 44:20 47:16 49:7  
 56:20 59:8,9 60:22  
 61:13 66:6 67:7 70:4  
 70:8 82:8 84:9 92:6  
 99:3 100:21 102:12  
 115:20 117:5 119:1  
 126:19 143:5 144:22  
 148:3 150:4 159:13  
 162:22 168:20 187:11  
 187:22 190:2,4  
 196:12 199:12 204:10  
 209:15 211:4 212:3  
 213:11  
**differently** 63:1  
**difficult** 14:17 76:20  
 81:22 82:1 96:19  
**difficulties** 55:4  
**difficulty** 27:16  
**digest** 178:16  
**diligent** 208:13  
**direct** 23:6 27:21 39:15  
 52:12 78:12 107:10  
 109:5 111:7 112:15  
 116:12 121:17 125:18  
 153:18 175:11  
**directed** 5:16 56:3  
**directing** 132:19  
**direction** 132:1  
**directly** 201:4  
**Director** 1:17 2:6 7:10  
 33:11  
**disagree** 60:16  
**discharge** 160:18  
 167:12,14 168:3,4,8  
 168:11,13 169:1  
**discharges** 155:7  
**discipline** 154:2 175:12  
 175:19  
**disclosure** 200:11  
**disconcerting** 201:21  
**discovered** 16:8 199:21  
**discovery** 15:22 49:9,9  
 169:18 181:19 202:2  
**discrepancies** 14:21  
**discrepancy** 67:6  
**discretion** 135:13  
 153:13 157:4 173:22  
 174:6,8,19 177:8  
**discuss** 71:19 83:10  
 144:3,5 147:1 206:4  
 207:9  
**discussed** 11:2 30:16  
 72:6 75:22 85:7 91:7  
 126:1 187:15  
**discussing** 89:17  
 150:19  
**discussions** 62:12  
 66:21 183:16 184:17  
**disparity** 28:6  
**disposition** 148:4  
 150:11 152:8,19,20  
 153:4,10,17 154:1,13  
 173:12 182:18,19  
 192:2  
**disregard** 43:14  
**disrespect** 42:3  
**disrespects** 176:5  
**disruptive** 176:21  
**disseminate** 145:3  
**District** 35:4  
**disturbing** 68:20  
**diverse** 8:4 91:20 92:3  
**diversity** 91:13  
**division** 35:19  
**DNA** 30:22  
**document** 133:19  
**documentary** 151:3  
 152:10 194:19  
**documents** 16:19  
 148:16 150:5 195:17  
 209:1  
**DoD** 34:13,15 98:13,21  
 99:6,22 100:6 105:13  
 120:1,15 123:8,11  
 124:3 203:16 205:13  
 212:10  
**doing** 14:14 19:20  
 35:19 52:22 54:5 61:6  
 70:22 77:3 81:11,16  
 98:13 104:21 106:2  
 108:21 112:4 129:14  
 131:3 136:15,18,19

137:2 146:19 179:9  
 179:11 181:10 193:13  
 193:14 204:4 214:6  
**dollars** 85:1 118:18  
**domestic** 36:4  
**double-check** 101:3  
**doubt** 165:10,12 206:15  
**dovetails** 28:3  
**draft** 145:22  
**dramatically** 16:12  
 47:16 65:20  
**draw** 51:8 130:3 179:3  
**drawn** 156:9  
**drift** 176:17  
**Drive** 1:10  
**drop** 124:4  
**dry** 41:22  
**due** 20:1 45:8 60:12  
 65:10  
**duties** 18:9 153:22  
 182:6 183:1 192:7  
**duty** 34:16 35:1 119:12  
**Dwight** 1:20 6:17 34:21  
 139:10,15 146:1  
 179:3 184:16 188:8  
 197:10 212:8  
**dynamic** 149:17,17  
**dynamics** 59:8

## E

**E** 3:1  
**earlier** 99:4 121:17  
 159:14  
**early** 25:6 126:10  
**easier** 92:10  
**easily** 49:20  
**easy** 129:6  
**edit** 121:16 123:21  
**Education** 37:7  
**effect** 10:13 65:14 66:6  
 82:9 122:1,6 165:6  
 166:13,20 171:10  
 185:6 192:4 204:16  
 204:17  
**effective** 11:1 18:20  
 31:6,8 92:15 130:10  
 132:15  
**effectively** 24:22  
 132:13  
**effectiveness** 107:13  
**effects** 8:16 12:11 97:4  
 145:6  
**efficiency** 107:12 147:8  
 149:7 173:7  
**efforts** 39:10 47:20,22  
**Effron** 1:17 6:16 42:4  
 138:19 139:9 140:17  
 140:21 141:4 143:16

144:3 145:22 146:1  
 161:19,21 162:2  
 172:3,7,16 173:19  
 175:4 177:10 178:2  
 178:12 179:2 180:21  
 182:7,9 183:7,15  
 184:4,10 185:17  
 186:4 188:7 189:17  
 191:9,21 197:9  
 198:12,19 200:3,19  
 203:20 204:14,18  
 206:16 207:12 209:7  
 210:2,12,15 212:12  
 212:17 213:12 214:22  
 215:2,10  
**Effron's** 206:2  
**eight** 17:6 90:13  
**either** 41:4 79:22 106:4  
 125:7 178:19,21  
 179:22 180:7 188:16  
 195:14 207:8 208:7  
 210:17,19  
**elected** 174:20  
**electing** 158:6  
**element** 165:11 166:21  
 206:9,10,14  
**elements** 182:16  
**eliminating** 121:8  
**Elizabeth** 1:13 67:16  
**else's** 176:14  
**employees** 36:11  
**employs** 17:2  
**emulate** 151:7 178:6  
**enacted** 188:10  
**endeavoring** 70:1  
**ended** 34:22 44:7  
 150:22 181:19  
**ends** 197:21  
**enforced** 205:1  
**engage** 144:6 165:14  
**enhance** 144:11 147:7  
 147:18 148:15 149:6  
 173:6  
**enhanced** 144:21  
**enhancements** 151:12  
**enhancing** 70:19  
**enjoyed** 38:7  
**enlighten** 115:1  
**enlisted** 43:10  
**enmeshed** 113:6  
**enormous** 103:9  
**ensure** 79:17 132:10,15  
 165:15  
**ensuring** 169:8  
**entire** 142:3 158:20  
 165:5 172:4 184:7  
 200:20  
**entirely** 84:9

**entities** 12:19 122:2  
**entitled** 170:9 203:4  
**entity** 13:15 15:11 23:7  
 91:10 111:8 112:16  
 113:17 114:16 117:20  
 117:22 118:3,4,7  
 119:3 120:4 126:15  
**environment** 145:15,16  
 190:2,4,5,6  
**envisions** 204:20  
**equal** 123:1  
**equality** 106:16  
**equally** 80:6  
**equivalent** 64:15  
**erect** 203:8  
**erects** 203:8  
**erred** 210:7  
**error** 167:5 211:1,2  
**especially** 47:9 94:5  
 113:4  
**essential** 29:20 175:19  
**essentially** 53:12 64:13  
**establish** 130:11  
 134:11  
**established** 80:14  
 154:21 158:3  
**establishing** 148:16  
 157:1  
**et** 134:14,15  
**ethical** 15:1  
**Ethics** 87:6,13  
**ethos** 42:19  
**evaluate** 44:14 81:19  
 97:4 134:8  
**evaluating** 133:12  
 205:20  
**evaluation** 149:8,13  
**eve** 24:8  
**Eventually** 34:12  
**everybody** 48:6 51:17  
 54:8 80:5 85:21 88:4  
 98:9 99:4 118:14  
 128:7 166:14 168:19  
 187:17  
**evidence** 19:1 26:9  
 27:17 29:9 30:19  
 82:11 97:6 100:7  
 106:3,4 113:1 123:3  
 129:8 151:3 165:10  
 190:10,11 193:22  
 194:16,19 195:9,14  
 201:15,16 206:9,13  
**evidently** 22:4  
**evolve** 149:18  
**exactly** 117:1 194:2  
**examination** 52:13  
 54:18 211:11  
**examine** 151:2 160:19

211:7,21 212:14  
**examined** 209:19  
**examining** 11:17 114:8  
 210:7,17,18,18  
**example** 13:18 24:1  
 92:8 116:18 209:12  
**examples** 20:22  
**excellent** 54:9  
**exceptional** 136:10  
**exceptions** 155:10  
**exclude** 103:17  
**excluded** 103:15  
**exclusively** 33:20  
**excuse** 136:17 155:3  
 161:17 183:22 190:21  
**execution** 135:22  
**executive** 33:6 142:3  
 150:5  
**executives** 121:21  
**exercise** 153:12  
**exercised** 174:8  
**exercises** 180:18  
**exercising** 153:22  
**exhibits** 201:22  
**exigent** 104:15  
**exist** 204:22  
**existing** 188:4  
**exists** 193:8  
**expanded** 98:15  
**expanding** 100:18  
 104:11  
**expands** 167:16  
**expansion** 69:9  
**expect** 180:3  
**expectation** 197:13  
**expectations** 92:21  
 93:2,3  
**expected** 184:2  
**expedited** 6:1  
**expeditiously** 133:9  
**expenditure** 112:10  
**expenditures** 85:9  
**experience** 5:11,22  
 10:14,22 11:10 27:9  
 28:4,8,17 29:1 30:13  
 31:12,16 32:12,15  
 46:14 48:10 53:13,15  
 53:20 55:2 57:19 58:2  
 58:5,12,15 59:16 60:9  
 60:11 61:15 62:2,4  
 63:5,9,11 64:9 65:1,4  
 65:10 66:5 68:15  
 72:10 73:13,14,16  
 74:7 76:3 78:13,15  
 79:2,4,7,15,18 80:5,7  
 80:10 82:3 85:13 91:1  
 92:9 97:16 106:19  
 108:3,18 119:19,20

120:9 127:17 129:3  
 129:21 130:12 132:12  
 133:18 134:12,14  
 135:1,3,8 146:4  
 173:19 174:20 175:2  
 175:14,15  
**experienced** 21:5 53:17  
 54:22 61:16 76:21  
 77:11 80:6 82:22  
 103:12 135:15 174:18  
**experiences** 40:12  
**expert** 23:22 24:2,3,12  
 24:16 25:6,8 26:15,20  
 27:1,4,15,18,22 46:3  
 48:5 69:14 81:10  
 103:12 106:18 108:12  
 109:6 113:16 125:16  
 125:19 126:9,21  
 177:3  
**expert's** 79:20  
**expertise** 24:5,11 53:20  
 64:15 77:10 114:3  
 115:13 116:2 205:20  
**experts** 13:5 21:3 23:2  
 23:13,16,16 24:7 25:5  
 25:12,19 26:17,18  
 29:16 38:9,12,15,17  
 77:17 78:1 92:11 93:2  
 111:3 207:21  
**experts'** 27:10  
**explain** 213:15  
**explains** 65:9  
**explanation** 46:8  
 197:10  
**explanations** 45:13  
**explicitly** 73:17  
**exploration** 68:3  
**explored** 26:4  
**express** 94:5 104:13  
**expressed** 68:9 127:5  
**expressing** 101:4 140:2  
**expression** 69:1  
**expressly** 161:11  
**extend** 106:15 127:1  
 129:17  
**extended** 129:18  
**extends** 144:18 164:18  
 167:11  
**extensive** 30:15  
**extent** 40:16 72:22  
 97:11 108:14 122:17  
**extenuation** 195:14  
**extra** 44:2  
**extremely** 14:6 38:8,12  
 103:11  
**eyes** 165:6 172:20  
**eyewitnesses** 51:7

## F

**FACA** 80:20 86:11  
**face** 27:2 121:13  
**facilitate** 149:8  
**facility** 90:10  
**fact** 15:18 20:9,19  
 86:16 96:6 97:21  
 98:16,17 101:19  
 110:10 111:22 112:2  
 120:21 136:21 194:7  
**fact-finding** 103:21  
**facto** 186:11  
**factor** 186:10  
**factors** 153:20 173:16  
 174:3 191:18 192:3  
**facts** 16:8 18:22 31:1  
 51:8 150:22  
**failed** 34:5  
**fair** 20:11 22:15 50:5  
 95:14 107:14 176:9  
**Fairfax** 1:10  
**fairly** 27:2 167:5 172:17  
**fairness** 12:9 19:5  
 89:12 147:8 173:7  
**faith** 45:12  
**fall** 35:17 36:2 108:19  
 165:17  
**familiar** 66:11,12,17  
 113:3 117:2  
**familiarity** 87:17  
**families** 43:11  
**family** 144:21 191:16  
 195:19  
**fan** 179:4  
**far** 61:20 138:5 176:11  
 186:8  
**fashion** 140:4  
**fast** 44:2  
**favor** 104:19 192:8  
**federal** 2:12 42:11  
 91:21 148:18 154:5  
 156:10 157:6 167:6  
 169:7 173:20 174:9  
 178:4 193:9  
**feel** 11:15 39:16 117:15  
 119:3 148:11 172:22  
**feeling** 99:8  
**feels** 208:12  
**fellow** 179:4 195:20  
**felony** 54:1  
**felt** 68:2 76:5 193:2  
**FEMALE** 94:2  
**field** 27:10 28:14 38:9  
 39:18 42:9 49:20 52:1  
 62:12 67:1,2,5 101:7  
**fielding** 179:12  
**fighting** 50:2  
**figure** 44:13 100:14

104:18 110:1 126:4  
 132:22 135:14 136:12  
 197:22  
**figured** 11:11  
**figures** 93:19  
**figuring** 92:4 179:19  
**file** 51:3 166:6,16 168:6  
 168:11 213:6  
**fill** 34:19  
**final** 177:17  
**finally** 145:16  
**financial** 84:21  
**find** 8:13 14:12 25:21  
 58:14 59:15 72:3 77:4  
 100:2 110:7,9 117:19  
 123:16 124:2 189:5  
**finding** 92:19 166:21,22  
 188:2 197:7  
**findings** 75:13 158:10  
 158:15 165:4 184:8  
 199:5,5,10  
**finds** 116:20,21 121:9  
 206:19  
**fine** 68:5 214:10  
**finish** 75:1 132:4  
**firm** 35:18  
**first** 7:9 15:12 24:17  
 27:4 28:16 29:4,5  
 37:6 40:21 54:11,16  
 55:6 59:1 70:13 74:12  
 76:16 98:10 102:20  
 103:6 111:21,21  
 112:7 122:10 123:8  
 137:20 139:4 151:13  
 167:19 168:15 172:2  
 209:9 213:7,9,17  
**first-time** 192:18 209:2  
**fiscal** 4:21,22 142:15  
**five** 54:3 58:4 60:8  
 63:10  
**fix** 55:5  
**fixed** 99:10 147:15,15  
**flesh** 180:15  
**floor** 161:2  
**focus** 152:21 157:3  
 169:10  
**focused** 74:19 112:6  
 182:10,15,16  
**folks** 61:19,19 62:12  
**follow** 18:11 76:13  
 102:21 188:5 193:20  
 198:10 200:9 204:12  
**follow-up** 114:12  
**followed** 163:17 202:19  
**Following** 5:11  
**Football** 36:2,17  
**footing** 127:3  
**footnote** 49:3,15

