

UNITED STATES DEPARTMENT OF DEFENSE

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JUDICIAL PROCEEDINGS PANEL

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MEETING

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WEDNESDAY
JULY 22, 2015

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The Panel met in Conference Room 150,
Judicial Proceedings Panel Conference Room, 875
North Randolph Street, Arlington, Virginia, at
11:04 a.m., Hon. Barbara Jones, Chair, presiding.

PRESENT

Hon. Barbara Jones
Hon. Elizabeth Holtzman
Dean Michelle Anderson
Lisa Friel
Laurie Rose Kepros
COL(R) Lee Schinasi
BGen(R) James Schwenk
Jill Wine-Banks
Maj Gen(R) Margaret Woodward

WITNESSES

Major General Robert Shadley, U.S. Army, Retired
Major General Peggy Combs, U.S. Army
Major General Gina Grosso, U.S. Air Force
Rear Admiral Cari Thomas, U.S. Coast Guard
Brigadier General Austin Renforth, U.S. Marine
Corps
Lieutenant Colonel Michael E. Sayegh, U.S.
Marine Corps

STAFF:

Maria Fried, Designated Federal Official

**Colonel Kyle W. Green, U.S. Air Force - Staff
Director**

**Lieutenant Colonel Glen Hines, U.S. Marine Corps
- JPP Subcommittee Staff Attorney**

**Lieutenant Colonel Kelly L. McGovern, U.S.
Army - Deputy Staff Director**

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

(11:03 a.m.)

1
2
3 MS. FRIED: Good morning everyone. And
4 thank you for all being here and for taking time
5 out of your busy schedules to do the work of the
6 subcommittee. I think we're ready to get
7 started.

8 CHAIR JONES: Thanks Maria.

9 MS. FRIED: Thank you.

10 CHAIR JONES: I think we should get
11 right into the results of each of our working
12 groups. And Colonel Hines and I, Glen and I
13 thought we might as well just go working group by
14 working group. And just for the record, the
15 purpose of the working groups was to actually
16 take two or three issues and each group had three
17 or four members to it and it made it possible to
18 concentrate on specific issues rather than the
19 whole of Article 120.

20 And I know, speaking just for my
21 group, it was a great way to try to discuss and
22 come to some decisions about our issues. So if I

1 could ask you, Liz, to present on Issues, is it
2 just 5 and 8?

3 HON. HOLTZMAN: Yes. But --

4 CHAIR JONES: But they were --

5 HON. HOLTZMAN: -- Laurie was going to
6 present.

7 CHAIR JONES: Okay, that's great.

8 MS. KEPROS: I drew the short straw.

9 Yes, we worked on Issues 5 and 8. And you have
10 in front of you --

11 Col GREEN: Should I hand these out?

12 I'm just going to --

13 MS. KEPROS: You're about to get what
14 is already a past draft of this document. We are
15 continuing to edit this. There is some odd
16 language and just some things that we're --

17 CHAIR JONES: You're not alone.

18 MS. KEPROS: Yes.

19 CHAIR JONES: We've done the same thing
20 in our group. So --

21 MS. KEPROS: So -

22 CHAIR JONES: -- thank you.

1 MS. KEPROS: So it's not a final
2 product. But if you see something that causes
3 confusion about what we're getting at, that
4 feedback is welcome because maybe we can improve
5 the editing as we continue to do it. Our first
6 issue had to do with the term bodily harm. And
7 we have come up with two proposed
8 recommendations. And we are specifically
9 endorsing one of those recommendations over the
10 other one.

11 But as this subcommittee is aware, we
12 have already many times discussed some of the
13 confusion that we think comes from the use of the
14 term bodily harm in that the statutory definition
15 is much more broad than the lay understanding of
16 that term bodily harm. That the words bodily
17 harm, we're concerned, cause potentially Panel
18 Members to require the government to show some
19 sort of additional physical injury that the
20 definition doesn't actually require.

21 So our first proposal is a very, very
22 narrow alteration to the existing statute to try

1 to eliminate that confusing phrase, bodily harm.
2 It literally takes the definition of bodily harm
3 as it currently exists and drops it into
4 (b)(1)(B), which is -- currently says, causing
5 bodily harm. And now it would say causing an
6 offensive touching of another, however slight,
7 including any non-consensual sexual act or non-
8 consensual sexual contact. It just takes exactly
9 what is in the definition, moves it into the
10 statute.

11 Our preferred recommendation, however,
12 is our second proposal. Which breaks down the
13 kinds of behavior currently described in bodily
14 harm into two crimes so that it is clear there is
15 a baseline crime for any kind of non-consensual
16 sexual act and there is a more aggravated version
17 of that crime for a situation where there is a
18 non-consensual sex act involving what we are
19 calling physical harm. We remove the term bodily
20 harm, we use the terminology instead physical
21 harm.

22 That terminology was selected because

1 it already exists in some of the other
2 definitions. It's part of the definition of
3 force. And we have not gotten any commentary
4 from all the people we've heard from thus far
5 that the term physical harm is confusing to
6 anybody.

7 But the clear intent would be to have
8 an aggravated offense for a scenario where
9 somebody was physically injured. That, that is
10 something worse and that, that is something
11 delineated in the statute. We'd have the
12 baseline nonconsent and the aggravated nonconsent
13 plus physical harm and eliminate bodily harm and
14 eliminate the phrase offensive touching in that
15 process.

16 So we don't make even in that change
17 any substantive changes to the scope of the crime
18 from what it currently is. We are just trying to
19 clarify the language so that it is more obvious
20 what is covered or is not by the crime to prevent
21 any potential unjust acquittals from panelists
22 who are looking for bodily harm in addition to

1 nonconsent. So that's kind of the Proposal Two
2 that we are preferring.

3 The reason we have suggested Proposal
4 One as an alternative is we have heard the
5 feedback that there are people who just want to
6 do nothing or almost nothing to change the
7 statute. And that would still cause some
8 opportunities for improvement without changing
9 the scheme.

10 One further benefit that we see to
11 carving out into nonconsent in one place and
12 physical harm in the other is it would make it
13 easy for the President, and we would endorse
14 recommending this, to set a different sentencing
15 cap when the crime is a merely non-consensual
16 crime and not one that involves physical injury.
17 The physical injury crime is currently punishable
18 by a maximum of 30 years and we would suggest the
19 President set a lesser cap for the behavior that
20 is merely non-consensual, but not resulting in
21 physical harm and provides some greater gradation
22 in terms of offenses and the consequences that

1 are following -- that are flowing from that. So
2 that is Issue 5. And I'm looking at my --

3 HON. HOLTZMAN: Yes. Laurie can I just
4 --

5 MS. KEPROS: Yes.

6 HON. HOLTZMAN: -- put a -- add
7 something to that. Just because some of you
8 haven't had a chance to look at it and may be
9 confused. Let's go back to the definition of
10 bodily harm. The term -- which is (g)(3), bodily
11 harm. The term bodily harm means any offensive
12 touching of another, however slight, including
13 any non-consensual sexual act or non-consensual
14 sexual conduct.

15 So the existing law, that definition
16 of bodily harm really has two elements. Any kind
17 of offensive touching or non-consensual sex. Our
18 concern was that the term bodily harm, because
19 that's the term that's read to the jury panel,
20 suggests physical injury of some kind and may
21 confuse Panel Members that non-consensual sex in
22 and of itself is not a crime. Well, we want to

1 make it very clear. It's like cutting out the
2 underbrush.

3 This is not changing the basic
4 concept, which is in the statute now, that a non-
5 consensual sexual act is a crime. All we're
6 doing is separating that out and putting that
7 into a new section, (b)(4). So you have -- if
8 you go back from the definition, which is (g)(3).
9 Look at Article 120. You have: (a) rape; two,
10 sexual assault, which is (b).

11 You -- we would add a fourth -- a new
12 paragraph (4) to (b)(3) -- to (b), which would be
13 the non-consensual sexual act. So we wouldn't be
14 creating anything new. We would just be
15 separating out that non-consensual sexual act,
16 which is already in the statute, and having that
17 as a separate subsection so that Panel Members
18 wouldn't be confused, courts wouldn't be
19 confused, and everybody would understand that
20 there is this baseline crime. Okay.