**Force** 37:20 43:21 44:4  
 44:6,8 203:1  
**forces** 144:9 147:20  
**fore** 30:17  
**forfeit** 186:20  
**forfeits** 155:21  
**forget** 9:1  
**forgive** 64:12  
**forgotten** 71:3  
**form** 66:22 70:15 100:3  
 175:17 192:22 205:22  
**formal** 31:18 127:19  
 134:18 141:21 188:15  
**formation** 140:8  
**former** 19:12  
**formulated** 125:10  
**formulation** 90:3  
 120:20  
**forth** 171:3 172:17  
**forthcoming** 11:8  
**fortunate** 138:18  
**forum** 155:17  
**forward** 6:10 11:21  
 48:18 52:5,6 73:3  
 86:3 90:1 137:6  
 150:16 152:14 180:11  
**forwarded** 142:1  
**found** 10:22 17:10  
 70:10 72:12 77:14  
 85:14 98:18  
**four** 4:13 39:14 58:4  
 60:8 61:7 63:10 102:3  
 128:11,19 130:4  
 134:4 150:4  
**fourth** 31:13 76:9,10  
**framework** 198:14  
**frankly** 10:8 63:11  
 87:13 89:19 96:20  
 113:1 121:13 129:13  
 170:1 213:4  
**fraud** 116:20  
**Fred** 43:9  
**free** 39:16 148:11  
**frequently** 23:19  
 150:19  
**fresh** 165:6 201:1,6  
**FRIDAY** 1:7  
**Fried** 2:12 4:3,4 105:4  
 105:11 107:6 215:6  
**Friel** 1:18 7:15 35:2,3,3  
 46:9 49:3 53:19 54:8  
 58:8 66:19 73:4  
 115:17  
**front** 7:14 60:7 133:19  
**fruit** 48:1  
**fulfill** 66:1 70:18  
**full** 4:16,16 26:4 142:16  
 193:17

**full-time** 36:7  
**fully** 54:20 124:22  
**function** 64:12 91:15  
**functioning** 175:17  
**functions** 17:12 175:20  
**fundamental** 47:2  
 177:6 181:17  
**funded** 23:17  
**funding** 23:15 27:22  
 106:17,19,22 108:1  
 108:13 109:6 110:13  
 125:17,20 126:9,21  
**funny** 52:15  
**further** 30:4 105:14  
 107:17 144:5 167:22  
 202:6  
**future** 11:12 65:6 74:4  
 74:18 75:17 112:6  
 149:13  
**FY17** 130:7

---

**G**


---

**G** 3:1  
**gap** 34:18,22  
**gather** 200:13 212:13  
**gears** 140:4  
**gee** 72:18  
**general** 1:20 7:14 24:4  
 32:5 33:2 34:1,13,16  
 38:16 39:16 45:3,17  
 71:12 81:20 115:3  
 128:5 136:7 139:20  
 146:6,7 165:20,22  
 166:2,11 167:20  
 168:14 173:16 175:22  
 177:5 207:22  
**generally** 14:13 18:3  
 50:16  
**generate** 92:9  
**geography** 91:15  
**George** 37:22  
**getting** 32:22 44:7  
 52:16 54:12 65:8  
 69:19 100:6 121:22  
 128:16 166:8 182:10  
**Gillibrand** 177:6  
**give** 5:15 9:6 40:17  
 50:19 69:6 71:11  
 100:19 134:22 138:1  
 146:21 147:19 149:19  
 151:17 160:9 194:11  
 195:5 196:9 207:5  
**given** 20:10 22:4 40:16  
 87:1 92:19 100:8  
 137:4 147:16 181:1  
 183:11 193:16 197:10  
**gives** 170:21 196:8  
**giving** 52:1 94:6 168:19

207:9  
**glad** 52:19 148:6  
 171:20 203:18  
**goal** 147:21  
**goals** 132:22  
**goodness** 197:22  
**gotten** 97:1 208:10  
**govern** 150:8  
**governed** 200:14  
**government** 15:11  
 23:21 26:5 80:15  
 101:8,13 151:2 152:5  
 159:21 160:4 177:20  
 183:5,6 195:21 196:5  
 206:21 213:6  
**government's** 213:5  
**governmental** 146:5  
**governs** 155:11  
**grab** 77:1  
**Grand** 1:9  
**granted** 47:2  
**grants** 135:13  
**grateful** 146:18  
**greater** 97:1 160:17  
**greatly** 31:12  
**grew** 41:5,7  
**ground** 8:13 98:19  
 159:22 177:14  
**grounding** 96:5  
**grounds** 104:4,7,14  
**group** 1:17 42:3,5,10  
 57:20 118:21 140:9  
 140:15 141:6,6,12  
 146:9 151:11 153:15  
 156:3,11 160:3  
 162:21 163:16 169:5  
 173:11 174:16 175:8  
 177:11 191:13,15  
 199:15 203:21 205:7  
 206:2  
**grow** 43:17  
**grown** 161:13  
**guaranteed** 65:22  
**guess** 57:14 58:9 59:11  
 65:7 71:5,5,22 73:9  
 80:18,22 95:10  
 100:19 104:7 108:19  
 109:19 112:3 119:16  
 189:4 208:19  
**guidance** 78:21 148:4  
 150:11 153:10,12,15  
 153:18,20 154:3,4  
 157:3 160:10 171:7  
 173:14,15,16,18  
 174:10,10 182:5  
 183:10  
**guide** 174:4  
**guidelines** 178:3,6

**guiding** 154:12  
**guilt** 156:1 195:11  
 197:7 199:5  
**guilty** 82:5 186:13,14  
 198:8,16,17,21 199:7  
 199:10  
**gym** 176:14

---

**H**


---

**Hail** 24:12  
**half** 28:20 96:16 129:19  
 205:17  
**hand** 50:2  
**handed** 56:14 99:21  
 100:1 199:22  
**handle** 28:22 29:2  
 48:10,17 60:9 63:15  
 65:1 76:20 79:19  
**handled** 33:19 35:16  
 176:2 177:1  
**handling** 47:12,15 58:1  
**hands** 102:8  
**happen** 14:8 87:12  
 141:17 158:9  
**happened** 14:8 43:20  
 50:20 51:14 87:14  
**happening** 8:13 28:14  
 40:5 51:19 52:14,18  
 100:10  
**happens** 136:13 194:7  
 207:19  
**happy** 32:7 86:19 144:6  
 179:16  
**harassment** 145:14  
**hard** 82:5  
**hardest** 184:17  
**harmless** 211:2  
**hazing** 145:17  
**headed** 156:12  
**heads** 100:14  
**hear** 9:10 10:19 29:3  
 46:19,22 47:6 60:20  
 64:8 67:4 70:5,6,9  
 93:14 95:20 104:22  
 105:10 109:9 119:5  
 121:5 123:8 126:3  
 139:2,8 203:18 213:2  
 214:18  
**heard** 12:20 15:7 21:20  
 24:1 25:10 27:13 40:5  
 51:16,22 57:20 58:11  
 60:7 61:14,19 62:10  
 64:14,19 66:14,15  
 67:11,12,20,21,22  
 68:7,7 69:7 70:7,7,9  
 76:2,14 77:13 79:10  
 82:14 84:21 89:6  
 94:22 98:9,12,21,22  
 99:3,5,13 100:22  
 102:16 106:4,5  
 109:13 110:5 113:1,8  
 113:20,21 124:18  
 126:10,11 129:8,21  
 173:14 180:16,17  
 185:12 187:8 191:1  
 213:8  
**hearing** 6:10 10:13  
 15:21 16:11,20 49:22  
 51:20 63:7 67:3 71:11  
 96:5 97:16 98:11  
 124:13 148:4 150:18  
 151:8,22 152:1,7,9,13  
 152:16,21 153:7,8  
 181:19,21 182:1,6,10  
 182:11,18 183:1,11  
 197:5 198:9,13  
 201:12  
**hearings** 6:5 15:19,21  
 19:8 51:11 66:13,18  
 85:12 96:12 185:12  
**heavily** 18:5  
**held** 83:18  
**help** 43:1,11 51:8 68:14  
 77:2 92:11,13 104:18  
 110:1 115:9 120:1  
**helped** 32:21 66:22  
**helpful** 17:12 78:19  
 121:2 122:8 130:3  
 197:12  
**helping** 13:1 24:14  
**helps** 44:16  
**hey** 195:9 202:12  
**high** 20:6 40:17 45:11  
 45:14 72:2 82:18,18  
**higher** 30:19 39:20 48:1  
 185:22 203:9  
**higher-ups** 40:2  
**highly** 21:3 23:2 29:16  
 88:20 111:3 175:18  
**hire** 18:15  
**hired** 18:10 36:1 46:17  
 100:8  
**hiring** 98:14  
**historic** 96:7  
**historical** 97:14  
**history** 16:1 103:2  
**hitting** 179:11  
**hold** 196:16  
**Holiday** 1:10  
**Holtzman** 1:13 4:7,14  
 9:14 48:22 49:17  
 55:11,18 56:22 57:9  
 67:16,17 86:16 95:6  
 103:5,5,18 105:8  
 107:1,16 116:17  
 118:10 119:4 123:10

124:14 125:9 127:6  
 131:16,20 132:4  
 133:14,22 136:17  
 161:17,20 162:1  
 214:12,14,19  
**Hon** 1:11,13,13,17  
 139:9 146:1 161:19  
 161:21 162:2 172:16  
 173:19 175:4 177:10  
 178:2 179:2 180:21  
 182:7,9 183:7,15  
 184:4,10 185:17  
 186:4 188:7 189:17  
 191:9,21 197:9  
 198:12,19 200:3,19  
 203:20 206:16 207:12  
 209:7 210:2,12,15  
 212:12,17 213:12  
 214:22 215:10  
**Honor** 215:7  
**Honorable** 6:16 140:16  
**hopefully** 147:4 149:9  
 149:19 211:12  
**hoping** 202:5  
**hours** 93:3  
**House** 130:9 142:11,16  
 143:3,9 170:4,6 180:7  
**houses** 143:12 147:3  
 158:9  
**houses'** 143:1  
**HQEs** 30:5  
**hundred** 34:7  
**hypothetical** 102:2  
 208:9 212:16

---

**I**


---

**idea** 54:16 71:18 126:4  
 132:21 207:22  
**ideas** 170:11  
**identical** 143:12  
**identified** 17:11 20:22  
 21:4 28:11 29:16 30:9  
 45:15 64:5 97:12  
 137:12,13 209:9  
**identifiers** 134:13  
**identifies** 122:17  
**identify** 26:22 27:9  
 78:20 135:1,2 145:2  
 207:5  
**identifying** 134:13  
**IG** 113:5,6,18 116:19,19  
 116:20,21,22  
**ignorance** 177:18  
**ignores** 111:22  
**immediately** 22:22  
 111:1 188:5  
**impact** 15:17 96:10  
 97:7 133:12 175:11

175:16 178:21  
**implement** 148:20  
 205:3,6  
**implementation** 156:8  
 170:21  
**implemented** 72:5,6  
 159:19 160:11 200:22  
**implementing** 170:16  
 171:2 204:20 205:12  
 205:14  
**implicates** 20:1  
**implies** 134:6  
**implying** 81:13  
**impolite** 12:1  
**importance** 12:11  
**important** 10:18 11:15  
 12:17 25:17 32:19  
 38:12 45:18 68:3  
 85:16 96:3 97:17  
 135:21 143:15,22  
 144:1 151:21 175:8  
 176:12 179:9 181:15  
 194:4 204:14 207:12  
**importantly** 63:6  
**impossible** 50:4  
**impracticalities** 8:17  
**impression** 45:9 183:17  
 185:11  
**improperly** 81:14 85:2  
 208:15  
**impropriety** 15:14  
**improve** 31:12 147:10  
 147:18  
**improvement** 168:17  
**improvements** 141:15  
 141:17  
**in-house** 13:21  
**inadequacy** 18:16  
 68:12,15  
**inadequate** 23:21  
**inappropriate** 116:19  
 116:21 165:16  
**inappropriately** 160:14  
**incident** 36:4 50:20  
**include** 5:7 107:8 129:7  
 173:16 195:15  
**included** 142:18  
**includes** 7:1 129:5  
 143:19,20 160:15  
 167:12  
**including** 5:19 6:1,4  
 21:2 23:1 33:19 38:6  
 74:9 103:15 108:1  
 143:17 145:5,11  
 155:6 161:8 187:18  
**inclusion** 21:11 104:8  
 144:15  
**inconsistent** 28:9 67:12

**increase** 47:21 107:12  
 147:5  
**increased** 92:2  
**inculcate** 26:3  
**incumbent** 14:12  
**independent** 5:2 17:13  
 22:17 23:7 95:16  
 99:16 100:19 101:13  
 107:11 111:8 112:15  
 113:5,17,19 114:16  
 116:8,12 117:4  
 119:15 120:4 121:17  
 126:14 147:12 161:4  
 177:15  
**indicated** 4:14 8:1 62:1  
**indicates** 56:14  
**indicting** 81:14  
**individual** 46:17 119:10  
 165:21 174:2 199:10  
**individual's** 192:17  
**individuals** 6:8 9:22  
 33:15  
**indoctrinating** 90:8  
**inevitably** 27:7  
**inexperienced** 111:17  
**infamous** 36:4  
**infantry** 34:4  
**influences** 186:9  
**inform** 156:17 202:6  
**informal** 19:21  
**informants** 121:2  
**information** 20:5 25:13  
 26:2,8 50:20 60:2,3  
 64:6 65:3 66:9 73:22  
 74:21 75:18 85:11,18  
 97:2 102:6,22 105:6,7  
 105:12,14 106:1  
 110:3 111:15 114:15  
 149:6 151:18 152:2,6  
 152:10,17 183:2,14  
 190:7,9,18 192:10,13  
 192:15,16 193:6,12  
 194:17 197:4,14,19  
 200:12 201:18 209:18  
 211:19  
**informed** 25:14 119:8  
**inherent** 22:1 89:11  
**initial** 13:10  
**inject** 14:19  
**Inn** 1:10  
**innocence** 156:1  
 195:11 199:6  
**input** 7:1 189:16 190:21  
 190:22 195:5  
**inquire** 83:6  
**inquiry** 15:10 16:13,14  
 24:21 150:22  
**inserted** 142:14

**insight** 116:10  
**insights** 24:11  
**installation** 9:4 13:6  
 25:4 61:6 85:15  
**installations** 5:17 8:4  
 9:10,20 10:1 56:20  
 58:14 61:21 68:8  
**instance** 67:2 110:12  
 197:7 213:7  
**instances** 18:13  
**institutional** 30:8 59:6  
**instructions** 196:8,9,10  
**insure** 95:14  
**intended** 8:18 133:2  
**intense** 53:13,14  
**intention** 84:11  
**interchangeable**  
 113:14  
**interest** 154:2 170:20  
**interested** 169:5  
**interesting** 159:16  
**internal** 14:14 116:8  
 121:10  
**international** 33:6  
**internet** 150:2  
**interrupt** 8:22 148:11  
**interrupted** 118:8  
**interruption** 12:1  
**intervention** 45:6  
**interview** 14:18 18:11  
 21:13 52:2 65:2 73:22  
**interviewing** 14:4  
**introduce** 32:10  
**introduced** 191:20  
**introduction** 3:3 21:6  
**invariably** 195:18  
**investigate** 14:7 32:19  
 145:5  
**investigated** 20:21  
**investigating** 14:6,10  
 18:22  
**investigation** 5:20  
 13:11,12,22 14:9  
 15:18 30:17 35:20  
 50:19 62:6 64:3 68:3  
 145:9 150:21  
**investigations** 10:15  
 31:2 35:16 36:8,15  
 41:19  
**investigative** 13:9 16:3  
 17:7 47:8 49:13 68:14  
 90:16  
**investigator** 14:15 15:9  
 17:20 18:15 19:17  
 21:16 22:9,20 48:12  
 51:4,8 95:19 98:12  
 99:20 101:11 102:7  
**investigators** 10:6