21 And we think that that's confused
22 because when it's put under the heading of bodily

1 harm, people may say, well, there must be
2 something more than just non-consensual sex. So
3 that was the theory behind our second proposal.
4 Just wanted to make sure that you understood that
5 there was a new section that was involved.

6 Maj Gen WOODWARD: I've got a question
7 about the -- I mean, causing non-consensual
8 physical harm to the other person, under sexual
9 assault. I guess, what is the point in -- I'll
10 be honest with you, the victims that I know, it -
11 --- they would actually prefer to be physically
12 injured often because then it's a more obvious
13 injury. And so I think by us saying that it's
14 more significant if they get a physical injury,
15 that it's not significant. Because the
16 significant injury we've got up in -- under rape.

17 I just -- I think what we're -- when
18 you separate it out and you change the minimum
19 (sic) sentence, you're basically saying that,
20 well, if you're not physically injured, it's not
21 that significant. And I don't know that it's the
22 right thing to do to sit there and say that the

1 trauma that survivors go through needs to be
2 physical to be as significant.

3 MS. KEPROS: I mean, I can speak to
4 that from my point of view. I don't think it's
5 about saying it's not significant. It's still a
6 crime and what we're doing is clarifying that it
7 would still be a crime.

8 I think it is a more egregious crime,
9 and I'm not saying the impact on the victim is
10 more or less, because every victim is different
11 and how someone processes being harmed is
12 different, but I do think we generally recognize
13 that when you inflict a long-term physical injury
14 to somebody --

15 Maj Gen WOODWARD: You're not saying
16 long-term.

17 MS. KEPROS: Well, no. I'm just --

18 Maj Gen WOODWARD: All you're saying --
19 your definition just says --

20 MS. KEPROS: -- giving --

21 Maj Gen WOODWARD: -- physical injury.

22 MS. KEPROS: It does. And I'm just

1 giving that as an example. Like we look at
2 assault crimes in most jurisdictions and say,
3 well, did they break a bone? That makes it a
4 more serious level of offense. Well, did they --
5 I mean, we make those gradations based on level
6 of injury routinely. And so, I don't think it's
7 a matter of saying, it's not serious. It's still
8 serious. We're still --

9 Maj Gen WOODWARD: But you're saying
10 level of injury, physical level of injury is
11 greater than the emotional level of injury. What
12 I think I'm trying to say is, I think if you
13 talked to most victims, that they would say that
14 the emotional injury is higher than the physical
15 one.

16 MS. KEPROS: Okay.

17 Maj Gen WOODWARD: So you are
18 submitting -- by changing that minimum (sic)
19 sentence, you're saying, and I think it's a
20 pretty clear statement, that says, well, it's --
21 it's like telling a wounded warrior who has
22 traumatic brain injury that, that's not

1 significant because we can't see it. Whereas if
2 you've lost a limb, yes, that's much more
3 significant to you. You were more hurt in -- you
4 know what I mean?

5 MS. KEPROS: Can I just --

6 HON. HOLTZMAN: Can I ask a question
7 about this?

8 MS. KEPROS: Yes. Sorry.

9 HON. HOLTZMAN: Kyle, is there a
10 difference in the sentence with regard to rape as
11 opposed to sexual assault?

12 Col GREEN: There is. I mean --

13 HON. HOLTZMAN: What is the difference?

14 Col GREEN: -- (A), (B), (C), and (D)
15 all have different maximum sentences. The
16 maximum sentence under -- it's the same. It's a
17 dishonorable discharge and forfeitures and
18 reduction in grade. Those are all the same. But
19 the confinement is different for each of those.
20 For (A) it's life without parole. For (B) it's a
21 maximum of 30 years. For (C) it's a maximum of
22 20 years. And for (D), abusive sexual contact,

1 it's 7 years.

2 HON. HOLTZMAN: So --

3 DEAN ANDERSON: And it could be
4 anything up to, right?

5 Col GREEN: Right.

6 DEAN ANDERSON: That's not mandatory?

7 HON. HOLTZMAN: There's no minimum.

8 DEAN ANDERSON: So it's anything up to
9 --

10 Col GREEN: Right.

11 DEAN ANDERSON: -- including --

12 Col GREEN: That's the ceiling,
13 correct.

14 HON. HOLTZMAN: So that's the only
15 point I'm making. Is that the statute at present
16 makes a distinction between the sentence,
17 severity of the sentence.

18 Maj Gen WOODWARD: Of grievous bodily
19 harm --

20 HON. HOLTZMAN: Well, not only --

21 Maj Gen WOODWARD: -- versus just --

22 HON. HOLTZMAN: -- that, but --

1 Maj Gen WOODWARD: -- physical.

2 HON. HOLTZMAN: -- administering,
3 without the knowledge of a person, a drug or
4 intoxicant and then raping them. So there is no
5 force. So what I'm saying is that just to help
6 you think it through, because I think it's a very
7 important question that you're -- issue that
8 you're raising.

9 But if you look at all the items, for
10 example, in (A), you might say that, well, should
11 it be the same sentence? Is that as egregious --
12 is the emotional harm -- we're looking at the
13 emotional damage to the victim. Can you really
14 say that the emotional damage is that much
15 greater in that case as opposed to this case?
16 And so I'm just raising that with you.

17 Maj Gen WOODWARD: No. But it's a
18 different level there. But when you just talk
19 about non-consensual physical harm, okay, so if I
20 have a victim who freezes and then the
21 perpetrator doesn't have to do anything and can
22 just basically attack her at will versus another

1 victim who gets a black eye, let's say. Okay.
2 And you're telling those two victims that, yes,
3 the one that got the black eye has a much -- had
4 a much more serious case against her or him
5 versus the other one that froze and had, you know
6 --

7 MS. FRIEL: And I just add that I was
8 struck exactly the same way. Because the kinds
9 of injuries you're talking about when you're
10 talking about not grievous injuries, but this
11 lower level, are going to be black eyes and
12 bruises and, if you're lucky, a vaginal tear to
13 help prove it was non-consensual.

14 Maj Gen WOODWARD: That's right.

15 MS. FRIEL: You're talking about a
16 whole group of not significant injuries, if you
17 will. And I'm struck the same way that, that
18 doesn't make that rape that much more or even
19 more serious than the person who gets raped with
20 no bruises on their arms or something.

21 And I can't say I'm familiar all the
22 other 50 states, I'm not ---- or what the feds

1 do. I know New York does not make a gradation as
2 a more serious sexual assault if you have lower
3 level physical injury, these kinds of common
4 things if we have any physical injury. And so
5 I'm struck the same way.

6 Now, yet I totally agree the bodily
7 harm definition is confusing. It can have the
8 confusing effect and that it's helpful to word it
9 in a way that makes it very clear that you don't
10 need any injury to fit within sexual assault. I
11 just don't think we need the two gradations. I
12 think we just need to make it clear that you
13 don't need any kind of physical harm to fit in
14 sexual assault.

15 MS. WINE-BANKS: So you would add the
16 non-consensual sex as a crime under (B). Would
17 you take out (B) altogether under (b)(1)(B)?

18 MS. FRIEL: I think I might go change
19 the word bodily harm and make it clearer that --
20 what we want to say.

21 MS. WINE-BANKS: That any --

22 MS. FRIEL: That it doesn't require

1 physical injury.

2 DEAN ANDERSON: Or just --

3 MS. FRIEL: Whether you --

4 DEAN ANDERSON: -- non-consensual sex.

5 MS. WINE-BANKS: Yes. Non -- yes.

6 DEAN ANDERSON: Right.

7 MS. WINE-BANKS: Do what they do, which
8 is just to say non-consensual sex is a crime.

9 Maj Gen WOODWARD: Because it kinds of
10 gets to the whole resistance --

11 MS. WINE-BANKS: Would you add --

12 Maj Gen WOODWARD: -- thing.

13 MS. WINE-BANKS: -- grievous and other
14 bodily harm above?

15 DEAN ANDERSON: Yes.

16 MS. WINE-BANKS: So if there was any
17 harm at all?

18 MS. FRIEL: I think they have grievous
19 and --

20 MS. WINE-BANKS: Grievous is in rape?

21 MS. FRIEL: -- what is in --

22 HON. HOLTZMAN: Right.

1 MS. WINE-BANKS: So if it's not
2 grievous, but if you have a black eye or
3 bruising?

4 MS. FRIEL: I would say that's just a
5 version of non-consensual --

6 MS. WINE-BANKS: Okay.

7 MS. FRIEL: -- sexual contact.

8 HON. HOLTZMAN: But right now, you have
9 -- we tried not to make substantive changes here.
10 Right now, in (B), you have causing bodily harm
11 to that other person.