12:21 13:5,8,20,21  
 14:2 17:2 18:8 19:21  
 22:12,17 23:14 46:15  
 47:10 51:17 68:10  
 90:14 95:16 98:10,15  
 98:16 99:14,17 100:7  
 100:19 101:5,8,10,15  
 102:14,16,19 105:20  
 107:8,12 108:11,18  
 110:6 114:1  
**investment** 193:11,11  
 193:19  
**invited** 84:3,18 85:2  
**involve** 92:17 191:16  
 191:17  
**involved** 6:8 21:14 78:1  
 166:9 192:6,19 197:3  
**involvement** 6:2  
**involving** 5:4 50:17  
 51:6  
**Ironically** 90:20  
**issue** 12:4,8,16 15:1,3  
 20:17 25:22 28:3  
 32:19 45:8,18 47:9  
 63:22 70:21 74:14  
 76:4 78:20 96:3 97:8  
 97:13 98:2,4 102:11  
 103:21,22 104:21  
 108:9,13 116:22  
 117:9,12 125:7,7  
 153:19 160:21 173:13  
 177:6 197:11 199:13  
 200:11 206:18 207:6  
 207:10,18 208:2,7  
 209:5,10,13,16,17,19  
 210:4,6,6,8,20 211:9  
 211:11 213:10,13  
**issues** 11:13 16:14  
 21:12 24:5 29:9 38:11  
 47:7 64:4 77:2,2  
 82:10,14 89:11 92:3  
 106:15 156:1 167:2,4  
 170:11 183:18 199:6  
 206:22 207:2,11,14  
 208:4 209:8 211:15  
**item** 152:22 153:1  
**items** 146:22

---

**J**


---

**JAG** 21:21 37:8 40:9  
 44:4 61:15  
**James** 1:20 7:14  
**jeopardized** 66:3  
**Jill** 1:22 32:13,17 38:16  
**job** 15:3 18:9 34:12,15  
 36:7 81:12,17 82:4  
 88:4 92:22 103:9  
**jobs** 50:5

**Joe** 43:7  
**joining** 7:7  
**joint** 57:13 71:12  
 139:21 159:16 173:4  
 200:6 201:7,9 202:3  
 204:7 205:4  
**joke** 48:6  
**JPP** 1:18,18,19,20,22  
 4:6,17 5:8,11,15,18  
 7:10 9:3,15 19:10  
 20:3 22:13 30:11  
 32:18 67:20 69:7 71:2  
 74:15 75:5 84:17  
 137:6,7 146:12  
 205:20  
**JPP's** 7:5  
**jpp.whs.mil** 7:6  
**judge** 8:1 12:3 17:18  
 28:17 32:5,5 33:11  
 34:6,7 37:15,17,19  
 42:4 44:8 46:4 73:13  
 128:5,5 130:2 134:13  
 136:7,7 138:19 139:9  
 139:17 140:21 141:3  
 144:12 146:7 151:17  
 152:11 153:21,21  
 154:13 157:6,7,11,14  
 158:17 159:2,7,8,8  
 161:17 162:7 163:11  
 163:19 164:4,5,5,6,9  
 165:20,22 166:2,11  
 167:20 168:14 172:3  
 172:7 178:12,14  
 184:6,7,12 185:7,16  
 186:20 187:1,18  
 188:1,11,18,20  
 189:20 192:12 194:11  
 196:3,8,19 199:20  
 202:10 206:2 209:19  
 215:1  
**judge-alone** 158:20,22  
 185:22 186:15  
**judges** 8:9 63:8,15  
 74:11 147:16 156:12  
 156:15 173:2 184:3  
 188:20  
**judicial** 1:3 4:12,19 5:2  
 5:9 6:3,22 73:22  
 155:19,21 156:4  
 158:1,4 166:1 176:3

**July** 143:3  
**jump** 70:11 80:19 201:8  
**June** 9:18 142:20  
**junior** 18:5 41:7  
**jurisdiction** 92:4,6,8  
**jurisdictions** 91:18  
 92:12 93:15 122:5  
 155:20

**jury** 78:11 185:6 187:1  
**justice** 1:17,21 3:13 5:4  
 6:9,15,21 8:3,19 10:2  
 12:7,10 22:16 28:18  
 31:15 34:17,18 35:1  
 37:13 38:3,4,13,17  
 41:2,11 42:3,5,10  
 43:15 45:10,12 46:20  
 47:12 58:22 64:17  
 68:16 69:4 88:18  
 91:16 95:15 97:18  
 107:14 124:22 127:16  
 134:12 135:7 138:18  
 139:19 140:3,9,14  
 141:5,6,12,15 142:13  
 142:19 143:4,13,18  
 143:20 144:2 145:18  
 145:20 146:5,8,20  
 147:6,7,13,17,19  
 148:8 149:7,12 150:1  
 150:9 151:11 154:2  
 160:3 163:16 165:13  
 173:7 175:5 185:21  
 192:1 193:17 205:7

---

**K**


---

**keep** 11:22 48:16 127:2  
**Keptos** 1:18 7:9,19,22  
 8:21 12:2,3 33:10  
 39:5 53:6 55:21 56:18  
 57:2 58:16,18,21  
 59:13,18 60:1,14  
 63:17 65:5,16 66:8  
 69:14 73:18,21 89:13  
 91:3,6 115:17  
**Keptos'** 68:5  
**kept** 158:7  
**KGB** 34:10  
**kinds** 50:13 63:15  
 92:11 93:19 122:3  
**knew** 129:14  
**knowing** 27:13 54:10  
 79:1 197:17  
**knowledge** 27:8,11  
 61:15 132:12 146:4  
**knowledgeable** 27:19  
**known** 40:1 162:15  
**knows** 118:5 207:8

---

**L**


---

**labeled** 62:22  
**lack** 21:1 45:15 49:5  
 53:15 65:4,9 66:5  
 69:17 73:15 103:2  
**language** 99:12 123:19  
 131:5 202:19 203:2  
**larcenies** 176:10  
**larceny-in-the-barrac...**

189:11  
**large** 13:5 43:16 92:7  
 145:16 170:3  
**largely** 143:13 144:10  
 163:17  
**late** 69:21 77:15,17  
 108:7  
**Laurie** 1:18 7:9 33:7  
 38:21 58:17 67:6  
 73:20 79:10  
**law** 21:21 34:6 35:5  
 37:8,12 38:1,6 43:9  
 48:7,8 61:6,11 87:15  
 110:15 133:5 151:8  
 153:11 154:11,19  
 155:16 157:6 160:1  
 161:21 162:3 164:16  
 165:9,19 166:2 175:6  
 175:6 176:6 184:5  
 188:7 189:1  
**lawful** 164:6  
**lawsuits** 93:15,19  
**lawyer** 15:4 19:15 21:11  
 29:1 33:4,17 55:1  
**lawyer's** 27:16  
**lawyers** 18:21 19:13  
 21:5 27:8 29:3 30:2  
 33:13 41:14,16,18  
 72:14 129:9  
**lay** 24:19  
**lead** 31:17,21 79:13,17  
 80:10,12 127:17,21  
 135:9 140:21  
**leadership** 42:22  
**leads** 13:11  
**league** 36:2,12,18  
**leagues** 36:1  
**learn** 27:4 54:5,5 80:11  
 92:14  
**learned** 13:2 14:1 28:10  
 28:15 29:18 46:21  
 62:19 67:10 73:6  
 96:15  
**learning** 78:16,18  
**leave** 123:14 183:17  
**leaving** 22:8  
**led** 20:16 140:8 141:1  
**left** 35:17 187:10  
**legal** 8:11 21:7 22:2  
 29:9 37:7 43:10 46:15  
 53:4 75:21 76:10  
 149:17 210:6  
**legally** 109:2,8,18,19  
**legislation** 70:16  
 134:10 135:12 139:13  
 141:16 147:2 148:7  
 148:14 157:20 159:14  
 159:21 161:11 170:18

170:20 171:2,13  
 180:10 181:7,7  
 190:14 200:9,21  
 201:4  
**legislative** 6:3 142:13  
 146:3 159:15 180:4  
 204:11 205:8  
**legitimacy** 12:9 19:5  
 66:2  
**length** 29:22 32:2,4  
 128:2,4 129:3 133:21  
 134:2 136:6  
**lengthy** 194:6  
**lens** 120:18 175:6  
**lesser** 32:4 128:4 136:6  
**lest** 174:4  
**let's** 76:13 94:12,13  
 181:11 187:5 206:6  
**level** 5:18 9:11 23:9  
 25:4 29:14 31:5 72:2  
 74:12 76:16 85:15  
 90:15,17 91:21,22,22  
 98:10 102:21 111:10  
 112:17 135:3 156:10  
 162:8 199:18 208:22  
 211:5  
**levels** 23:4 28:6,8 35:22  
 44:21 111:5 114:7  
 130:13  
**life** 144:19 155:8,18  
 162:6 197:12,16  
 207:19  
**light** 139:7 151:13  
 183:12 200:18  
**limit** 161:14 163:9  
**limitation** 114:7  
**limitations** 43:18  
**limited** 30:7 62:2 104:3  
 127:7 157:5 163:5  
**line** 58:13 60:7 76:13  
 98:8 112:14 126:19  
**links** 144:20  
**Lisa** 1:18,19 7:15,15  
 35:2,3 36:19,22 49:16  
 78:14 88:4  
**list** 90:10 140:13,13,16  
 140:20  
**listened** 149:8 183:16  
**literally** 141:13 196:22  
 197:2 205:17  
**litigation** 7:11 15:5 19:3  
 21:10 29:8,14 31:16  
 33:11 88:19 127:16  
 135:8 178:10 209:2  
**litigators** 53:17  
**little** 9:6 33:8 37:2 49:2  
 59:6 61:13 153:11  
 168:20 180:13,15

187:22 193:21  
**lives** 12:14  
**living** 30:18  
**Liz** 4:14 48:21 55:16  
 93:21 95:5 103:5  
 116:16 118:8 119:3  
**loads** 28:20  
**locate** 18:11  
**Lonetree** 34:9  
**long** 23:11 35:9 97:15  
 124:11 157:7 160:14  
 173:15 197:1 199:21  
**long-term** 111:12  
 112:21  
**longer** 15:20 140:4,5  
 184:22 186:21  
**longevity** 59:6  
**longstanding** 172:6  
 181:18  
**look** 6:10 17:4 43:6  
 62:21 63:2 70:22  
 73:12 79:12 91:11  
 93:9 107:19 117:17  
 120:15 149:1,16  
 150:4,7 165:6 175:5  
 177:5 179:13 181:12  
 181:15 200:1,20  
 201:1,5,6 202:7 204:9  
 206:8 211:1,2 213:17  
**looked** 67:8 68:13  
 122:21 127:7 141:15  
 178:18 181:16 200:4  
 203:21 206:3 211:8  
**looking** 38:11,13 41:1  
 41:10 48:15 56:13  
 57:4 60:4 78:11 81:15  
 93:15 115:21 120:10  
 131:2 134:21 148:20  
 181:13 207:7  
**looks** 16:4 52:15 57:10  
 201:7  
**lose** 45:12 94:2 184:20  
 184:21  
**lost** 55:17 94:3 169:13  
**lot** 35:15 45:13 46:21  
 48:3,4,5 57:19 58:11  
 59:3 63:20 66:13  
 81:21 91:8 92:9 96:15  
 96:17 101:15 118:6  
 139:7 169:21 171:18  
 175:13,15 191:15  
 196:10 197:4 202:5  
**love** 91:3 205:19  
**low** 202:15,16  
**lower** 162:14,19 163:9  
**lowering** 166:7  
**LRM** 209:12  
**luckier** 140:17

**lunch** 138:9,11

## M

**M-I-L** 7:6  
**ma'am** 75:6 90:18 95:6  
 131:12,14,19  
**magnified** 50:8,9  
**main** 77:22 168:21  
**major** 153:2 161:16  
 164:11  
**majority** 50:7 81:7  
 82:19 193:3  
**make-up** 22:5  
**making** 41:6 46:5 50:8  
 96:9 151:19 152:19  
 174:4 175:8 179:14  
 211:10 214:3  
**man** 41:17 43:3  
**management** 142:2  
 149:5,11,13  
**managers** 147:17  
**mandate** 5:1 121:12  
**mandates** 149:22  
**mandating** 158:1  
**mandatory** 153:1,7  
 154:22 155:6,7,8  
 161:7  
**Manhattan** 35:4,14  
**manner** 112:6  
**manpower** 44:5 114:20  
 114:20 120:16,17  
**manual** 150:3,13  
 153:13 154:6,12  
 157:1 159:17 160:8  
 171:1,9 173:5 178:7  
 183:9 200:5,8,21  
 203:22 204:3,6,9  
 205:5,16  
**map** 92:1  
**March** 141:11  
**Maria** 2:12 104:18  
 105:2  
**Marine** 28:16 29:19  
 30:4 32:6 34:4 53:8  
 53:11 128:6 136:8  
**mark** 169:1  
**married** 88:8  
**martial** 11:19 81:20  
 153:14 155:13 158:7  
 173:6 200:6 204:1  
**Martin** 139:21  
**Mary** 24:13  
**material** 83:2 102:15  
 104:8,12 182:15  
 199:16,19 202:7  
 203:6,11 210:10  
 213:10  
**materials** 7:4 128:12

**matter** 19:4,6 55:13  
 71:19 94:16 120:19  
 136:21 138:12 161:13  
 186:18 188:7,17,21  
 188:22 189:1 200:3  
 206:16 207:16,20  
 215:11  
**matters** 171:22 175:10  
 182:17 202:1  
**maximum** 154:21 155:5  
 155:10 163:7  
**MCIOs** 50:19  
**mean** 29:20 67:22  
 105:16 109:9,15  
 117:2,4 121:8 123:12  
 124:21 137:9 180:16  
 183:3 186:2 197:2  
 211:15  
**means** 14:9 45:11  
**measure** 170:3  
**measures** 143:21,21  
**meet** 8:2  
**meeting** 1:5 4:12,15 5:7  
 6:22 7:3,8 83:17,18  
 83:22 85:20 86:10  
 89:18 138:20  
**meetings** 4:5  
**meetings** 85:5,20 86:1  
 86:7,14 87:15 140:11  
 140:19  
**Meghan** 2:7  
**member** 1:18,18,19,20  
 1:22 4:6 7:10 18:14  
 48:22 56:7,15 67:17  
 70:12 84:19 103:14  
 113:20 195:3  
**member's** 196:7,14  
**members** 4:13 5:8 7:5  
 9:9,13,15,18 10:10  
 56:5,9 78:11 84:2,11  
 84:13,16 86:2,8,9,10  
 95:1 103:8 114:14  
 118:4 133:3 139:10  
 139:17 158:6,13,16  
 159:1,4,11 167:17  
 184:11,14,21,21  
 185:4,13 186:12,20  
 187:9 188:14 192:5  
 195:1,20,21 196:4,15  
**memorandum** 5:14  
**memories** 78:2  
**memory** 59:6  
**men** 147:19  
**mention** 144:4  
**mentioned** 29:15 33:10  
 59:10 67:6 74:2  
 115:18 150:19 179:19  
 193:22 195:8 204:19

**merits** 158:13 159:1  
 194:1  
**mesh** 140:5  
**message** 133:7  
**met** 1:9 28:12 75:9  
 89:14 135:3 208:9  
**method** 12:5  
**metrics** 28:11 92:17  
 93:7 135:21 145:2  
**mic** 60:19  
**microphone** 161:18  
**miles** 140:10  
**military's** 16:3 18:16  
**millions** 118:18  
**mind** 71:6 136:14  
**minimum** 32:2 128:2  
 129:3 155:1,6  
**minimums** 161:7  
**minor** 154:9  
**minute** 55:11 77:16  
 94:13 187:7  
**minutes** 75:4,9 148:10  
 148:10  
**misconduct** 35:19  
**miserably** 34:5  
**mission** 90:9 107:13  
 119:14  
**Missouri** 93:12  
**misstated** 213:13  
**Mister** 80:21  
**mitigation** 31:6 195:14  
**mix** 139:6  
**mixed** 199:1,2  
**model** 16:3 25:14 44:5  
 96:4,11  
**models** 25:11  
**modernize** 147:9  
**modest** 151:12  
**modification** 212:5  
**modifications** 154:6  
**modified** 49:21 140:3  
 178:20  
**modify** 116:11  
**moment** 55:8  
**monetary** 109:10  
**money** 116:21  
**monitor** 130:12  
**month** 29:20 61:2  
**months** 36:6 61:4,5,5  
 75:1 160:16 161:3  
 166:9,10 168:5,10,13  
**monumental** 180:2  
**morale** 175:18  
**Morgenthau** 35:7  
**morning** 4:5 39:13  
 149:9 150:20 183:16  
**motions** 30:15 31:3  
**motivated** 38:8

**mouth** 213:15  
**move** 125:15 138:16  
 161:18 172:11  
**moved** 159:14 187:18  
**movement** 70:17  
**Moving** 112:11  
**multiple-track** 201:14  
**municipal** 91:21  
**murder** 155:9

---

**N**


---

**N** 3:1  
**n/a** 3:10  
**name** 35:3 42:12 88:2,9  
 115:18 140:15 153:17  
**narrow** 63:21 64:3  
**narrowed** 16:12  
**nation** 146:17  
**national** 4:20,21 19:13  
 22:5 36:2,17 38:5  
 130:7 140:11,18  
 142:14,17  
**nationally** 91:17  
**nature** 145:6 193:16  
 198:12,20  
**Naval** 119:22  
**navigate** 120:2  
**Navy** 2:5 17:1,9 60:22  
 61:12 88:10 129:22  
**Navy's** 61:12 64:17  
 90:13  
**NDAA** 130:20 131:17  
 132:8 133:16,21,22  
 135:12,22 136:12  
 137:6,17 142:18,21  
 142:22 143:18 206:4  
**near** 54:1  
**nearby** 192:20  
**necessarily** 21:16 27:9  
 28:14 76:21 93:6  
 102:5 170:6 176:7  
 180:6 214:3  
**necessary** 16:6 24:5  
 31:5 118:19 203:10  
**necessity** 29:11  
**need** 21:8 22:8 26:3  
 27:15 30:7 31:9 40:7  
 42:21 43:11 44:15  
 48:9,16 49:12 73:7,14  
 73:15 92:14 99:6,9,14  
 101:1,4,9 102:16  
 105:7,12,22 113:15  
 114:3 117:11 127:3,3  
 176:19,22 192:5  
 200:16 205:2  
**needed** 11:4 22:20  
 23:22 24:2 40:14 44:9  
 71:9 77:19 95:19

99:20 100:20  
**needs** 15:9 18:21 20:12  
 38:15 43:15 52:21  
 91:11,13 92:4,6 97:1  
 98:9 101:9 104:15  
 110:3 115:10,22  
 116:8,9 122:15 126:4  
 129:18 183:11 193:6  
**neither** 76:20 86:16  
**never** 25:20 40:12 41:9  
 41:13 42:20 53:21  
 83:22 84:18,21 87:1,2  
 129:15 132:21 149:14  
 185:15 186:8 208:12  
 208:20 213:2,8  
**new** 10:12 19:10 41:2  
 41:14 44:22 46:16  
 47:6,10 49:21 58:3  
 64:22 80:11 83:1  
 88:11 129:9 150:16  
 160:2 164:2 171:1,2  
 171:16 179:18 183:12  
 184:10 198:5 209:2  
 213:8  
**newspaper** 118:15  
**NFL** 36:11  
**night** 108:8  
**nine** 143:21 144:5  
**non-** 14:3 176:2  
**non-attributional** 10:18  
**non-binding** 153:19  
 173:14,15 174:11  
**non-capital** 158:2  
 164:22 166:7  
**non-Defense** 117:16  
**non-Department**  
 113:16  
**non-governmental**  
 117:16  
**non-judicial** 177:1  
**non-military** 113:15  
 119:1 145:18  
**norm** 155:19 158:4  
**normally** 180:3  
**North** 1:10  
**not-** 201:4  
**notably** 15:17  
**note** 7:13 10:18 64:8  
 140:10 204:14  
**noted** 19:20 81:8  
 204:14  
**notes** 75:12  
**notice** 156:20 205:21  
 211:10,14,16  
**noticed** 167:4  
**notification** 145:8  
**notified** 145:10  
**notify** 207:17

**novo** 82:10  
**NPR** 90:20 93:14  
**number** 10:15 54:2,21  
 63:5,5 67:4 98:16  
 127:13 145:22 151:12  
 185:17 211:9  
**numbers** 22:18 59:20  
 59:21 60:5 82:19  
 95:17 99:19 113:9,10  
 185:8  
**numerous** 8:2 28:22

---

**O**


---

**object** 104:3,7 112:13  
 112:18,22 114:5  
 124:14  
**objection** 104:6 120:7  
 125:11  
**objections** 125:13,14  
**objective** 31:19 80:13  
 127:19 134:19  
**obligation** 161:4 208:12  
**observation** 19:12  
 63:18 76:11  
**observations** 6:10 25:2  
**obtain** 5:17 25:6 123:2  
**obviously** 10:1 12:14  
 15:2,15 17:19 18:18  
 20:1 21:11 29:8 30:5  
 30:13 93:5 96:14  
 109:16 205:1,19  
**occur** 14:11  
**occurred** 96:9,16 143:8  
**occurring** 20:20 24:8  
**occurs** 197:6  
**offenders** 192:19  
**offense** 19:16 155:15  
 156:6 157:2,12,13  
 159:9 165:11 166:21  
 176:21 179:13 182:16  
 192:20 193:17 198:22  
**offenses** 5:5 12:13  
 151:1 155:2,8,14  
 156:7 161:8 171:6,16  
 175:7 176:6 192:3  
 193:18 199:9,11  
**offer** 191:18  
**offered** 24:3 36:6 82:12  
 116:18  
**office** 7:11 33:12,14,18  
 34:13,16,20 35:4  
 36:12 53:22 54:1,3  
 58:4 71:12 106:18  
 142:1 165:21,22  
 168:14  
**officer** 16:20 34:5 37:6  
 40:9 46:3 51:13,15,15  
 51:16 151:22 152:1

152:13,16 153:7,8  
182:6,10,18 183:1  
**officers** 51:13 99:1  
183:12  
**offices** 18:6 91:19  
115:8,8  
**Official** 2:12  
**officials** 72:2  
**Oklahoma** 26:15  
**old** 51:10 54:1 96:11  
171:16 183:20  
**OMB** 205:9  
**once** 17:18 27:13 87:2  
111:21 141:19 143:3  
143:5 188:18 189:22  
194:10  
**one-question** 106:8  
**one-year** 170:22  
**ones** 44:22 57:11 75:14  
75:15 76:1 107:17  
204:2  
**ongoing** 141:10 147:12  
171:4,15  
**open** 4:5 87:8,15 193:7  
**open-** 150:21 181:18  
**open-minded** 101:14  
**opened** 35:18  
**opening** 4:8  
**operate** 13:16  
**Operational** 43:9  
**opinion** 43:17 45:2,17  
65:16 87:13,17  
120:22 127:5  
**opinions** 110:5  
**opportunities** 8:8  
190:19  
**opportunity** 8:2 27:4  
28:21 32:18 39:19  
52:2 81:9 123:2 151:1  
152:4,10 155:22  
158:15 160:8 167:17  
185:5,15,18 189:16  
191:3,7 195:5,7,22  
197:3 207:6,9 208:5  
211:18 212:6 213:20  
**oppose** 104:11 118:21  
**opposed** 51:3 71:20  
87:9 106:7 114:21  
179:14  
**opt** 188:1  
**optimum** 23:9 111:10  
112:17 114:7  
**option** 158:5,7  
**optional** 152:22 153:5  
**options** 137:9 176:2  
**order** 10:19 22:14 23:4  
48:7,8 57:15 85:16  
95:14 107:12 111:5

140:1 175:11 183:3,4  
186:12,20 192:4  
**ordered** 169:9,11  
**orderly** 95:11  
**orders** 150:5  
**organization** 23:1  
46:14 107:22 112:3  
114:19,21,21 115:21  
116:9 126:13,14  
**organizations** 13:10  
23:10 28:2 110:13  
111:11 112:19,21  
114:9 115:6,13  
119:10 120:10 122:2  
125:21  
**organizations'** 111:2  
**organize** 152:17 182:14  
**organized** 91:19  
**origin** 139:20  
**originally** 42:16  
**ought** 74:9 79:22 98:11  
130:19  
**outcome** 118:1 135:17  
**outcomes** 26:11  
**outlines** 130:6  
**outmanned** 76:5  
**outset** 173:1  
**outside** 23:7 36:5 44:12  
45:6 91:10 111:8  
112:13,16 113:1  
114:6,16 115:5,6,12  
116:9 117:11,22  
119:3 120:4 121:8,12  
123:14  
**overall** 45:9  
**overcrowding** 101:7  
**overnight** 194:12  
**overriding** 8:12  
**oversee** 36:15  
**oversimplification**  
81:19  
**oversimplifies** 79:9  
**overview** 146:21  
171:18

---

**P**

---

**P** 2:5  
**P-R-O-C-E-E-D-I-N-G-S**  
4:1  
**p.m** 138:14 215:12  
**PACER** 148:19,20,21  
148:21,22  
**page** 3:2 56:14 107:6  
122:18 128:11 130:4  
**paid** 98:2  
**panel** 1:3,9 4:13,13,19  
5:10 6:12 7:1,4 9:3,9  
9:12 10:21 11:5,22

19:9 32:9 34:14 38:10  
38:19 39:16 49:1  
53:16 55:21 56:5,6,9  
56:15 60:15 63:13  
64:20 66:11,16 67:20  
69:13 70:4,14,19  
71:13 74:12 76:15  
78:2 83:11,19 84:2,4  
84:5,10,13,16,19 85:7  
86:1,3,8,8,9,12 87:7,9  
87:19 94:6 95:4 103:6  
105:7,11 113:8,20  
114:4 133:8 135:20  
138:16 139:1,10,18  
158:7,13 192:6  
199:13  
**panel's** 66:13 71:8 72:4  
97:4 130:3,17  
**panelists** 8:1  
**panels** 48:14 185:13  
**paper** 16:18 51:21  
180:18  
**paragraph** 132:7,17,18  
**paralegal** 13:4,7 18:9  
41:18  
**paralegals** 10:7 18:5,7  
18:8 23:2 44:15 111:3  
**parameters** 156:5,8,13  
156:14,17,21 157:17  
157:19 160:5,6  
163:22 178:5 190:1  
**parity** 21:1 106:16  
**parole** 155:9  
**part** 40:22 45:14 60:12  
68:10 69:2 76:12  
77:13 87:6 94:1 109:1  
109:2 111:21 112:4  
122:10 130:15 151:21  
152:2 154:10 163:15  
181:10 183:7,8  
197:19 200:10 201:1  
210:3  
**PARTICIPANT** 94:2  
**participants** 2:10 4:11  
10:11,17 65:12,15  
100:2  
**participate** 209:4  
**participated** 9:16  
**participating** 4:15  
**particular** 28:15 38:21  
42:12 53:8 75:11  
77:18 84:3 90:9 97:6  
99:6 120:20 175:16  
175:21 212:21 213:4  
**particularly** 8:14 14:13  
27:6 29:8 104:14  
117:8 170:13 176:12  
180:9 182:16

**parties** 30:21 63:12  
65:21 66:6 124:13  
152:5 167:1,4 183:3  
187:19 190:9,18  
192:12 194:11 207:5  
207:17 208:2,4 214:1  
**partner** 146:4  
**partnerships** 146:6  
**parts** 60:4 124:21  
**party** 196:2 206:20  
214:4  
**passed** 130:8,21  
142:20 143:4,10,11  
143:12 147:3 158:8  
181:8 189:1  
**passes** 136:13  
**path** 59:5  
**pathway** 59:2  
**Patricia** 1:15  
**Pause** 55:9  
**pay** 18:15  
**penalty** 194:9  
**pending** 104:19 105:5  
105:14 131:6  
**pendulum** 172:12  
**people** 10:5 11:1 17:6  
21:22 25:19 34:14  
36:12,15 38:15 39:20  
40:16 41:5 42:7,14,17  
43:1,17 44:1,6,21,22  
45:4,11 46:8 50:17  
51:5,6,16 57:8,21  
67:22 69:1 72:12  
76:22 84:7 85:12,15  
86:14 92:14 97:13  
103:11 113:2,21  
114:4 118:19,21  
121:1 124:12 146:7  
147:14 150:7 173:3  
174:4 179:6 192:19  
193:11  
**percent** 30:11 49:18  
50:15 179:5,8 185:22  
186:7  
**percentage** 201:21  
**perceptions** 89:10  
**perfect** 149:14  
**perform** 172:4 175:20  
**period** 33:19 35:16  
170:22 205:2  
**permanent** 30:6  
**permit** 31:14 127:15  
**permitted** 18:3 135:9  
169:17  
**person** 15:3 17:14  
34:20 55:22 68:21  
75:11 76:21 84:6  
119:9 120:1 140:19

145:9 157:12 182:19  
199:6  
**person's** 189:7 191:16  
**personal** 36:9 65:16  
**personnel** 8:3 10:8  
16:17 23:3 106:18  
108:1,2,18 111:4  
119:9 144:10  
**perspective** 32:21  
46:10 47:5 76:1 89:16  
168:18  
**perspectives** 5:18 9:11  
**persuasive** 31:10 39:2  
**Peters** 2:7  
**phase** 26:19  
**phenomenon** 41:2  
**philosophy** 172:8,10,15  
172:18,21  
**phone** 55:12 77:1 79:21  
84:5 105:9  
**phones** 30:22  
**phrase** 120:3  
**pick** 145:22  
**pie** 137:3  
**piece** 90:20 96:14  
206:13  
**piecemeal** 74:22 140:4  
**pilot** 17:5 130:13  
131:18 132:18,21  
135:17  
**pink** 122:18  
**place** 15:12 24:17 35:14  
132:15 134:8 149:10  
150:6 152:9 157:10  
175:10 177:7 190:3  
193:19  
**placed** 150:2 163:2  
**places** 59:22 67:12  
**plain** 167:5 202:19  
203:2  
**plainly** 160:1,7 163:13  
163:20 177:21,21  
**planet** 12:15  
**plans** 105:18 110:10  
112:5 117:8  
**players** 36:3,11  
**playing** 179:15  
**plea** 163:19 186:14  
198:8,16,17,21 199:2  
**plead** 186:12 199:7  
**pleas** 199:1  
**please** 39:17 54:13 56:2  
148:11 161:20  
**pleasure** 12:3 146:9  
**pled** 199:10  
**plenty** 118:20  
**plus** 44:7 76:8  
**pocket** 43:6,7