12 MS. FRIEL: Right.

13 HON. HOLTZMAN: That is a crime. So
14 we're trying to preserve that idea of a physical
15 injury --

16 Maj Gen WOODWARD: But they -- but
17 we've been briefed a million times that the
18 bodily harm that they're talking about is --

19 HON. HOLTZMAN: Is exactly the rape.

20 Maj Gen WOODWARD: -- the sexual --

21 DEAN ANDERSON: It's just non-
22 consensual sex.

1 Maj Gen WOODWARD: -- contact.

2 HON. HOLTZMAN: No, that's not - -

3 DEAN ANDERSON: That's what the
4 definition says.

5 HON. HOLTZMAN: That's not the problem.

6 No. No. I think -- sorry. But that's the
7 problem. The spectrum of crimes included in
8 bodily harm includes everything from physical
9 injury all the way to non-consensual sex. It
10 includes a situation where you break somebody's
11 bone, because a breaking of a bone is not
12 grievous bodily harm.

13 Maj Gen WOODWARD: Yes, it is.

14 HON. HOLTZMAN: All the way down to --
15 no, it says dislocating or fracture -- doesn't it
16 say that --

17 DEAN ANDERSON: Fractured bones.

18 Maj Gen WOODWARD: Yes.

19 HON. HOLTZMAN: Fractured. Is break
20 included in that?

21 Maj Gen WOODWARD: Yes.

22 DEAN ANDERSON: Yes. Fractured,

1 dislocating --

2 MS. FRIEL: Even deep cuts.

3 HON. HOLTZMAN: Deep cuts. But maybe
4 not -- I mean, all I'm saying is that --

5 DEAN ANDERSON: Or other severe bodily
6 injuries.

7 HON. HOLTZMAN: All I'm saying is that
8 the present statute seems to ---- it implies that
9 there should be some crime that involves physical
10 injury. Because if you look at the definition --
11 you're shaking your head, but if you look at the
12 --

13 Maj Gen WOODWARD: I disagree
14 completely.

15 HON. HOLTZMAN: -- definitions, they --

16 Maj Gen WOODWARD: I think what you're
17 saying is --

18 HON. HOLTZMAN: -- go from the top to
19 the bottom.

20 Maj Gen WOODWARD: The words - -

21 MS. FRIEL: Because just hearing the
22 words bodily harm --

1 HON. HOLTZMAN: Look at their
2 definitions.

3 MS. FRIEL: -- and I agree imply
4 injury. The words with -- if you don't flip to
5 the definition, if you just look at the words
6 bodily harm, it implies physical injury. And,
7 yes, if you read the definition and understand
8 it, it will clear that up.

9 But what they're worried about is just
10 by even using bodily harm, so that's why your
11 first proposal, don't use the words bodily harm
12 and put the words right in there what you mean by
13 that and make it clear that it doesn't require
14 any injury. That would solve the problem.

15 DEAN ANDERSON: In the --

16 Maj Gen WOODWARD: But their
17 definition, ma'am, their definition of bodily
18 harm disputes exactly what you're saying. I
19 think their definition of bodily harm clearly
20 states that they mean that it's not physical --

21 HON. HOLTZMAN: No. They mean that it
22 can be various things. I'm trying to say it's

1 along a spectrum. All the things included under
2 the term bodily harm goes from anything less than
3 grievous bodily injury, which means a physical
4 harm to the person, all the way down to non-
5 consensual sex. So it's a spectrum that's
6 covered by this.

7 So what we thought -- and of course
8 obviously people can disagree with that. But
9 what we thought was since you have this whole
10 spectrum covered, that by having the whole
11 spectrum, it was confusing when you were dealing
12 just with the problem of non-consensual sex. The
13 person who's frozen, the person who for various
14 reasons can't respond, emotionally for -- that
15 has to be -- it has to be very clear in the
16 statute that there's nothing more that's required
17 than that. That should be a baseline.

18 That's why we want -- we thought --
19 yes, the quick and political fix doesn't really -
20 - may still not be good enough to separate out
21 that case where you have just non-consensual sex.
22 But we wanted to preserve the implication that's

1 in this existing statute of bodily harm. That
2 implication is that there's some physical injury.
3 And if you take that out, then you have no
4 physical injury section. That's what we're
5 saying.

6 So we tried to break it into two to
7 preserve the existing implication of covering
8 some physical harm and then also making it very
9 clear that you just were covering non-consensual
10 sex. And that we tried to clarify that those two
11 things were covered in the existing statute.
12 That's -- maybe I haven't made clear that was our
13 objective. Maybe somebody else can answer it
14 better than I have.

15 MS. WINE-BANKS: I'm more in agreement,
16 I think with Maggie, that the definition --
17 because at the lowest level, the definition
18 includes just any sexual act --

19 HON. HOLTZMAN: Non-consensual.

20 MS. WINE-BANKS: -- any non-consensual
21 sexual act --

22 MS. FRIEL: Or contact.

1 MS. WINE-BANKS: -- or contact, you
2 don't need to add any other additional element of
3 proof. And because the definition almost becomes
4 tautological, it says causes bodily harm and then
5 it says but the sex act is -- or the sexual
6 contact is the bodily harm, that if you just go
7 to your proposal of saying commits non-consensual
8 sexual act instead of saying physical harm,
9 you've covered every possible case and eliminated
10 the confusion that arises.

11 And our group discussed it in the
12 context of our definitions that, that was causing
13 a problem that would be solved by having non-
14 consensual sex act or contact as the criminal
15 statute. So I think I agree with you that I
16 don't see a meaning to a definition that says
17 anything -- okay, grievous, clear. And that is a
18 higher elevation of crime.

19 The minimal injury necessary is just
20 having had the sexual act or contact. So why add
21 any other -- you have to have bruises, you have
22 to have a black eye? Does that add anything?

1 Because if you don't resist, you're probably not
2 going to get the black eye. That raises the
3 resistance issue.

4 DEAN ANDERSON: That's the one that we
5 don't --

6 Maj Gen WOODWARD: That's what I --
7 that's why it's --

8 DEAN ANDERSON: Yes.

9 Maj Gen WOODWARD: -- really strikes me
10 as --

11 DEAN ANDERSON: It's interesting how
12 these are tied together.

13 MS. WINE-BANKS: Well, that was an
14 issue I raised in the beginning was each of these
15 things is going to have an impact on the other.

16 MS. KEPROS: I just don't want to speak
17 out of turn. I mean I guess, I understand the
18 concerns about the victim's experience and what's
19 a worse crime from that point of view. The
20 challenge is that I think when we are trying to
21 describe a penal scheme, what we're talking about
22 is what evidence a prosecutor needs to prove

1 something beyond a reasonable doubt.

2 So it's really not at this stage that,
3 that harm to the victim is going to come into
4 consideration in terms of what the appropriate
5 sentence is or anything like that. This is about
6 what are the elements of proof that describe the
7 crime. And certainly if you've got evidence that
8 there is a physical injury to someone, I think
9 that's something that's relevant to have the
10 prosecutor prove up as part of their case.

11 MS. WINE-BANKS: But didn't you say --

12 Maj Gen WOODWARD: But isn't there a
13 different sentence, minimum sentences for the
14 thing? That clearly lays out that there's a
15 different level of --

16 HON. HOLTZMAN: Can we just not focus
17 on the sentences and look at the elements of the
18 crime? Because I think that we're confusing two
19 things together.

20 DEAN ANDERSON: But I thought that you
21 -- I'm sorry. I thought that, that was part of
22 Proposal Two. That you wanted to separate out

1 two --

2 HON. HOLTZMAN: Well, that's part but

3 --

4 DEAN ANDERSON: -- crimes with
5 different levels of seriousness.

6 HON. HOLTZMAN: But that doesn't have
7 to be the -- you can break them out and then you
8 can deal with the sentencing. You don't have to
9 -- the sentencing is only part of the proposal.
10 Okay? It's not an integral part. You can take
11 Option A or Option B or Option A plus B.

12 DEAN ANDERSON: But the --

13 HON. HOLTZMAN: So let's just, I think

14 --

15 DEAN ANDERSON: What's the benefit --

16 HON. HOLTZMAN: -- take the sentencing
17 out of it.

18 DEAN ANDERSON: -- of breaking them
19 out? I guess, if I can ask that.

20 HON. HOLTZMAN: Okay. The benefit of
21 breaking it out is probably more political than
22 otherwise. One benefit of breaking it out is

1 that of course we have -- make it very clear that
2 the non-consensual sex act is a crime under this
3 statute. Okay. That's a very important benefit.

4 The second benefit is, Congress is
5 going to say, we have causing bodily harm over
6 here. So what are you doing with this physical
7 injury part? Why have you eliminated the
8 physical injury? So we say, well, we haven't
9 eliminated it, it's there. Now, theoretically,
10 is it necessary? No.

11 But if you look at dealing with --
12 what Congress is going to say, well -- or what
13 Laurie just said about a prosecutor being in a
14 position to get a higher grade of a crime or a
15 different grade of a crime by proving the injury.
16 That's the only reason to have it in there. Is
17 it theoretically, logically, or any other reason
18 necessary? I would say, no.

19 I'm just saying that it makes it
20 clearer and it may help in terms of -- because
21 Congress has to pass a statute here. And if
22 Congress says, well what happened to physical

1 injury, what's your -- what's our answer? So our
2 answer is, we put it in there. Now, you don't
3 have to have a lesser penalty or a greater
4 penalty for that than non-consensual sex. That's
5 a different, totally different point.

6 MS. WINE-BANKS: I think adding the
7 non-consensual sex is really important because
8 that is unclear that, that's included except if
9 you look at the definition. The definition says
10 that, that is what bodily harm means. So it is
11 included, but it's confusing. So making that
12 clearer makes sense.

13 But because you have to have that
14 before you can have any sexual charge, adding a
15 requirement of physical injury seems unnecessary.
16 If you think for Congressional relations and
17 political reasons it should be there in addition,
18 I guess I could live with that.

19 It just seems -- if we are going to
20 really deal with the issue of should we really be
21 making more changes -- because our group came up
22 with the same thing of, well, if we really want

1 to not make a major change, this is what we'd
2 recommend, but we really think you should do the
3 following, which would be a major change. So if
4 we're going to end up making major changes in any
5 one part, we may as well make the change that we
6 think is going to serve in the future much better
7 for prosecutions under this statute.

8 BGen SCHWENK: Another way to look at
9 it is -- on the physical harm is, when you have
10 physical harm in the statute and then you have
11 non-consensual sexual act in the statute, two
12 different places, it emphasizes the fact that
13 that non-consensual sexual harm does not need to
14 have any physical harm.

15 MS. WINE-BANKS: Right. Exactly.

16 BGen SCHWENK: That they're two
17 separate things. When you don't have it in there
18 and you just have imported it, some people are
19 going to -- people, these witnesses, can come up
20 with all sorts of confusion, but there's less
21 confusion. So that's one thought.

22 MS. WINE-BANKS: Yes.

1 BGen SCHWENK: The other thought is
2 that when you talk to victims and victims sit
3 there and talk about their experiences, if a
4 victim has some power trip idiot that beats the
5 heck out of them for an hour, but doesn't ever
6 get it up to grievous bodily harm because they
7 were using their fists and it never got there,
8 and there's no place for that victim to go but
9 the same statute, the same section of the statute
10 as somebody who didn't get injured beyond
11 emotional and whatever physical trauma there was
12 at the act itself --

13 DEAN ANDERSON: But General, can't you
14 prosecute for assault as well?

15 BGen SCHWENK: You could. But I'm
16 saying within the sexual assault, since we've
17 already decided as a matter of policy that within
18 this rape and sexual assault statute, we're going
19 to graduate things based on severity of injury,
20 hence the grievous bodily harm and death,
21 otherwise you wouldn't need that, this gives an
22 opportunity for there to be a charge that

1 reflects the severity of the injury that's not up
2 to grievous bodily harm but is significant in the
3 minds of anybody that's ever been beaten up.

4 Maj Gen WOODWARD: Well, that kind of
5 negates us trying to take out that you don't need
6 to resist for -- because any time you say that
7 it's more significant if they get the -- get
8 even, you know, physical, non-consensual physical
9 harm, then you're basically saying that it makes
10 a difference if you resist or not.

11 BGen SCHWENK: No. I mean, I think
12 what I'm saying is at the baseline --

13 Maj Gen WOODWARD: If you grade it.

14 BGen SCHWENK: -- the new one we have,
15 non-consensual sexual act, has its own level of
16 trauma that comes with it. That same level of
17 trauma is going to be present at all the other
18 higher up sexual acts that occur that are on this
19 sheet of offenses. And all we're doing is
20 recognizing -- the whole discussion is what do
21 you want to recognize as a specific type of
22 sexual assault or rape if you go up to (A)?

1 And our working group was just looking
2 at the fact that, as Liz said, already
3 encompassed within the bodily harm was bodily
4 injury, physical harm, beneath grievous bodily
5 harm, all the way down to just the act itself.
6 And so we tried to recapture that, to emphasize,
7 one, that there -- you don't need physical harm.
8 That's up here. This non-consensual sex act is
9 just that. That's all you need. And, two, to
10 give prosecutors the opportunity to, in a case
11 that is aggravated, to charge it with recognition
12 of that aggravating factor, which is somebody who
13 got beat up badly.

14 MS. FRIEL: And I think we totally
15 understand. I think there are just some of us
16 that don't think it's a -- basically it's an
17 aggravating factor in a rape scenario. That in
18 an assault scenario it is, but in a rape scenario
19 it's not. And we're in fear of the harm that it
20 does by suggesting that, that's more serious that
21 you ended up with a black eye or some bruises or
22 something like that.

1 HON. HOLTZMAN: But it's not more
2 serious. If it's part of (B), (B) has the -- I
3 mean, you could put it in its whole separate
4 section. But here you have an existing statute -
5 - let me see if I can conceptualize it again.
6 Make it simpler.

7 You have an existing statute that has
8 physical harm in it and consensual sex. We think
9 that, that's confusing when you deal with -- I
10 mean, any non-consensual sex. We think that,
11 that's confusing in the prosecution of the non-
12 consensual sex. Okay? So we want to separate
13 those two elements. We do not want to eliminate,
14 so we separated them into two. We have the
15 physical harm part that's existing in the
16 statute.

17 DEAN ANDERSON: See, I don't see ---

18 HON. HOLTZMAN: And we have the non-
19 consensual part that's in the statute now. Right
20 now. We did that because -- also -- so we've
21 done that. We haven't added any new concept. We
22 have not added any new concept to the statute.

1 The statute right now includes any offensive
2 touching of another. Whether that's a beating or
3 whether it's a touching. Okay?

4 So we haven't changed that. We
5 haven't changed anything by separating out the
6 physical injury part or the physical harm or the
7 offensive touching from the non-consensual sex.
8 So we have not changed the substance of this.
9 But we have retained the concept, both concepts.

10 We have not minimized the concept of
11 non-consensual sex because it is still under
12 paragraph (B), which is sexual assault. Under
13 sexual -- first you have rape, that has five
14 different subsections. Then you have sexual
15 assault, which is a lesser crime than rape.
16 Under sexual assault, we have the bodily harm
17 now. We've broken that into two elements. Both
18 of those elements are under sexual assault.

19 We have not minimized the crime. We
20 have not reduced the crime of whether it's non-
21 consensual sex or the physical harm. They're
22 both in the same place. We just put them in two

1 separate sections. That's what we've done. Try
2 to -- that's really --

3 MS. FRIEL: And I just think the point
4 is it's unnecessary and can cause some other
5 unintended problems. That's our point. If we're
6 saying that within that section of what's sexual
7 assault, all you really need is non-consensual
8 sex. You don't need any kind of injury at all.
9 Then why have a subsection that talks about
10 injury?