**point** 24:9 37:12 46:1,4  
47:5 50:13 52:20  
60:18,22 73:3,5,17  
106:13 109:20 110:1  
114:15 120:21 123:11  
125:22 129:1 130:9  
130:19 131:7 136:2  
142:2,11 143:7 159:4  
169:17 182:21 183:11  
188:22 189:3 195:9  
195:13,17 203:17  
204:13 210:15  
**pointed** 53:6 82:18  
122:15  
**points** 173:10  
**policies** 8:14 60:13  
65:11  
**policy** 36:9,10 110:14  
212:22  
**pornography** 201:20  
**portion** 94:20 130:7  
134:9 142:13 144:22  
158:13 162:8 169:22  
**position** 14:17 41:15  
119:15 179:16 212:11  
213:4  
**positions** 21:22 30:6  
37:9 65:2  
**positive** 170:16 178:9  
180:11  
**possibility** 14:11,19  
155:9  
**possible** 15:10 122:20  
215:3  
**possibly** 11:16 45:6  
74:22  
**post-trial** 147:9  
**posted** 4:17  
**postpone** 104:22  
**posture** 211:4  
**potential** 27:10 30:18  
31:1  
**potentially** 133:7  
**power** 109:10  
**powerful** 19:11  
**practical** 186:18 206:16  
**practice** 18:4 28:13  
30:15 31:3 52:11,12  
52:12 54:14 67:13  
90:22 147:10 154:8  
155:12 156:11 158:5  
160:10 161:13 164:12  
164:13 169:7,8  
177:19 178:1,2 185:8  
188:4,6,17,21 202:22  
207:3,16,17,21 208:1  
**practiced** 61:12  
**practices** 14:2 145:3

148:17 156:9 189:20  
**practitioners** 179:1  
**precise** 171:3  
**preferment** 13:12  
**prefferal** 89:20  
**preliminary** 10:13  
16:20 95:12 148:4  
150:17 151:8,14,15  
151:22 152:1,13,16  
153:6,8 181:20 182:1  
**premature** 98:21,22  
99:6 103:19 130:19  
**premeditated** 155:9  
**preparation** 25:8  
197:20  
**prepare** 197:14  
**prepared** 54:20 146:15  
197:18 204:5  
**preparing** 64:1  
**prescribe** 123:4 149:4  
171:1  
**prescription** 137:16  
**presence** 138:7  
**present** 1:12 2:16 27:17  
31:6 74:21 103:14  
151:2 183:6 190:9  
194:15,18,18 196:1  
**presentation** 3:5,12 5:8  
5:11 6:15 7:21 39:12  
68:5 94:6 121:7  
138:17 180:22 191:3  
**presentations** 19:9  
214:15  
**presented** 9:5 16:8  
73:10  
**presentence** 189:6,15  
189:18 190:15  
**presentencing** 193:8  
197:15  
**presenter** 7:9  
**presenters** 214:15  
**presenting** 11:7 19:1  
71:20  
**preserve** 169:17  
**president** 19:12 123:4  
153:18 159:18 160:9  
170:18,22 171:8,11  
204:19  
**President's** 131:6 147:4  
**presiding** 1:11  
**press** 93:15  
**presumably** 174:20  
**presume** 69:15 198:6  
208:16  
**pretrial** 19:3 147:8  
148:5 161:9,12,12  
164:12 169:18 186:16  
191:14 196:18,21

197:20 198:5,14,20  
**pretty** 36:4 81:17 96:22  
98:1 171:17 182:8,9  
202:15,16  
**prevention** 145:17  
**previous** 96:4  
**previously** 9:21 10:21  
19:8 60:6 62:9 189:19  
**primarily** 27:7 165:18  
166:15 178:3 190:5  
**primary** 34:16  
**principally** 16:18  
**principle** 15:22  
**principles** 153:14 154:4  
**prior** 21:20 25:10 30:13  
31:15 66:18 102:4  
103:2 127:15 128:20  
135:7 187:7  
**private** 13:19 35:20,22  
92:18 93:4 115:7  
120:11  
**privilege** 13:17,18  
29:11  
**privileged** 82:16  
**privileges** 13:16  
**proactive** 51:4  
**probable** 16:13 49:22  
51:20  
**probably** 7:16 30:19  
33:21 41:3 44:3 54:3  
105:4 148:9 202:18  
**probation** 190:16  
191:14 192:9  
**problem** 43:21 47:6,10  
47:22 49:4 53:18 65:9  
79:1 83:6 92:13 97:14  
100:5 104:19 117:15  
117:21 136:21 137:1  
137:8,12 206:19  
207:5  
**problematic** 22:11 27:6  
62:4  
**problems** 149:15,16  
**procedural** 196:10  
**procedurally** 70:21  
**procedure** 49:8,9 163:1  
179:20 191:5 194:6  
**procedures** 113:11,12  
148:17 149:4 156:19  
187:21  
**proceed** 115:16 184:11  
188:12 192:7  
**proceeding** 76:22  
82:13 151:6,10  
158:20,21,22 184:7  
185:22 186:3,4  
194:10,21,22 195:15  
197:1 199:4 214:4

**proceedings** 1:3 4:12  
4:19 5:3,9 6:2,4 7:1  
16:22 19:2 22:2 65:13  
66:7 169:16 211:14  
**process** 6:9 10:2,13  
11:16 15:16 16:7,18  
17:17 20:1,11 21:14  
31:19 34:11 41:2,3,11  
42:15 45:8 88:10,11  
89:21 98:14 99:10  
100:12,17 127:19  
132:14 134:18 141:9  
141:22 142:6 146:3  
147:9 148:6 151:21  
159:15 162:22 167:6  
170:1 179:21 180:4  
182:2 183:21 184:4  
191:1,2 192:4 197:3  
200:20 204:1 212:1,3  
212:4,4,5 213:18,19  
213:22 214:5  
**processes** 92:18 146:6  
**produced** 141:12,19  
192:22  
**product** 13:17 122:19  
128:12 141:18 204:10  
**professional** 13:16  
132:14 144:11  
**Professor** 39:11  
**professors** 21:21  
**proffering** 53:11  
**profound** 97:7  
**program** 5:20 10:12  
37:7 38:6 130:10  
131:2,18 132:9,18,21  
134:22 144:21  
**programs** 21:7 53:5  
130:13 131:2 134:5  
**progress** 11:22 71:16  
72:7 179:18  
**project** 135:18 140:22  
141:1 146:2  
**prompt** 192:2  
**promptly** 150:1,6  
**promulgate** 204:19  
**promulgated** 205:21  
**pronounce** 88:2  
**proper** 21:17 40:1  
**properly** 174:7  
**proposal** 143:2 154:3  
166:13 169:20 180:19  
180:20 202:3,4,7  
203:8,14 204:18  
205:15  
**proposals** 141:7 166:4  
205:8,21  
**proposed** 3:12 22:13  
23:20 27:1 134:10

135:12 138:17 141:15  
143:14 157:9 162:21  
163:10 167:1 169:2,6  
170:17 188:10 201:10  
201:13 205:5,12,16  
211:13  
**prosecute** 15:12 26:5  
81:22 82:2 132:11,13  
144:12 176:9  
**prosecuted** 176:7  
**prosecution** 5:21 11:16  
13:11 35:11 40:13  
46:11 47:8 52:12 59:1  
59:7,15 61:5,10 63:4  
64:9 76:16 79:21 80:3  
81:10 99:18 102:6  
103:1 106:16 108:5  
111:17 112:20 124:11  
125:6 130:11 132:15  
154:5 194:20  
**prosecution's** 102:8  
**prosecutor** 33:4 37:9  
47:3 48:11 52:8,11  
64:14 80:1 82:2  
101:20 129:5 174:7  
174:21 175:3 194:15  
206:10 207:8  
**prosecutor's** 73:13  
**prosecutorial** 35:9  
153:13 173:22 174:6  
174:19  
**prosecutors** 8:7 10:5  
12:21 18:2 25:4 57:22  
58:13,21 60:7 61:16  
62:3 64:22 68:9 72:13  
74:10 76:8 100:21  
101:1,19 102:13  
176:11,15  
**prospective** 169:12  
**proud** 69:2  
**prove** 44:9  
**proven** 17:8  
**proves** 165:10  
**provide** 4:7 22:16 24:12  
25:15 26:10 29:17  
53:13 93:17 95:15  
99:16 105:19 107:11  
108:17 147:11 150:10  
193:5 197:4 211:18  
212:5 213:19  
**provided** 16:6 20:13  
32:18 39:13 66:20  
141:4 173:2,6 195:5,6  
199:17 204:7  
**provides** 145:4,9 151:8  
152:4 153:11,14  
**providing** 93:7 129:14  
**provision** 130:20

144:11,14,17 145:7  
145:18 170:7  
**provisions** 139:13  
144:2 145:19 170:5  
203:22  
**psychological** 82:16  
199:19 208:10  
**psychologist** 24:4  
**public** 1:5 3:15 6:22 7:2  
7:3,12 13:20 25:11  
33:12,14,17 46:16  
71:11 83:19,21 85:6  
86:5 87:11 90:20,22  
91:18 93:5,8,16 115:8  
122:4 148:15 150:10  
150:13 156:19 201:11  
201:12 202:5 205:10  
205:15,18 211:10,16  
215:4  
**publication** 211:13  
**published** 93:10 156:5  
156:22  
**pull** 75:17  
**pulled** 42:17 75:14  
**punishment** 154:20,20  
155:1,3,4,15 162:4,8  
162:11,12 176:3  
177:1  
**punishments** 154:21  
155:6  
**punitive** 147:11 155:7  
160:18 164:19 167:12  
167:14 168:2,4,8,10  
168:13 169:1  
**purpose** 23:22 157:3  
**purposes** 134:13  
169:19 171:10 192:1  
**pushback** 40:2  
**pushing** 40:4  
**put** 18:9 24:14 25:20  
31:9 34:10 46:10 47:4  
49:1 62:1 83:16 92:16  
100:13,21 116:4  
122:16 134:7 138:20  
150:11 159:17 178:8  
180:15 181:2 192:9  
193:19 195:22 205:18  
213:14  
**puts** 12:7 97:17 195:17  
195:18  
**putting** 119:16 152:2  
205:13

---

**Q**


---

**qualifications** 28:11  
**qualified** 21:3 23:2  
29:16 31:21 103:11  
111:3 127:21 134:20

**qualitative** 60:2 66:8  
**quality** 26:8 68:16  
147:18  
**quantify** 68:17,18  
**quantitative** 60:3  
**quantum** 162:8  
**question** 53:1,2,16 56:2  
58:10 59:12,14 69:12  
70:13 71:4 72:18  
77:19 79:2 81:3 82:7  
83:9,11 90:19 91:3  
95:3 102:1 105:17  
108:20,22 109:21  
114:11,13 117:10  
120:2 132:5 137:4  
177:18 184:1 206:5,7  
208:19 211:6,17  
212:2  
**questions** 10:11 32:7,9  
39:15 54:19 66:22  
76:20 77:12 79:8  
87:18 90:11 92:17  
93:22 94:1 124:2  
148:11 171:21 178:15  
195:2 199:16 214:13  
**quickly** 92:10 134:6  
144:4 172:11  
**quite** 12:6 45:3 76:5  
96:6 118:5 209:22  
**quiz** 99:1  
**quorum** 84:14  
**quoting** 66:15

---

**R**


---

**raise** 89:11 117:10  
167:2 206:18 207:14  
208:16,17 211:7,22  
**raised** 10:20 11:14 76:4  
108:10 125:22 160:20  
167:4 177:7 195:8  
207:1,2 209:5 210:19  
211:16  
**raises** 69:11 71:6 97:18  
**raising** 70:22 82:10  
210:6  
**ramification** 18:19  
**ran** 90:20  
**RAND** 118:10 119:21  
121:11 192:8  
**range** 10:5 157:2,5  
163:7 164:10  
**rape** 29:10 161:8  
**rapidly** 192:7  
**rate** 45:11,14  
**rates** 11:18 20:6 48:2  
**Ray** 36:3  
**re-endorsed** 190:13  
**reach** 132:22