11 HON. HOLTZMAN: Because you have it
12 existing. That's the point.

13 Maj Gen WOODWARD: But it's going to
14 exist as non-consensual.

15 HON. HOLTZMAN: Yes. But right now --

16 Maj Gen WOODWARD: If you read the
17 definition --

18 HON. HOLTZMAN: Except go back to the
19 definition. The definition has two elements in
20 it. Not just non-consensual sex, it says any
21 offensive touching. So if you just have the --

22 DEAN ANDERSON: But non-consensual sex

1 is part of that, I think it's -- because it's
2 included.

3 HON. HOLTZMAN: Right. It is -- no,
4 it's two separate --

5 DEAN ANDERSON: Where's the part that
6 says --

7 HON. HOLTZMAN: Let me read it to you.
8 Bodily harm means -- go back to (g)(3).

9 DEAN ANDERSON: Right.

10 HON. HOLTZMAN: Bodily harm means,
11 okay? One element of bodily harm, any offensive
12 touching. That could be as General Schwenk said
13 somebody punching somebody else. That is
14 included in that --

15 Maj Gen WOODWARD: It could also be me
16 -- sorry, Michelle ---

17 DEAN ANDERSON: That's okay.

18 Maj Gen WOODWARD: -- but it could be
19 me patting you on the butt for -- so that has no
20 physical --

21 HON. HOLTZMAN: As part -- right.
22 That's right.

1 Maj Gen WOODWARD: -- harm.

2 HON. HOLTZMAN: But it could have. I'm
3 trying to say that this includes physical harm.
4 It also includes nonphysical harm, namely the
5 non-consensual sex. I think what we've tried to
6 do is preserve both sides of that. What you're
7 suggesting is we don't need to include the
8 physical harm even though that presently is in
9 the statute. And my objection to that is that
10 Congress is going to say, why have you changed
11 the law? And our --

12 Maj Gen WOODWARD: We don't --

13 HON. HOLTZMAN: -- answer to that is we
14 don't want to --

15 Maj Gen WOODWARD: -- see it in this
16 definition. That's the big --

17 HON. HOLTZMAN: Okay. But the
18 definition --

19 Maj Gen WOODWARD: -- complication
20 here.

21 HON. HOLTZMAN: But the definition is
22 -- and you don't have to trust me, I don't want

1 you to trust me. Any offensive touching. That
2 means a punch in the face. That means a punch in
3 the face.

4 MS. FRIEL: I mean --

5 HON. HOLTZMAN: I'm not saying the
6 least. I'm talking about the most. Okay?

7 Maj Gen WOODWARD: Okay. Then that
8 could be the non-consensual sexual contact.

9 HON. HOLTZMAN: Right. But the statute
10 includes more than non-consensual sex. That's
11 all I'm saying. The definition now includes (A)
12 and (B). We want to include both (A) and (B).
13 That's -- I don't know how I could be clearer
14 about that.

15 DEAN ANDERSON: So following this (A)
16 and (B) line, it seems to me that what the
17 statute clearly does is say that -- is define
18 bodily harm as (B). And then a subsection of (a)
19 is non-consensual sex or sexual contact. Right?
20 Because the --

21 BGen SCHWENK: Right.

22 DEAN ANDERSON: -- broad --

1 BGen SCHWENK: And that's the --

2 DEAN ANDERSON: Right.

3 BGen SCHWENK: -- confusion.

4 DEAN ANDERSON: Right.

5 BGen SCHWENK: Is whether it really is
6 or not.

7 DEAN ANDERSON: And so to the extent
8 that we want to do no harm to change the statute
9 -- I don't mean to use the word harm.

10 (Laughter.)

11 DEAN ANDERSON: To the extent that we
12 want to change the statute the least, the easiest
13 way to do that is to remove the word bodily harm
14 and take the definition of bodily harm and
15 include it in (b)(1)(B). Right? Because then
16 that's not changing the implication that it is
17 any offensive touching, however slight, including
18 non-consensual sex. That's your Proposal One, I
19 take it.

20 BGen SCHWENK: That's Proposal One --

21 DEAN ANDERSON: Is that right?

22 BGen SCHWENK: -- right.

1 DEAN ANDERSON: That's Proposal One.

2 HON. HOLTZMAN: Yes.

3 DEAN ANDERSON: Okay.

4 BGen SCHWENK: And that addresses the

5 --

6 DEAN ANDERSON: Just to understand the
7 difference between the two.

8 BGen SCHWENK: And that addresses the
9 concern that bodily harm --

10 DEAN ANDERSON: The words.

11 BGen SCHWENK: -- is a problem ---

12 DEAN ANDERSON: At the -- right.

13 BGen SCHWENK: -- as a concept. Right.

14 DEAN ANDERSON: So there are two --

15 BGen SCHWENK: But it doesn't --

16 DEAN ANDERSON: -- theories -- go
17 ahead. Go ahead.

18 BGen SCHWENK: Right. But it doesn't
19 address the other problem which the witnesses
20 talked about, about the confusion of whether the
21 sex act alone, the including non-consensual
22 sexual act alone is enough or whether it needs

1 more. And so the way to do that was, split out
2 non-consensual sexual act, whether Congress wants
3 us to or not, split it out and make it what we
4 made (4). So it stands by itself and it's clear
5 to everybody and his brother it stands by itself.

6 DEAN ANDERSON: So --

7 Maj Gen WOODWARD: So are you saying
8 commits a sex act upon another person by causing
9 an offensive touching of another, however slight,
10 including any non-consensual sex act or non-
11 consensual sexual contact, that's not clear?

12 That --

13 BGen SCHWENK: That's what the --

14 Maj Gen WOODWARD: -- non-consensual
15 contact --

16 BGen SCHWENK: -- witnesses said.

17 Because that's the -- we had witnesses come in
18 and tell us all that --

19 Maj Gen WOODWARD: Because it had
20 bodily harm.

21 BGen SCHWENK: -- that wasn't clear to
22 them whether the -- because of the awkward

1 wording by causing the sex act, the sex act alone
2 was sufficient. And so the way to make that
3 easier is to put it out separately. Which is
4 what we did in (b)(4). So Proposal One was to
5 take care of the problem of the use of the term
6 bodily harm. And Proposal Two in part was to
7 clarify that the non-consensual sexual act alone
8 is sufficient for an offense.

9 MS. WINE-BANKS: I think General
10 Woodward just made a very good point though,
11 which is that the confusion came from the statute
12 saying it was causing bodily harm and then you
13 had to refer to the definition which actually
14 doesn't include --

15 Maj Gen WOODWARD: Right.

16 MS. WINE-BANKS: -- any harm beyond the
17 sexual contact. So if you remove the words
18 causing bodily harm and substitute, as you did in
19 your first proposal --

20 BGen SCHWENK: Right.

21 MS. WINE-BANKS: -- causing --

22 BGen SCHWENK: An offensive touching.

1 MS. WINE-BANKS: -- an offensive
2 touching or a nonconsent -- including a non-
3 consensual, then it's clear that the non-
4 consensual is in and of itself --

5 Maj Gen WOODWARD: Sufficient.

6 MS. WINE-BANKS: -- sufficient. So
7 that you wouldn't need to go to the more
8 disruptive of the current statutory plan.

9 BGen SCHWENK: Well, I think we all
10 thought it was sufficient and clear, but to the
11 witnesses that fact that it says, commits a sex
12 act upon another person by an offensive touching
13 including a sex act, they wonder whether you need
14 another sex act or sexual contact. Because --

15 MS. WINE-BANKS: So maybe just change
16 --

17 BGen SCHWENK: -- they have sex act
18 twice in the same --

19 MS. WINE-BANKS: Yes.

20 BGen SCHWENK: -- offense. And so
21 that's what people said caused confusion. So we
22 -- just incorporate -- getting rid of the term

1 bodily harm and incorporating the definition
2 directly into (b)(1)(B) doesn't address that
3 confusion.

4 DEAN ANDERSON: So would --

5 BGen SCHWENK: Now we all may
6 collectively say those people are crazy if they
7 can't read that into the -- but it isn't that
8 clear. When --

9 DEAN ANDERSON: So --

10 BGen SCHWENK: -- you look at (b), our
11 (b)(4), it couldn't be clearer.

12 MS. FRIEL: Why don't you just say --

13 BGen SCHWENK: We think it couldn't be
14 clearer.

15 MS. FRIEL: -- sexual act and (B) just
16 says without consent. Right?

17 BGen SCHWENK: Yes. So for those of
18 you --

19 MS. FRIEL: It's as simple as change
20 (B) to say without consent. Right? Change it
21 from bodily harm --

22 DEAN ANDERSON: From bodily harm to

1 without consent.

2 MS. FRIEL: If the point is we want to
3 make sure it's clear that it's non-consensual,
4 just say without consent.

5 DEAN ANDERSON: And so the commits
6 assault on another person without -- well, the
7 point is --

8 MS. FRIEL: Without consent.

9 HON. HOLTZMAN: One of the reason we
10 use non-consensual act was we tried to keep as
11 much of the language, existing language that the
12 statute has as possible. So that's why we didn't
13 say without consent. We just -- non-consensual
14 act. So we just -- that's the rationale for
15 that. We did not want to change to the -- to the
16 maximum extent possible, we did not want to
17 change the existing statutory language. That's
18 all. Because we didn't want -- and so that's the
19 reason for it.

20 BGen SCHWENK: I mean, you can get rid
21 of (b)(1)(B). If you don't like the idea of the
22 physical harm, right? Just get rid of (b)(1)(B)

1 and then keep our (b)(4) as (4) so that the
2 (b)(1) offenses are all the ones except the
3 bodily harm, which we now kill. And then we add
4 (b)(4) which is to incorporate that very clearly
5 a non-consensual --

6 Maj Gen WOODWARD: Non-consensual
7 sexual act.

8 BGen SCHWENK: -- sexual act. And now
9 what -- so then the two different points of view
10 are --

11 Maj Gen WOODWARD: Yes.

12 BGen SCHWENK: -- is it important
13 enough to cull out bodily injury physical harm
14 beneath grievous bodily harm from a non-
15 consensual sex act or isn't it? Is it better,
16 unintentional consequences or whatever, to keep
17 it all together?

18 If you keep it all together, then you
19 I think at this point probably kill (b)(1)(B),
20 that bodily harm, just kill it. And put our (4)
21 in. And if you think that's it worth keeping the
22 physical harm as an additional ability to charge,

1 then you do what the -- our Proposal Two
2 completely says by not eliminating (b)(1)(B), but
3 just changing it into physical harm.

4 Maj Gen WOODWARD: So Proposal Three.
5 I like your Proposal Three, Jim.

6 BGen SCHWENK: Okay. Well, I'm just
7 saying that, that's where it seems some of you
8 are going.

9 HON. HOLTZMAN: The problem though is
10 just -- right. I can't understand the objection.
11 Is the objection that you don't want to make
12 changes in the statute? Or is the objection of
13 some other substance? Because if you don't want
14 to make any changes in the statute, that I can
15 understand.

16 But I go back to the point that
17 somebody's going to say, okay, you have this --
18 the present statute does include this element of
19 physical injury. And if Congress is going to say
20 to us, well, how come you changed it just to
21 include the act of non-consensual sex? But you
22 didn't include the physical injury part of it.

1 Why did you leave that out? What's our answer to
2 that?

3 DEAN ANDERSON: The statute never
4 included it. The definition of bodily harm
5 doesn't require --

6 HON. HOLTZMAN: Doesn't --

7 Maj Gen WOODWARD: You're using the
8 exact same verbiage.

9 HON. HOLTZMAN: I didn't say it
10 required. I --

11 DEAN ANDERSON: Okay. But we're just
12 using the exact same verbiage to the extent --

13 HON. HOLTZMAN: Well, wait a minute.

14 DEAN ANDERSON: -- that Congress wants
15 you to --

16 HON. HOLTZMAN: Okay. But I'm making
17 a different point. That's not my question. My
18 question is, if you agree that this should be a
19 separate section on non-consensual sex as a
20 (b)(4), if you say that, that that's a good idea
21 because it makes it totally clear to judges, to
22 prosecutors, to the members of the jury that non-

1 consensual sex is a crime in and of itself, okay.

2 So let's assume everybody agrees with
3 that. I don't know if you do. But if you get to
4 that point, okay, then the question is, somebody
5 is going to say to you, the existing statute also
6 includes some kind of physical injury, not a
7 requirement, but you could prosecute that, why
8 did you take it out? That's all.

9 Maj Gen WOODWARD: The --

10 HON. HOLTZMAN: So what's the answer to
11 that?

12 Maj Gen WOODWARD: The proposal that I
13 -- as I see it, that Jim just said is what you're
14 really in essence doing is you're moving
15 (b)(1)(B) down to (b)(1) or (b)(4) and you're
16 using the exact same verbiage that is literally
17 in (b)(1)(B) in (b)(4). If you take the
18 definition of bodily harm and just put the
19 definition in there instead of the words bodily
20 harm --

21 HON. HOLTZMAN: No.

22 Maj Gen WOODWARD: -- it's the same

1 word.

2 HON. HOLTZMAN: That's not -- then we
3 haven't been clear. What we're doing is -- what
4 the Proposal Two does is two things. One thing
5 is (b)(4), which just takes the part of the -- it
6 doesn't take the whole definition. But it just
7 takes part of the definition --

8 Maj Gen WOODWARD: But Proposal Three
9 is to take the whole definition and put it in
10 there as --

11 BGen SCHWENK: Well, that's Proposal
12 One.

13 HON. HOLTZMAN: That's Proposal One.
14 No, no, no.

15 Maj Gen WOODWARD: Proposal One? Okay.

16 BGen SCHWENK: Proposal One puts the
17 whole definition in there.

18 MS. FRIEL: Just replaces bodily harm
19 with what is meant by it.

20 BGen SCHWENK: Yes. The last option I
21 presented was, kill (b)(1)(B).

22 Maj Gen WOODWARD: Right. And put it

1 in (b)(4).

2 BGen SCHWENK: And -- no. And then in
3 (4), put in --

4 Maj Gen WOODWARD: Add in --

5 BGen SCHWENK: -- non-consensual sexual
6 act.

7 Maj Gen WOODWARD: Yes. Then why don't
8 you just put (b)(4) as the definition of bodily
9 harm.

10 HON. HOLTZMAN: Yes. That's Proposal
11 One.

12 Maj Gen WOODWARD: And then you cover
13 everything else.

14 HON. HOLTZMAN: No. But the point I'm
15 making is, let's go -- I'm trying to get -- to
16 break this down in a different way. If you agree
17 that this should be a separate, totally separate
18 crime for non-consensual sex with no other
19 language in it. No obfuscation, nothing else.

20 So we have -- so if we just have -- if
21 everybody agrees that we should have just a
22 section that says sexual assaults, person subject

1 to that section commits a sexual act upon another
2 person by engaging in an act of non-consensual
3 sex. I don't have the language in front of me.
4 If you think there should be a separate section
5 like that, nothing else, no other language, just
6 this is it. Non-consensual sex, that's a crime.
7 That's sexual assault.

8 Then the question comes up, okay, what
9 do we do with the rest of the (b)(1)(B) language?
10 The (b)(1)(B) language has two parts to it. One
11 is the non-consensual sex and the other is the
12 offensive touching. And Congress is going to say
13 or somebody's going to say to us, okay, we
14 understand that you took out the non-consensual
15 sex part and made that a separate crime. We got
16 that. Because that's the law now, but you're
17 emphasizing that, that should be very clear. Why
18 didn't you do something about the physical
19 injury? Why did you drop that?

20 MS. FRIEL: Okay. So, here's the
21 answer.

22 HON. HOLTZMAN: So then --

1 MS. FRIEL: Number one --

2 HON. HOLTZMAN: Okay.

3 MS. FRIEL: What we -- you didn't drop
4 physical injury, you dropped offensive touching.
5 It doesn't say physical injury.