- reached** 187:10  
**react** 197:15  
**reaction** 100:18  
**read** 66:21 79:11  
 114:18 121:21  
**readily** 192:15  
**ready** 4:3 7:8 198:2  
**real** 34:15 40:6 44:1  
 94:14 115:20 146:9  
**realize** 122:18 178:16  
**realizing** 54:12  
**reason** 40:22 48:7  
 98:19 100:10 104:6  
 112:22 114:2 130:18  
 136:11 187:14 208:20  
 209:3  
**reasonable** 27:2 80:14  
 81:1 98:11 163:20  
 165:9,11 206:15  
**reasons** 45:16 65:12  
 68:1 81:21 125:7  
 157:7  
**rebuttal** 196:1  
**recall** 9:14 86:5,18  
 180:22  
**recap** 158:18  
**receive** 6:14 7:1 20:4  
 65:3  
**received** 7:2,4 20:4  
 111:15 154:15 161:10  
 165:16  
**recognize** 25:18  
**recognized** 26:14,16  
**recognizes** 136:9,22  
 190:20  
**recognizing** 47:21  
**recollection** 85:20 90:5  
 90:7 108:6  
**recommend** 136:1  
 189:13  
**recommendation** 22:14  
 22:21 27:20 31:13  
 44:11 57:17 70:18  
 71:8 72:5,18 73:2  
 74:7,8 79:13 80:9  
 91:10 95:10,10,13,21  
 96:5 97:22 98:20,20  
 99:15,15 100:3  
 105:13,14 106:20  
 107:9,9,15,21 109:4  
 110:2,16,20 111:13  
 111:20 112:12 120:20  
 121:15,20 122:1  
 124:5,8,15,17 128:10  
 128:15 129:18 130:18  
 130:22 134:16,17  
 135:4,10 136:3,4,9  
 137:5,10,14 151:20  
 152:20,22 153:3,4,9  
 154:9 163:16 179:14  
 182:20 200:10 203:16  
**recommendations** 3:7  
 5:12 22:13 25:15  
 57:16 67:9 69:12,17  
 69:22 70:14 71:7,14  
 72:8,16 75:19 91:9  
 106:14 107:3 127:6  
 128:21 133:16 138:6  
 146:13 159:17 160:3  
 163:18 172:9 173:11  
 175:9 177:12,13  
 178:19 179:6  
**recommended** 106:22  
 109:3 151:12 153:16  
 156:3 163:4 166:18  
 168:21 192:10  
**recommending** 100:11  
 100:16 108:15,16  
 110:9 124:20  
**recommends** 109:4  
 110:22 124:8 125:18  
 127:14  
**reconciled** 181:12  
**reconsidered** 200:16  
 200:17,18  
**record** 46:6 55:14 82:10  
 83:1,15,17 84:15 87:4  
 94:17 138:13 157:7  
 163:2 165:5,7 182:12  
 192:17 203:21 212:15  
 215:12  
**records** 82:16  
**redo** 166:20  
**reference** 97:3 107:2  
**referred** 51:12 148:19  
**referring** 30:3  
**refers** 128:20  
**reflect** 89:20 148:17  
 154:7  
**reflected** 68:8 97:15  
 163:21  
**reflection** 104:9  
**reflects** 8:11  
**reform** 143:20  
**reforms** 144:8,10  
**regard** 5:22 131:21  
**regarded** 88:20  
**regarding** 75:20,20  
 144:8 152:7 153:20  
**regardless** 72:15  
 160:20  
**regional** 39:21 44:22  
 76:17,17 77:11 78:7  
 90:15  
**regular** 112:4  
**regulations** 123:3  
**reinforcement** 69:8  
**reject** 163:13,19  
**related** 5:5 69:17 75:15  
 145:19 199:3  
**relates** 127:8  
**relating** 5:18  
**relationship** 101:21  
**relative** 12:22  
**relatively** 17:3 150:21  
 174:17  
**relaxed** 190:10  
**release** 205:10  
**released** 202:8  
**relevant** 16:8,11,15  
 19:1 31:2 102:22  
 118:7 194:1,1 195:10  
**relief** 167:19  
**reluctance** 174:3,13  
**rely** 18:5 24:22 50:18  
**relying** 75:13  
**remained** 138:6  
**remember** 44:3 54:11  
 89:17 106:21 139:3  
**remembering** 21:19  
**remove** 181:18  
**removing** 169:1  
**repeat** 71:7 99:9  
**repeatedly** 113:8  
**repeating** 128:15  
**repeats** 136:4  
**repetitive** 66:14  
**replace** 49:12 153:16  
 153:16  
**replaced** 156:10 166:4  
**replacing** 156:3  
**replow** 177:14  
**reply** 213:6,7  
**report** 5:9,13 9:3 11:5,7  
 11:9,12 38:22 39:1  
 59:10 62:16 63:3,16  
 63:19,21 68:4 73:10  
 74:19 75:16 77:9,13  
 79:10 84:21 85:1 94:8  
 94:22 104:2,4,20,22  
 107:1,2,5 108:7  
 117:18 118:17 121:21  
 121:22 123:6 124:19  
 134:4,8 136:13  
 141:13 142:14 143:8  
 144:18,20,21 145:10  
 145:11 151:14,15  
 154:8,16 157:16,22  
 158:3 159:5 160:13  
 161:6 163:17 167:7  
 167:16 169:19 170:2  
 170:3,5 172:16  
 178:17 189:6,15,18  
 190:15 193:8 197:15  
 200:11 204:11 205:17  
 206:5  
**reported** 13:3 19:8 23:4  
 111:5  
**reporting** 47:21 48:2  
 65:6 144:16,19  
**reports** 11:8,12 29:3  
 47:6 64:2 67:7 74:4  
 74:18 75:2,17,18  
 93:10 144:14 148:19  
 191:14 199:19 208:11  
**represent** 24:22 178:22  
**representation** 19:16  
 33:15 93:18 129:15  
**representative** 68:1  
 89:16  
**representatives** 113:9  
 141:5 142:17  
**represented** 172:8  
**representing** 9:22 15:5  
 93:1  
**request** 13:13 15:7  
 17:20 23:17 26:20  
 106:8 139:20 167:17  
 184:7,13  
**requested** 9:9 112:10  
 143:6 165:20  
**requests** 7:2 17:22  
 21:18 23:19 40:1  
 41:19,20  
**require** 14:2 21:15 48:4  
 74:8  
**required** 15:20 24:18  
 26:22 28:9 144:22  
 151:9,14 189:18,19  
 206:10 207:15,16  
**requirement** 144:19  
 182:14 186:11 189:2  
**requirements** 115:10  
 119:14 183:12 196:12  
**requires** 148:14 149:3  
 152:15 165:5 188:11  
**requiring** 29:13 153:18  
 173:12 191:13  
**requisite** 63:4,8  
**research** 11:4  
**resembles** 151:7  
**reserved** 124:2  
**residing** 42:7  
**resolved** 29:21  
**resolving** 89:22  
**resource** 13:14 15:3  
 17:10 21:4 47:1,2,9  
 89:18 90:21  
**resourced** 93:17  
 107:22 124:22  
**resources** 3:6 5:10 7:21  
 11:10 12:5 14:15

18:17 20:13 21:1 40:1  
 40:13 41:9,13 45:15  
 47:8 48:5,5 49:5,13  
 50:8 52:17 59:9 63:22  
 68:13,15 69:17 70:20  
 71:9 72:19,21 73:7,15  
 74:2,13 90:16 98:3  
 108:1,17 110:9  
 117:10 120:12 121:10  
 122:4 124:20 127:8  
 128:21  
**resourcing** 12:6 89:12  
 96:8  
**respect** 22:11 70:19  
 86:7 95:21 101:6  
 103:22 104:1 110:8  
 112:9 124:1 125:6,7  
 126:5 146:20 148:13  
 154:1 182:5 192:16  
 207:2  
**respective** 40:18  
**respects** 151:21  
**respond** 39:17 49:2  
 70:2,11,12  
**responded** 70:7  
**response** 10:21 19:9  
 45:21 69:13 70:4,14  
 70:19 71:8 72:4 87:5  
 125:2 137:16  
**responsibilities** 22:7  
**responsibility** 71:14  
 97:4  
**responsible** 92:22  
**restating** 69:21  
**restitution** 187:15,17  
**result** 20:20 22:11  
 27:20 31:13 58:19  
 69:9 81:7,21 82:4  
 85:10 123:6 141:22  
 142:6 144:16  
**resulting** 143:8 155:14  
**results** 40:19 81:16  
 115:15 145:8,10  
 199:4  
**resume** 69:14  
**resumed** 55:14 94:17  
 138:13  
**retain** 13:19  
**retained** 159:6  
**retains** 160:12 161:6  
 167:8  
**retaliation** 144:15 145:2  
 145:5,8  
**retention** 168:21  
**retire** 37:19  
**retired** 7:14 34:12  
**retrospect** 129:13  
**return** 183:20

**returned** 191:6  
**reveal** 15:9 24:18  
**reveals** 177:18  
**reverse** 57:15  
**review** 1:17 5:2 20:17  
 22:22 42:3,5,10 71:14  
 83:1 111:1 113:18  
 130:14 140:1,7,9,14  
 141:5,6,12 146:9  
 147:12 151:11 160:3  
 163:12 164:17 165:5  
 165:14,17,21,21  
 166:1,5,19 167:3,9,14  
 167:18,21,22 168:7,9  
 168:22 169:2,3 171:5  
 196:20 205:7  
**reviewed** 7:4 16:19  
 66:21 199:14  
**reviewing** 112:2  
**revised** 142:18  
**revisions** 6:4 141:21  
 142:5  
**revisit** 181:6,17  
**Rice** 36:3  
**rights** 3:10 5:22 6:13  
 10:12 19:7 20:2,2  
 138:21  
**risk** 12:7 89:11 97:18  
**risking** 14:18  
**Robert** 35:7  
**role** 9:1 17:7 90:2  
 133:11  
**roles** 16:17  
**rolling** 141:9  
**room** 27:18 135:20  
**rotated** 63:9  
**rotating** 129:21  
**rotational** 60:12 65:10  
**round** 53:2  
**routinely** 17:22 25:18  
 199:22 206:12  
**RSP** 19:14 25:10 73:1  
 85:14 96:20 99:7  
 106:14,19 107:4,20  
 128:10,15 136:4  
 146:12 177:12  
**RSP's** 72:7 107:3,9  
**rudimentary** 204:5  
**rule** 70:16 86:8 195:7  
 200:14 201:1,10,13  
 202:18,19 203:1,2  
**rules** 29:9 80:20 86:11  
 150:7 170:16 179:20  
 183:9 190:10,10  
 200:7 201:3 204:15  
 204:20,22 205:6,12  
 205:14  
**run** 77:1 157:15

**running** 101:15 185:21  
**runs** 159:10  
**rural** 92:5,11

---

**S**


---

**S** 140:17  
**sacrifices** 147:21  
**safe** 131:8 182:22  
**said/she** 51:6  
**SAPRO** 144:14,18  
 145:1  
**sat** 54:21  
**Saunders** 2:8  
**saw** 57:16 59:5 199:20  
 208:12  
**saying** 12:5 43:2 57:21  
 84:18 93:16 128:9  
 129:13 131:9 172:22  
 176:17 188:11,15  
**says** 51:2 77:9 80:5  
 102:2 109:4,4 112:14  
 134:10,16 135:6  
**schedule** 87:1  
**Schenck** 1:19 7:15  
 36:20,21,22 37:3,5  
 48:19 49:16,16 60:17  
 60:21 62:11 88:5,8,12  
**Schinas** 39:11  
**Schlitz** 43:12  
**school** 21:21 34:6 35:5  
 37:8 38:1 53:4  
**schools** 35:21 47:14  
**Schwenk** 1:20 7:15  
 34:2,3 38:16 40:20  
 45:3 64:18 78:5 79:9  
 80:2,19 81:18 88:1,3  
 88:5 91:4 94:10,12  
 115:3,4  
**scope** 16:11 104:3  
**screaming** 43:8  
**scrub** 115:14  
**sealed** 201:15,15,19,22  
 202:1 203:6  
**searching** 16:14  
**seating** 80:8  
**second** 22:21 23:12  
 29:5 54:16,22 71:3  
 76:14 80:8 85:20 99:8  
 111:13 112:12,14  
 114:5 128:22 130:1  
 198:9  
**secondly** 152:4 181:13  
 185:18 211:17  
**secretary** 23:6 27:21  
 107:10 108:16 109:5  
 109:13 111:7 112:1  
 112:14 116:7,12  
 117:19 121:9,14  
 122:16 125:18 132:9  
 134:10 136:12,20  
 139:22 140:7 148:14  
 149:3 150:12 153:19  
 173:13  
**sections** 61:2  
**sector** 35:21 38:18  
 120:11 173:20  
**security** 35:18 38:6  
**seeing** 48:1 69:4  
 202:17  
**seek** 167:19  
**seeking** 26:5  
**seeks** 209:12  
**seen** 91:17 100:7  
 113:13 202:15 203:7  
 203:12 208:13 213:9  
**sees** 162:7  
**segmented** 156:6 157:9  
 159:6  
**segue** 52:22  
**select** 158:20  
**Senate** 130:9 142:12,20  
 143:5,11 170:4,7  
 180:8  
**Senator** 177:6  
**sends** 166:3  
**senior** 37:15,20 41:5  
 44:22 59:4 119:8  
**sense** 20:9 39:22 40:3  
 40:12 69:6 71:21  
 119:18 124:15 128:17  
 137:3 150:14  
**sensitive** 22:8 91:13  
 193:14  
**sent** 146:8  
**sentence** 111:21 112:7  
 112:12 114:5 116:11  
 136:5 137:20 155:13  
 157:11 158:11,11  
 159:9,12,22 160:1,13  
 160:15,16,19,22  
 161:5,15 162:5,9,12  
 162:17 163:3,8 164:7  
 164:18 165:4,15,16  
 166:9,22 167:10  
 168:5 177:20 184:8  
 184:22 185:16 188:4  
 191:6 194:10 196:11  
 196:13,17,19,20  
 197:4  
**sentenced** 159:2  
 184:12 187:9 188:14  
**sentences** 157:14  
 166:10  
**sentencing** 26:17 31:7  
 148:5 154:15 155:17  
 155:19,21 156:4,6,7

- 156:14,16 157:4,10  
 157:10,17,19 158:2,4  
 158:6,16,17 159:3,6,7  
 159:8,11 161:7 163:1  
 163:14,22 164:3  
 170:14 177:19 178:3  
 179:20 184:6,14  
 185:7,14 186:21  
 187:1 188:3,12,20  
 189:21 190:2,7,11,12  
 190:13 191:1,2,14  
 192:15,16 193:5  
 194:2,6 195:3,10  
 196:3,5,6,8,18 197:1  
 197:14,18 198:1,2,9  
 198:13 199:8  
**sentencings** 184:3  
 187:6  
**separate** 57:11 110:12  
 143:19 155:14 184:13  
**separation** 164:20  
**September** 9:18  
**series** 61:2  
**serious** 12:8 28:22 45:7  
 136:22 137:12  
**serve** 31:16,21 61:2,4  
 127:17,21 135:9  
**served** 33:2,5 37:8  
**service** 17:2 18:14  
 22:22 23:10 28:2 32:4  
 39:20 64:11 111:1,11  
 112:2,18 113:5  
 119:21 125:20 128:4  
 135:2 136:6 147:21  
 156:12 159:16 160:18  
 167:17 172:4 173:4  
 190:16 192:9 195:21  
 200:1,7 201:7,9 202:3  
 204:7 205:4 214:16  
**services** 8:5 17:13  
 19:20 21:7 22:16,22  
 23:9 27:22 28:9 31:14  
 31:18 32:1 37:21 42:8  
 42:15,18 44:11,12  
 50:15 53:4,9 59:2  
 60:13 61:22 71:12  
 88:20 91:14 95:15  
 99:16 105:19,21  
 106:9 107:10 109:5  
 111:1,10 113:7  
 115:15 116:2,14  
 121:18 125:19 127:15  
 127:18 128:1 134:16  
 134:18 141:4 142:12  
 145:4 186:10  
**servicing** 103:7  
**session** 94:15 102:18  
 177:2 196:16
- set** 32:2 53:1 60:22  
 123:5 128:2 130:13  
 149:19 163:7 168:3  
 176:1 178:8 204:5  
**sets** 163:6  
**setting** 10:19 164:8  
 171:2 172:17  
**seven** 36:6 41:17 148:3  
**severe** 160:14  
**severely** 47:22  
**severity** 196:13  
**sex** 19:16 31:7 33:16  
 35:11 54:1 64:9 155:7  
**sexual** 5:4 6:8 7:11 10:2  
 10:14 11:18 12:12  
 19:22 20:6 28:20 29:6  
 29:7 31:17,22 33:11  
 33:20,21 35:15,19  
 37:21 46:11 47:15  
 48:10,17 49:19 50:1,9  
 50:14,15 57:18 60:9  
 61:17 63:11 79:14,16  
 82:15,17 103:2 113:8  
 127:18,22 129:10,20  
 144:16 145:6,14  
 161:8 177:8 185:20  
 189:9  
**shape** 96:22  
**share** 104:13 115:14  
 126:17  
**shed** 139:7  
**sheet** 56:13 122:18  
**shields** 29:10  
**shifted** 104:14  
**short** 41:8 43:2 212:13  
**shortages** 90:21  
**shot** 40:20  
**show** 24:19 48:8 57:8  
 206:14  
**showed** 34:22  
**shows** 48:7 84:16  
**shut** 193:7  
**side** 47:3 64:16 68:22  
 74:20 76:20 80:3,9,16  
 81:10 89:12  
**sides** 16:7 38:15 51:9  
 105:20  
**signal** 37:6  
**signature** 131:6 147:5  
**signed** 140:19  
**significant** 15:15 26:18  
 58:1 90:1 161:10  
**significantly** 59:16  
**signs** 171:12  
**similar** 63:5 115:9  
 122:3 164:13 167:6  
 178:15  
**simple** 106:9
- simply** 60:12 69:21  
 105:17 119:12 124:19  
 126:5 151:15 164:8  
 182:11 211:22 214:4  
**Simultaneous** 87:21  
 88:7  
**single** 56:6 141:14  
 155:13  
**sir** 77:7 131:4  
**sit** 80:11  
**site** 3:5 5:16 6:11 7:21  
 9:4,13 11:3,14 32:20  
 56:4 62:14,20 63:20  
 64:2,10 72:12 75:4,12  
 85:8,10 86:14,17 87:3  
 94:8 111:14  
**sitting** 78:11 129:22  
 192:5  
**situation** 18:19 28:19  
 93:6 129:16 191:16  
**situations** 198:7  
**six** 37:15 56:4,15,19  
 61:2,4,5,5 72:2,3  
 160:15 161:3 166:9  
 166:10 168:5,10,13  
**six-month** 161:2  
**Sixth** 20:2  
**size** 91:14 92:12 205:17  
**SJA** 152:18 182:1,12  
**skill** 29:14 130:12  
 134:12,14  
**skilled** 193:13  
**skills** 29:12 54:4  
**sky** 137:3  
**slap** 121:13  
**slide** 208:19  
**slightly** 44:20 102:12  
**slow** 30:5  
**slowly** 172:11  
**small** 92:5 169:22  
**society** 46:16 149:17  
 185:3  
**sole** 22:9  
**solution** 132:19  
**solutions** 43:22  
**solve** 45:18  
**somebody** 24:13 69:7  
 80:7 92:20 114:3  
 121:11 122:17 123:5  
 135:2,14 176:13,20  
 176:20 186:11 191:7  
**somebody's** 176:3  
**somewhat** 72:5 151:6  
 164:13 190:10 199:12  
**sophistication** 31:5  
**sorry** 55:17 71:4 105:9  
 111:19 118:8 133:18  
 202:11 212:17
- sort** 17:4,14 24:12 30:8  
 51:11 96:5 106:7  
 116:10 126:1 130:11  
 130:12 135:10,13  
**sorted** 51:18  
**sorts** 10:8 176:5  
**sound** 80:22  
**sounded** 76:2 214:6  
**Sounds** 80:14  
**source** 23:16 178:10  
**sparse** 172:17  
**speak** 7:19 8:8 20:11,18  
 31:5 37:1 51:5 56:1  
 58:13 173:21  
**speaker** 105:9  
**speaking** 6:7 8:6 72:13  
 85:15 87:21 88:7  
**speaks** 57:17 107:21  
**special** 5:19,20 10:6,11  
 21:6 36:8 37:9 48:9  
 49:22 50:10,11 51:1  
 62:6 64:13,20,21 65:3  
 73:14,16 74:1,10  
 75:20 99:18 100:20  
 101:2,6,12,18,21,22  
 102:16,18 103:22  
 112:20 124:10 125:5  
 126:12,17 127:2  
 176:1  
**specialized** 38:14  
**specializing** 121:1  
**specialty** 77:18  
**specific** 29:10 120:18  
 133:17 135:5 139:13  
 146:22 171:6 179:5  
 182:15 191:7 200:10  
 208:7  
**specifically** 67:8 76:19  
 87:2 89:17 91:9 99:13  
 169:15 190:20  
**specify** 133:21 134:1  
**spend** 93:10  
**spending** 118:18  
**spent** 35:10 37:15 85:1  
 103:9 116:21  
**spoke** 8:9,10 9:21 10:5  
 10:17 12:16,18 62:13  
**sponsorship** 93:11  
**sports** 35:22  
**spot** 116:4 119:17  
**spy** 34:10  
**staff** 2:3,5 17:11,15  
 32:5 33:14 39:5 42:5  
 42:14 100:13 118:17  
 123:18 128:5,12  
 136:7 138:2 139:22  
 147:1 151:17 152:11  
 153:21 154:13