6 HON. HOLTZMAN: I understand that, but
7 --

8 MS. FRIEL: And conceptually --

9 HON. HOLTZMAN: Okay.

10 MS. FRIEL: My answer back to Congress
11 is it never said physical injury and you're
12 wrong. What we did drop is offensive touching.
13 But it never made sense there anyway. The
14 offensive touching part is part of your
15 definitions that we just changed of sexual --

16 Maj Gen WOODWARD: The sexual contact.

17 MS. FRIEL: -- contact. What kinds of
18 contacts are offensive are defined under sexual -
19 -

20 Maj Gen WOODWARD: Right.

21 MS. FRIEL: -- contact. You don't need
22 it. You don't need it. It didn't make any

1 sense. That's part of what's so confusing about
2 it. That we decided the definition of bodily
3 harm didn't make any sense because it's a piece
4 of sexual contact and it's a piece of nonconsent.
5 And we fixed it by saying here's nonconsent,
6 that's a crime. And now, if you want to talk
7 about what's an offensive touching, look at the
8 definition of sexual contact.

9 HON. HOLTZMAN: Yes, but sexual contact
10 is not sexual act. Is it?

11 MS. FRIEL: Here, we have --

12 MS. WINE-BANKS: Yes.

13 MS. FRIEL: We have worked on --

14 MS. WINE-BANKS: Yes.

15 MS. FRIEL: -- and fixed up the
16 definitions of sexual contact and sexual --

17 MS. WINE-BANKS: And sexual act.

18 MS. FRIEL: -- act. Both of them.

19 MS. WINE-BANKS: They're two different
20 crimes. Or two different --

21 HON. HOLTZMAN: Well, okay. I still

22 --

1 MS. FRIEL: I don't think you need any
2 more offensive touching within the sex crime
3 Article 120. Then when you see how --

4 DEAN ANDERSON: Because it's all --

5 MS. FRIEL: -- they're all encompassed
6 in these definitions of contact --

7 DEAN ANDERSON: Yes. But that's my --

8 MS. FRIEL: -- provided it's non-
9 consensual.

10 DEAN ANDERSON: That's all it says?

11 Okay.

12 MS. FRIEL: All these acts require
13 nonconsent.

14 HON. HOLTZMAN: But you've done some
15 work on the definitional side --

16 MS. FRIEL: Right.

17 HON. HOLTZMAN: -- but we're looking --
18 and so you're coming at this, you're saying well,
19 we've redefined whatever and so we've got it
20 covered. All I'm saying is that Congress has got
21 it covered right here when it says causing bodily
22 harm to that other person. And somebody's going

1 to say, why did you eliminate that concept? Even
2 though the bodily harm is defined in a way that
3 encompasses a whole spectrum --

4 MS. FRIEL: And I want to say the
5 answer --

6 HON. HOLTZMAN: -- why have you
7 eliminated that?

8 MS. FRIEL: -- is it's covered
9 somewhere else. We didn't eliminate it, it's
10 covered in the definition of sex -- it was always
11 covered in the definition of sexual contact. You
12 initially wrote -- not you, but Congress, you
13 initially wrote a confusing statute with this
14 idea of bodily harm. It was unnecessary. It's
15 confusing. We don't need it. Offensive
16 touching, if it's sexually offensive, it's
17 defined by sexual contact or sexual act.

18 DEAN ANDERSON: That's non-consensual.

19 MS. FRIEL: And the nonconsent part, we
20 put in here as a separate (4) to make it clear.
21 That's the answer to Congress.

22 Maj Gen WOODWARD: Ma'am, I suggest if

1 you're worried -- I think you're wrapped up in
2 the words bodily harm --

3 HON. HOLTZMAN: Oh, I'm not wrapped up
4 in --

5 Maj Gen WOODWARD: -- but if you just
6 take their own definition of bodily harm and put
7 it in place of those words up in the front,
8 you'll see that we've retained -- with the
9 suggestion we're talking about, we've retained
10 every piece of that -- their verbiage.

11 HON. HOLTZMAN: No. But the problem is
12 going back to it, we are proposing that because
13 there is a confusion with the definition that we
14 have a separate crime that's just non-consensual
15 sex.

16 DEAN ANDERSON: So --

17 HON. HOLTZMAN: That's a separate
18 crime.

19 DEAN ANDERSON: It's already there --

20 HON. HOLTZMAN: Okay?

21 DEAN ANDERSON: -- it's just worded
22 funny.

1 MS. WINE-BANKS: I might -- I think
2 that the problem is that their definition uses
3 the word causing bodily harm and then defines --

4 DEAN ANDERSON: To not be bodily harm.

5 MS. WINE-BANKS: -- bodily harm in a
6 way that is not bodily harm.

7 DEAN ANDERSON: Right.

8 MS. WINE-BANKS: To any rational person
9 is not bodily harm, it's an offensive touching
10 that's not really what people would consider
11 bodily harm. Or it is the very act that we're
12 really dealing with here, the sexual act.

13 CHAIR JONES: Which is offensive
14 because it's non-consensual.

15 MS. WINE-BANKS: And so if you just
16 include the non-consensual, you've included
17 everything and in our sexual act and sexual
18 contact definitions, we've included every
19 possible permutation of contact between anything
20 and any -- I mean, really for same-sex
21 relationships as well as heterosexual, it's all
22 included so that I don't think we're taking

1 anything away, except confusion possibly.

2 CHAIR JONES: What happened to -- I
3 thought there was a lot of testimony that maybe
4 we don't understand what bodily harm means or
5 even somebody, some perfectly bright normal
6 person doesn't understand what it means in the
7 statute. But that the practitioners know what it
8 means and they understand. They're -- I could
9 have sworn that there was some testimony that
10 this is not --

11 MS. FRIEL: Yes.

12 CHAIR JONES: -- an issue in practice.

13 MS. FRIEL: Yes, I think Lisa Schenck
14 really thought that too.

15 DEAN ANDERSON: Right.

16 CHAIR JONES: And that --

17 BGen SCHWENK: Because it's been in
18 Article 128 for so many years.

19 CHAIR JONES: Long before the 2012
20 version.

21 BGen SCHWENK: And so, therefore,
22 hasn't been a problem there and so that was the

1 testimony, yes.

2 MS. KEPROS: And our concern is that
3 may be true for practitioners who have the
4 benefit of the full statutory scheme, who have
5 the benefit of seeing how all the pieces work
6 together, what the definition says. That is not
7 necessarily going to be true in the case of Panel
8 Members.

9 CHAIR JONES: I'd like to see --

10 MS. KEPROS: And --

11 CHAIR JONES: I'm sorry. And I'm --

12 MS. KEPROS: Yes.

13 CHAIR JONES: -- interrupting you
14 because I've been sitting here thinking, what are
15 they charging right now? They must be charging -
16 - they've been charging bodily harm for 20 years?
17 I don't know.

18 MS. KEPROS: They're charging bodily
19 harm. It's in the bench book. And it's the same
20 term that exists in Article 128 in the context of
21 assault crimes. So the lawyers and the judges
22 are familiar with this terminology. We just

1 think to any non-lawyer, it's going to be very --

2 CHAIR JONES: But we care about the
3 about the Panel.

4 MS. KEPROS: Right.

5 CHAIR JONES: So the question is what
6 is the judge saying to the Panel? And it seems
7 to me, and I just throw this out, because I
8 haven't -- it sounds like there are some
9 substantial changes coming with this other --
10 with our other group. But at the moment, I
11 guess, my thinking would be that there should be
12 an explanation that however confusing this may be
13 that sexual assault (b)(1)(B) means any non-
14 consensual touching or however we're putting it.
15 And that should be an explanation --

16 MS. KEPROS: In an Executive Order?

17 CHAIR JONES: -- in the Executive
18 Order.

19 Maj Gen WOODWARD: But isn't the
20 confusion just the words bodily injury -- bodily
21 harm?

22 HON. HOLTZMAN: Correct.

1 Maj Gen WOODWARD: And so what you are
2 recommending by just replacing the definition of
3 bodily harm into bodily harm, I think that gets
4 rid of the confusion that we heard about. I
5 guess that's my frustration is I think --

6 BGen SCHWENK: It would take care of
7 that issue, yes.

8 Maj Gen WOODWARD: -- if we just put
9 their verbiage in, then it eliminates the
10 confusion that we all heard about. Because I
11 think it was just the term bodily --

12 BGen SCHWENK: Well, both -- well,
13 there's -- there are two. One, I think it was
14 sort of us that generated the concern about
15 bodily harm because the testimony was, as Judge
16 Jones says, that, hey, we practitioners all know
17 all --

18 CHAIR JONES: Right.

19 BGen SCHWENK: -- that stuff. It
20 doesn't bother us. But we were concerned about
21 members. So we sort of generated that one. The
22 one the witnesses talked about was because of the

1 cumbersome language commits a sexual act upon
2 another person by an offensive --

3 DEAN ANDERSON: Causing offensive
4 touching.

5 BGen SCHWENK: -- touching, including
6 any -- is whether -- how many of those can you
7 have? Can you have just one non-consensual act
8 and that's enough? Or do you need double?