**staffed** 42:17  
**staffing** 13:4,4 23:1,8  
 23:10 43:19 44:5  
 68:14 91:11 106:19  
 111:2,9,11 112:3,16  
 112:17 114:7 115:10  
 115:22 116:13 121:18  
**staffs** 42:13  
**stage** 17:17 20:17 25:7  
 185:14  
**stake** 118:1  
**stakes** 97:18  
**stand** 25:20 52:9,10  
**standard** 160:8 163:20  
 167:5  
**standards** 11:17 36:17  
 166:18 169:2  
**start** 12:5 32:14 45:12  
 57:15 95:13 98:7  
 128:9 136:14 171:14  
 173:3 183:2 206:6  
**started** 40:8 47:17 74:6  
 134:6  
**starting** 58:22  
**starts** 93:6  
**state** 7:12 33:12 84:15  
 91:22 93:12 118:13  
 148:18 149:1 156:9  
**statement** 121:19 122:1  
 191:8 195:16  
**statements** 14:21  
 192:21  
**states** 1:1 6:7 9:20  
 26:13 67:19 99:7  
 115:20 154:5 173:21  
 174:11 193:10  
**statewide** 33:15  
**statistics** 66:5,9 81:1,6  
 113:13  
**status** 73:12  
**statute** 152:15 154:22  
 158:8 188:9 189:18  
 200:4 204:3  
**statutes** 150:8  
**statutory** 166:18 171:7  
 204:16  
**stay** 187:5  
**stealth** 183:20  
**steered** 199:15  
**step** 131:22 180:11  
**steps** 133:4  
**Stone's** 106:2 116:6  
**story** 52:8 93:14 117:5  
**strategy** 15:10 24:10,18  
 25:9 31:10  
**streamline** 147:9  
**strengthen** 147:6  
**strikes** 119:13

**strong** 12:6 52:20  
**strongly** 112:13 118:20  
 119:3  
**structure** 147:7  
**studies** 146:14  
**study** 108:8 120:1,16  
 120:17 141:7,9  
 177:16 186:8  
**stuff** 55:1 66:15  
**subcommittee** 1:18,18  
 1:19,20,22 3:7 5:8,9  
 5:13,16 6:6,11 7:10  
 9:2,9,13,16,19 10:10  
 11:3,6,21 39:3 48:15  
 49:1 56:1,10,12 62:18  
 65:18 66:12 67:17  
 68:2,4 69:10 70:7,10  
 70:12 71:1,20 72:1,10  
 73:11 83:7,16,20  
 84:13 87:9,22 94:22  
 95:1 96:18 98:18  
 103:8,14,21 104:2  
 106:5 108:15 110:22  
 114:14 118:4 120:8  
 120:22 121:7 124:18  
 125:17 127:7,14  
 132:1,5 133:3,7 136:3  
 137:2,8,11,12,14  
 180:17 181:1  
**Subcommittee's** 104:9  
 133:15,16 138:5  
**subcommittees** 139:5  
**subject** 101:14 125:3  
 154:20 157:8  
**subjective** 31:19 80:13  
 127:20 134:19  
**submissions** 152:11  
**submit** 152:6  
**subsequent** 47:6  
**subset** 186:19  
**substance** 110:4 179:8  
 179:9  
**substantial** 69:8  
**substantially** 130:22  
**substantiated** 145:11  
**substantively** 110:21  
**substitute** 23:20 54:10  
**substituted** 55:2  
**subtitle** 143:19,19,22  
**suddenly** 54:12  
**suffers** 78:17  
**sufficient** 22:18 65:1  
 79:18 95:17 99:19  
 113:17 132:12 211:17  
 213:19,21  
**sufficiently** 27:19 93:17  
**suggest** 15:13 31:11  
 81:11,16 122:11,20

132:8 135:22  
**suggested** 121:16  
 141:16 147:1  
**suggestibility** 24:3  
**suggesting** 79:5 97:6  
 176:15 212:16,18  
 214:5  
**suggestion** 105:2,5  
 214:7  
**suggestions** 110:6  
 204:5  
**Sullivan** 1:20 6:18,18  
 34:21 138:19 139:10  
 139:16 172:5 191:10  
 193:20 197:8 201:8  
 204:12 212:10 215:2  
**summarize** 164:2  
**summarizing** 62:9  
**summary** 139:11  
**superb** 39:13 82:4  
**supervisor** 41:20 108:2  
**supervisors** 42:21  
**supervisory** 41:15  
**support** 23:3 98:4  
 104:13 111:4  
**suppose** 53:2 132:20  
**supposed** 27:17 42:8  
**Supreme** 26:13  
**surface** 124:16  
**surfaced** 40:10,11  
**surprised** 46:19,22  
 135:11  
**surveillance** 26:4  
**survey** 19:21  
**surveying** 92:18  
**suspect** 93:18 173:17  
**SVC** 129:7,11  
**SVCs** 99:13  
**SVU** 48:8  
**switch** 185:15,18  
**sympathetic** 191:18  
**system** 8:11 10:9 12:10  
 16:5 26:21 27:7 38:14  
 38:14 41:7,8 43:17,18  
 45:5,13 46:2,21 47:13  
 49:14,21 68:11 69:2,3  
 69:4,13 71:8,10 72:4  
 72:14 82:8,9,19 113:3  
 124:22 134:11 140:3  
 145:20 147:6,7,13,17  
 147:20 149:7,10,12  
 149:18 150:1,9 156:2  
 156:4 157:9 159:20  
 160:21 162:15,20  
 164:3,14 165:13  
 168:18 173:8 178:4  
 184:10 185:21 188:19  
 190:12,13,17 191:11

192:2,11 193:5,9,17  
 194:3 201:14 203:5  
 203:14  
**systemic** 140:1  
**systems** 19:9 48:4 70:4  
 91:16 113:14 119:1  
 149:1,17

---

**T**


---

**table** 7:14 24:19  
**taken** 75:12 117:13  
 147:2  
**takes** 79:3 92:22 145:14  
 152:9 175:10 176:13  
 176:20 197:1 199:8  
**talk** 39:19 44:21 50:12  
 50:22 51:1 52:11  
 61:22 62:7 63:14 78:6  
 78:21 80:2 85:14  
 86:14 89:5 100:1  
 110:19 139:3,12  
 143:16 146:22 148:2  
 148:6 173:11  
**talked** 18:2 63:19  
 187:20  
**talking** 30:13 31:6 56:8  
 56:9,11,12,22 62:19  
 72:2 78:14 89:20  
 102:3 103:19 110:8  
 176:4 189:7 198:7,20  
 209:15 213:1  
**talks** 74:12 130:9  
**Tammy** 2:5  
**task** 37:20 159:16  
**tasked** 71:2  
**tasking** 74:15  
**tasks** 5:19 9:11  
**taught** 37:11 54:14  
**Taylor** 1:14 39:8,9  
 40:21 44:17 52:19  
 97:11 106:12,13  
 107:2 108:6 114:11  
 119:6,7 122:9 127:9  
 127:10 138:10 172:2  
 173:9 174:14 177:4  
 177:17 178:11  
**Taylor's** 178:15  
**teach** 38:3  
**team** 140:12  
**teams** 36:1 140:18  
**technical** 30:19 55:4  
 144:10 154:9  
**technicalities** 22:7  
**telephone** 2:16 4:9,15  
**tell** 7:17 32:14 33:8 48:6  
 53:5 67:14 71:15 80:4  
 89:13 113:9 114:12  
 131:2 185:9 199:14

- telling** 52:8 136:14  
 198:4  
**tells** 36:13 102:20  
**temporal** 188:2  
**temporarily** 187:12  
**temporary** 21:4  
**ten** 13:6 33:18 35:12,13  
 41:18 94:13  
**tendency** 175:5  
**tendered** 16:19  
**tenor** 63:3  
**tens** 84:22  
**term** 23:11 177:22  
**terminology** 14:3 64:13  
**terms** 40:6 59:3 64:8  
 68:13 70:18 106:15  
 153:10 162:4 164:4,8  
 164:15 170:19 172:17  
 173:10 178:1,21  
 179:10 185:8 192:2  
 196:20 197:11 206:20  
 211:13  
**terrain** 49:6  
**Terri** 2:8  
**terrible** 179:12  
**terrific** 38:22 197:10  
**testify** 15:19,20 51:21  
 51:21 61:22 106:6  
 151:9 195:21  
**testifying** 52:7 195:20  
**testimony** 19:19 21:20  
 25:10 30:10 32:22  
 51:17 61:14 62:9  
 64:19 67:1,11,20,21  
 69:7 73:17 76:14 78:2  
 84:9 99:13 102:17  
 121:6 169:13,18  
 187:7,16  
**Texas** 43:22  
**thank** 4:4 6:18 7:6,22  
 7:22 32:16,22 33:7  
 34:3 38:6,10,18,20  
 44:17 49:15 52:22  
 55:16,20 83:8,8 85:2  
 87:15 94:4,9,10 95:6  
 103:6,13 130:16  
 138:7 139:9,14  
 146:15 161:20 162:1  
 172:3 178:11,14  
 187:2,5 214:10,15,18  
 214:22 215:10  
**thank-** 214:19  
**thanks** 7:20 12:2 34:1  
 35:2 36:19 37:4 38:21  
 39:10 55:12,19 95:8  
 215:1,9  
**theory** 209:11  
**thereabouts** 138:16  
**thereof** 103:2  
**They'd** 54:2  
**things** 8:14,17 14:21  
 19:6 26:12 29:10 30:5  
 61:7,13 70:8 85:17  
 104:5 106:12 108:17  
 109:17,19 124:10  
 136:1 139:3,5 174:13  
 176:5,10 178:18,20  
**third** 21:11 27:20  
**thorough** 117:18  
**thought** 19:11 35:6  
 105:16 108:9 115:5  
 115:11,22 119:11  
 135:20 172:13 174:16  
 174:16 187:21 211:8  
 211:22 213:13,16  
 214:5  
**thoughtful** 24:14 26:9  
 103:11  
**thoughts** 78:6  
**thousands** 84:22  
**three** 29:4 35:6 39:14  
 46:12 56:6,7,15,20  
 76:7 84:13 86:9 88:15  
 89:14 96:21 102:3  
 115:20 122:18 133:17  
 150:4 151:4 181:8  
**threshold** 166:8 176:12  
**thrilled** 139:2 140:20  
**Throw** 43:22  
**thrown** 129:10  
**thumbs** 182:13,13  
**Thursday** 201:11  
**Tideswell** 2:5 55:7 75:6  
 130:2,6 131:4,11,14  
 131:19 132:3  
**tie** 120:1  
**tied** 160:4,6,7 178:3  
**timely** 211:14  
**times** 191:15 196:22  
**timing** 170:19 197:11  
**TJAG** 167:22  
**TJAG's** 166:12  
**today** 4:11 7:7 9:1 11:6  
 12:4 23:13 25:16  
 39:12 122:12 148:2  
 149:16 180:16  
**today's** 4:8,15 5:7 7:3  
**told** 14:7 27:14 75:10  
 83:21 84:5,10 86:19  
 87:7 115:5  
**Tom** 1:14 44:19 47:5  
 172:1  
**ton** 102:16  
**tone** 55:3 61:13 68:6  
**tool** 49:9 178:9  
**tools** 16:6 49:13 147:17  
 173:6 179:18  
**top** 140:15,20  
**topic** 23:12 27:15,17  
 32:12 75:15 89:18,19  
 120:18  
**topics** 5:18 10:16,20  
 11:2,19 63:20 64:6  
 65:6 90:11  
**touch** 10:9  
**touching** 8:11  
**tour** 28:16 29:22 32:2,4  
 128:2,4 129:3 133:21  
 134:1 136:6  
**tours** 29:20  
**traces** 139:20  
**Tracey** 1:15 87:20 88:1  
 88:10,16 89:2,5,9  
 90:4,12,19 96:1 97:3  
 107:20 108:12 116:3  
 116:5 119:6,8,17,19  
 120:6,14 121:15  
 123:20 125:10 127:11  
 127:12 132:7 133:6  
 133:11,20 134:1  
 135:19 178:14  
**Tracey's** 104:13  
**track** 64:17 88:19,19,22  
 193:12  
**tradition** 173:20  
**traditional** 150:20  
 151:5  
**traditionally** 175:9  
**train** 61:19  
**trained** 18:7 33:13  
**training** 5:21 10:14  
 21:22 48:9 53:5,13,14  
 53:20 54:8 59:9 68:14  
 98:17 102:17 108:2  
 126:11 129:8,11,12  
 145:4,5 205:2  
**transcribed** 4:16  
**transcript** 4:17  
**transcripts** 66:12  
**transfer** 6:1  
**transformed** 16:2 151:5  
**transmitted** 205:11  
**transparency** 147:5  
 148:3,13 149:21  
**transparent** 162:22  
**trauma** 145:6  
**traveled** 67:18 103:10  
**treated** 174:12  
**tremendous** 12:10  
 32:11 173:6  
**tremendously** 146:11  
**trial** 8:7 14:21 16:15  
 19:2,19 21:1 24:8  
 25:3 26:11,17 29:1,6  
 29:11,13,14 30:3 31:4  
 31:8,10 33:17 34:8  
 39:20 54:14 59:4,16  
 61:18 63:8 73:13 74:1  
 74:11,18 75:20 76:15  
 80:15 82:11,12 104:1  
 113:11,12 122:22  
 126:15 129:4,10  
 132:10 147:8 156:18  
 158:10,14,19 159:1  
 163:11 169:10,12,13  
 169:18 174:5,5,9  
 184:11,19 185:6  
 186:12,20,22 187:8  
 187:18 191:3,19  
 194:15,16 196:7  
 197:14,17,17,21  
 198:3 199:18 202:8  
 202:16 203:7,12  
 208:11,11,15,21  
 209:10 210:7 211:5  
 212:3  
**trials** 26:19 29:4 54:21  
 62:5 76:16  
**trickled** 44:10  
**tried** 34:7 46:8 50:14  
 54:2 189:10 190:8,9  
 194:8  
**trips** 56:20 57:7  
**true** 39:7 70:13 79:22  
 96:11  
**trust** 117:19  
**trusted** 91:7  
**trusting** 116:6  
**try** 44:13 88:3 135:15  
**trying** 18:11 42:22  
 49:20 56:16 58:5  
 59:18 61:17 70:18  
 120:8 171:19 189:5  
 192:2 213:14  
**turn** 60:19 92:14 102:8  
 102:14 145:21 150:17  
 182:12  
**turned** 103:1,3  
**turning** 210:10,12,18  
**turns** 98:13 99:9  
**two** 9:12 22:12 32:3  
 46:21 57:8,19 61:8  
 76:6,8 84:2,16 85:5  
 85:19 86:6,8,21 88:14  
 89:14 100:21 113:14  
 124:1 128:3 129:3,20  
 133:4 143:1 160:17  
 167:11,13 168:5,8,10  
 170:21 181:8,9  
 204:17 209:7  
**two-fold** 121:16  
**two-tier** 203:14

**two-year** 168:22  
**type** 30:14 61:1 167:21  
 180:2 181:19 189:11  
 190:3  
**types** 29:13 109:17  
 129:22 185:19 202:2  
 209:7  
**typically** 63:10 119:20  
 187:9 194:11,18  
 199:18 201:19 206:22  
 212:21

---

**U**

---

**U.S** 2:5 37:10 150:12  
 154:11  
**UCMJ** 5:6 122:22 123:7  
 140:2 153:11 155:2,5  
 161:11 181:10  
**ultimately** 8:18  
**unable** 18:8  
**unanimous** 69:1  
**unavailability** 62:7  
**unaware** 70:17 162:10  
 162:12  
**uncommon** 194:20  
**under-** 20:20  
**under-defended** 20:21  
**under-informed** 91:12  
**under-reported** 47:22  
**under-resourced** 13:3  
**under-resourcing**  
 12:22  
**underlying** 172:10  
 192:1 209:17 210:3  
**undermine** 20:12  
**understaffed** 111:16,18  
**understaffing** 23:5  
 111:6  
**understand** 12:18 20:3  
 32:11 69:13,20 85:17  
 106:1 108:22 123:10  
 125:13 131:17 174:14  
 187:3 194:4 200:15  
 210:2,5  
**understanding** 85:22  
 86:11 90:14 114:22  
 119:13 189:14 210:8  
**understood** 52:21 53:7  
 187:7  
**undetected** 20:18  
**unfortunate** 43:16,21  
**unfortunately** 72:11  
 205:7  
**unheard** 208:3  
**uniform** 5:3 141:14  
 148:16 149:4  
**uniformly** 18:1  
**unique** 164:14 165:12

**unit** 35:11,12,14 175:17  
 175:20 176:19 189:9  
 192:18  
**unitary** 156:7 157:13  
 159:12  
**United** 1:1 6:7 9:20  
 26:13 67:19 154:5  
**units** 50:18 51:5,7,16  
 175:12  
**universe** 31:1  
**universities** 47:15  
**University** 38:1  
**unreasonable** 160:2,7  
 163:14 177:21,22  
**unsworn** 195:15  
**unusual** 199:1  
**unwanted** 137:4  
**update** 73:2 99:22  
 100:6,15 128:16,19  
**updates** 149:22  
**upholds** 36:17  
**upper** 163:9  
**urban** 92:7,8  
**urgent** 104:16  
**use** 114:6 116:2 134:11  
 151:18 163:22 169:10  
 169:15  
**useful** 17:9 21:4 122:5  
 153:15 178:8 182:1  
 214:1,2  
**usually** 61:17 76:7,8  
**utility** 147:11  
**utilized** 29:17

---

**V**

---

**v** 26:15  
**VADM** 87:20 88:1,10,16  
 89:2,5,9 90:4,12,19  
 96:1 97:3 107:20  
 108:12 116:5 119:19  
 120:6,14 121:15  
 127:12 132:7 133:6  
 133:11,20 134:1  
 135:19 178:14  
**VADM(R)** 1:15  
**valid** 53:17 109:22  
 125:22  
**valuable** 49:10  
**value** 26:22 29:15 193:8  
**variations** 171:15  
**variety** 174:1  
**various** 5:17 16:17 60:3  
 66:13 68:7 91:18 93:8  
 122:4  
**vary** 179:6  
**vast** 81:7 193:3  
**vector** 120:8  
**vectoring** 120:15

**vehicle** 15:22  
**verbatim** 128:10,13,15  
**verdict** 187:10 191:5  
 194:5  
**versa** 188:1  
**version** 142:18,19,21  
 143:4,6,10,11,12,14  
**vest** 27:22 109:6 125:19  
 126:21  
**vested** 174:18  
**vesting** 109:10  
**veto-proof** 131:7  
**vice** 188:1  
**victim** 5:20 8:9 10:7  
 14:6 21:7 49:22 50:10  
 50:11,22 51:1,1,15  
 52:3 62:6,7 64:14  
 73:16 74:1 75:20 79:3  
 82:17 101:2,21 102:9  
 102:20 151:9 189:16  
 190:22,22 191:2,6,8  
 195:4 199:19 209:11  
 211:18 212:19 214:2  
 214:4  
**victim's** 5:22 6:13 10:11  
 10:12 90:2 102:10  
 189:8 208:10,20  
 212:6 213:1  
**victims** 5:19 10:6 12:12  
 14:5 15:20 21:6 51:20  
 52:6 64:20,21 65:3  
 73:14 74:11 76:8,9  
 102:12 152:6  
**victims'** 3:9 99:18  
 100:20 101:6,12,18  
 101:22,22 102:18  
 103:22 112:20 124:10  
 125:5 126:12,18  
 127:2 138:21 209:4  
**Victor** 1:14  
**view** 65:10 104:14  
 117:6  
**viewed** 193:2 212:1  
**views** 10:19 11:1 208:2  
 212:6  
**violates** 160:1  
**violating** 122:21  
**violation** 87:14 123:7  
**violence** 36:4  
**Virginia** 1:10  
**virtually** 68:22  
**virtue** 102:7  
**visit** 3:5 7:21 9:10 41:16  
 57:10,13 64:3 75:12  
 78:22 84:3,14 86:14  
**visited** 6:6 9:19  
**visits** 5:16 6:11 9:4,14  
 9:17 11:3,14 32:20

39:19 56:4,16 62:14  
 62:20 63:20 64:10  
 66:17 72:3,12 73:11  
 75:4 83:20 84:1,17,20  
 85:8,10 86:18 87:3,9  
 87:10 94:8 111:14  
**VLC** 30:4  
**voice** 40:16,17  
**voices** 40:4  
**vote** 83:22 87:8,10  
 100:4 104:19,22  
 122:11  
**votes** 196:16  
**voting** 131:7 196:12

---

**W**

---

**wait** 50:21,22 75:1  
 125:2 130:19  
**waived** 186:11  
**waives** 164:22  
**walked** 35:8  
**wallet** 176:14,20  
**wanted** 6:19 20:8 66:16  
 68:2 69:2,3,6 84:3,4,6  
 86:20 87:10 90:11  
 104:12 140:14 209:14  
 212:9 214:13,14  
**wanting** 183:2  
**wants** 48:17 83:3  
 116:11 144:5 164:21  
**warrant** 175:22  
**Washington** 37:22  
**wasn't** 68:21,22 74:16  
 141:3 189:19 203:12  
 206:4  
**way** 11:1 21:18 25:5  
 26:1 36:16 40:8 41:8  
 44:20 46:1 48:16  
 53:18 68:6 75:22  
 86:21 88:6 95:11  
 97:13 110:2 118:17  
 119:18 126:18 140:2  
 152:17 153:12,15  
 168:20 172:12 176:8  
 176:16 181:16 182:15  
 185:12 188:15 213:16  
 214:5  
**ways** 91:20  
**website** 4:18 7:5  
**week** 41:17 90:21  
 140:12  
**weighing** 192:8  
**welcome** 3:3 4:10 6:17  
 6:19  
**welcoming** 138:22  
**well-understood**  
 177:22  
**went** 34:6 35:4,17 37:7

37:22 54:11,18 55:14  
56:4,5,15 57:9,9,10  
61:21 62:13 66:17  
94:17 99:2 102:17  
129:9 138:13 166:11  
215:12  
**weren't** 129:14 179:22  
205:9  
**West** 37:12  
**white** 135:10  
**wide** 174:1  
**willing** 140:21  
**Wine-Banks** 1:22 32:13  
32:16,17 44:19 54:7  
56:19 74:17 75:8 77:7  
77:14 88:17 89:4,8  
90:6,18  
**winter** 140:19  
**wish** 140:13,13,16  
191:8  
**wished** 84:19,20  
**wishes** 90:2  
**witness** 14:20 25:20  
106:18 108:12 125:16  
**witness'** 169:12  
**witnesses** 1:16 14:18  
15:19 18:12 123:2  
151:3 192:21 194:20  
195:1,2,18  
**wives** 43:11  
**woman** 102:2  
**woman's** 103:2  
**women** 147:19  
**wonder** 104:17  
**wondered** 63:13  
**wonderful** 141:18 172:4  
**wondering** 150:3  
180:13,14 189:13  
**word** 112:13,22 114:6  
121:8 123:14  
**wording** 135:12  
**words** 86:9 109:3  
169:16 179:22 213:15  
**work** 13:17 21:8,15  
36:12,14 69:3,10  
77:22 92:15,20 94:7  
116:20 122:19 128:12  
138:2 139:7 145:15  
146:8,9,12,15,18  
154:18 159:20 170:15  
185:8 191:15  
**workable** 25:14  
**worked** 17:6 36:5 38:16  
181:22  
**working** 8:17 11:20  
13:20 38:7 41:17  
42:10 118:22 137:19  
168:4 170:1 173:5

178:7 192:12 205:5  
**workplace** 36:9  
**works** 14:5 197:11  
**world** 8:4 34:15 41:10  
46:11 47:20 48:13,17  
82:3 90:22  
**worldwide** 17:6  
**worry** 84:10  
**worth** 21:19 137:19  
**worthwhile** 85:10  
**worthy** 147:20  
**wouldn't** 77:9 118:6  
125:5 191:20  
**writ** 145:16 209:12  
**write** 123:6 134:8 174:3  
174:13 179:20  
**writers** 193:15  
**written** 4:17 7:3 79:11  
124:8 152:11  
**wrong** 64:13 66:10  
188:9 198:7  
**wrongful** 20:19  
**wrote** 114:15

---

**X**

---

---

**Y**

---

**year** 4:21 9:8 29:18,18  
34:22 35:6 37:19  
96:16 99:4 142:15  
164:19 165:19 181:1  
204:20,22  
**years** 4:22 8:16 15:17  
17:5 19:14 20:7 22:3  
32:3 33:18 35:8,10,12  
35:13,13 37:6,15  
40:11 46:22 47:17,18  
54:4 58:5 60:9 61:8  
63:10 79:7 88:14,15  
96:21 117:13 128:3  
129:4,21 133:17  
134:5 151:4 160:17  
167:11,13 168:5,8,10  
170:21 181:9 204:17  
**yelling** 43:8  
**yesterday** 143:10  
**York** 46:16 58:4  
**young** 27:8 40:9 41:16  
43:10

---

**Z**

---

**zero** 13:7 155:4

---

**0**

---

---

**1**

---

**1,300-page** 141:12  
**10** 148:9

**10:06** 55:14  
**10:10** 55:15  
**10:48** 94:17  
**11** 35:11  
**11:03** 94:18  
**11:50** 138:13  
**1103** 201:6  
**1103(a)** 200:14 205:15  
**12** 19:22  
**12:44** 138:14  
**12:45** 138:15  
**120** 5:6 22:1 29:6  
**138** 3:13  
**140A** 211:13  
**14th** 142:20  
**15** 5:1 56:14 148:10  
**18** 29:20  
**18th** 142:16  
**1983** 35:5

---

**2**

---

**2** 106:15 110:20 111:21  
125:8,13,14 132:13  
**2:04** 215:12  
**20** 5:14 30:11  
**2009** 38:3  
**201** 3:15  
**2011** 35:17  
**2012** 5:6  
**2013** 4:21  
**2014** 4:22 36:3  
**2015** 141:11 142:7,10  
**2016** 1:7 3:13 5:14 6:15  
9:8 73:6 138:18  
139:19 142:13,19  
143:13,18 145:19  
146:21 171:12  
**2017** 22:5 142:15  
144:19  
**2018** 171:13  
**2021** 144:20  
**215** 3:17  
**24-7** 36:13  
**25** 9:22 35:11 37:6  
**25th** 4:12  
**26** 142:10  
**26th** 142:7  
**28** 35:8,10  
**280** 6:8 9:22  
**2nd** 143:9

---

**3**

---

**3** 106:15 107:6 108:13  
109:4 110:17,18  
125:15,16  
**32** 6:4 10:13 11:16  
15:16 16:11,22 49:8  
49:21 51:10,12,13,14

51:15,16 96:2,4,11,13  
104:16 150:18,20  
151:5,10 169:15  
180:14 181:11,16,19  
183:19,21  
**32s** 52:1  
**33** 153:17

---

**4**

---

**4** 3:3 74:8 106:15  
127:14 134:17 136:3  
**412** 201:18  
**46** 122:21  
**4610** 1:10  
**49** 169:6

---

**5**

---

**5** 176:13,20  
**5(e)** 143:19,22  
**5,000** 33:21  
**50** 49:18 50:15 179:7  
**500** 179:11,12  
**513** 82:14 199:18  
201:17 210:7,10  
213:10  
**56(a)** 154:22

---

**6**

---

**6(b)** 190:20 209:5  
**60** 179:7  
**69** 167:20,22

---

**7**

---

**7** 3:7  
**70** 185:22 186:7  
**7th** 143:3

---

**8**

---

**80** 186:7  
**800** 33:13  
**81** 107:10  
**82** 107:21  
**85** 179:5  
**86** 128:10

---

**9**

---

**9** 1:7  
**9:00** 1:10  
**9:19** 4:2

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