9 DEAN ANDERSON: Yes. Can --

10 BGen SCHWENK: There was confusion as
11 to whether the sex act alone was sufficient. And
12 so, to eliminate that and in that proposal -- if
13 you keep the same language, you haven't addressed
14 that proposal. Now whether --

15 DEAN ANDERSON: So --

16 MS. WINE-BANKS: Put in (b)(4) though,
17 right?

18 BGen SCHWENK: Right. If we add a
19 (b)(4), then it would address that.

20 MS. WINE-BANKS: Or what if you -- yes.
21 If you divide --

22 BGen SCHWENK: Right.

1 MS. WINE-BANKS: -- the definition.
2 Take the definition and say offensive touching,
3 is that a clear enough language? Or non-
4 consensual sex? So you've divided the definition
5 of physical harm or whatever -- bodily harm.
6 You've eliminated bodily harm, which causes
7 confusion, by putting in the definition of bodily
8 harm. Which is offensive touching, including
9 non-consensual. But instead of saying including,
10 you make non-consensual as a separate --

11 HON. HOLTZMAN: But the problem isn't
12 -- isn't part of the problem that the bodily harm
13 is part of the assault statute and so generally
14 people consider this to be some kind of an
15 assault, not just a casual --

16 CHAIR JONES: Well, an assault is any
17 touching, really. I don't know how it's pled in
18 --

19 BGen SCHWENK: No, that's right.

20 CHAIR JONES: -- an assault.

21 MS. KEPROS: Or any offensive touching.

22 BGen SCHWENK: Any offensive touching.

1 MS. KEPROS: Right.

2 CHAIR JONES: Right. Yes. I mean, an
3 assault can be anything from --

4 BGen SCHWENK: That's where it all --

5 CHAIR JONES: -- this to smash in the
6 head.

7 BGen SCHWENK: That's where all this
8 comes from. It comes from the assault world.

9 HON. HOLTZMAN: Right.

10 BGen SCHWENK: Yes.

11 CHAIR JONES: Yes.

12 LtCol HINES: The assault statute --
13 just to answer the question real quickly. If you
14 look at (3) on bodily harm, when the judge gives
15 that it's in the -- it's in Article 128, the
16 assault statute. And the instruction stops with
17 the term bodily harm means any offensive touching
18 of another, however slight, period.

19 CHAIR JONES: I'm sorry.

20 LtCol HINES: It's --

21 CHAIR JONES: Any offensive touching --

22 LtCol HINES: It's the first part of

1 that sentence, Judge. It's the term bodily harm
2 means any offensive touching --

3 CHAIR JONES: However slight.

4 LtCol HINES: -- of another, however
5 slight, period. And they added the rest of this
6 language here for Article 120.

7 HON. HOLTZMAN: Well, another way --

8 DEAN ANDERSON: When did they add that?

9 HON. HOLTZMAN: -- to solve this
10 problem --

11 DEAN ANDERSON: When did they add that,
12 Glen?

13 LtCol HINES: Well, when this statute
14 came out. That extra language --

15 CHAIR JONES: This was in --

16 LtCol HINES: -- was put in there --

17 CHAIR JONES: -- 2012?

18 LtCol HINES: -- to include any non-
19 consensual sexual act.

20 DEAN ANDERSON: Wait. So this is a
21 2012 --

22 LtCol HINES: Right.

1 DEAN ANDERSON: -- revision of
2 something has always included --

3 LtCol HINES: Well, in the assault
4 statute.

5 CHAIR JONES: Yes.

6 DEAN ANDERSON: Oh, you're talking
7 about --

8 LtCol HINES: Yes.

9 CHAIR JONES: Sexual assault or
10 physical assault.

11 HON. HOLTZMAN: Another way to address
12 this is simply to keep the bodily harm section,
13 (b)(1)(B), causing bodily harm to another person.
14 Define that as an offensive touching, not the
15 non-consensual sex. And break out the non-
16 consensual sex and have that in a separate
17 section.

18 And then you've done -- that's another
19 way to do it. So you've left the bodily harm
20 there and you have the definition as an offensive
21 touching of any kind, no matter how slight, and
22 then you have a (b)(4) that says non-consensual

1 sexual act is a -- I mean, if that solves the
2 problem --

3 DEAN ANDERSON: Well, it suggests --

4 HON. HOLTZMAN: -- that's another way
5 to do.

6 DEAN ANDERSON: Well, it suggests that
7 -- something different than what Congress defined
8 bodily harm as. Because Congress defines bodily
9 harm as any offensive touching, however slight,
10 and then somewhere within that, including any
11 non-consensual sex or non-consensual sexual
12 contact.

13 HON. HOLTZMAN: Right. But --

14 DEAN ANDERSON: So it's a subsection of
15 --

16 HON. HOLTZMAN: I know, but --

17 DEAN ANDERSON: -- it's not separate
18 from.

19 HON. HOLTZMAN: But what we could do is
20 separate that out.

21 DEAN ANDERSON: Well, we could, but
22 that would be changing what --

1 HON. HOLTZMAN: Well, we understand
2 that.

3 DEAN ANDERSON: Right. If we believe
4 that it is not an offensive touching, however
5 slight, I think it is, so why would we separate
6 it out? That's --

7 BGen SCHWENK: Because of the
8 confusion.

9 DEAN ANDERSON: Well, the confusion
10 only comes because of the term bodily harm. I
11 think we solve that confusion --

12 BGen SCHWENK: Well, there's two -- I
13 think there's two --

14 MS. KEPROS: There's still a
15 circularity problem.

16 BGen SCHWENK: -- parts of confusion.

17 DEAN ANDERSON: There are two. And I
18 think I have a solution for the second --

19 BGen SCHWENK: The one about --

20 DEAN ANDERSON: -- confusion.

21 BGen SCHWENK: -- whether the sex act
22 alone is sufficient.

1 DEAN ANDERSON: Exactly. So the two --
2 so if we -- let's just hold for a second and
3 follow this train. The bodily harm, the term
4 itself is a problem that at least we articulate.
5 That's not one that's --

6 BGen SCHWENK: Right.

7 DEAN ANDERSON: -- articulated, as I
8 recall the record, by those who are
9 practitioners. Okay. But for a lay person,
10 bodily harm suggests something that is not
11 required by the definition of bodily harm.

12 BGen SCHWENK: Right.

13 DEAN ANDERSON: So one thing to solve
14 that particular problem is obviously the first
15 proposal. Swap in the definition offensive
16 touching, including non-consensual sexual act or
17 non-consensual sexual contact. Problem with that
18 is the repetition of sexual act. The word sexual
19 act when the definition itself of sexual assault
20 includes a sexual act.

21 BGen SCHWENK: Right.

22 DEAN ANDERSON: Commits a sexual act

1 upon another person by causing any offensive
2 touching of another, however slight, including
3 any non-consensual sexual or non-consensual
4 sexual contact. We could change the phrase, the
5 comma including any, because that is what causes
6 the sense that well, does there need to be two?

7 And we could say, which would include,
8 or which includes. It's a way of modifying any
9 offensive touching of another, however slight.

10 And not requiring an additional sexual act. I'm
11 not sure that it's perfect. But it's at least a
12 way of changing that language very slightly, but
13 trying to clarify that this is just --
14 definitionally, it's within the rubric of an
15 offensive touching.

16 MS. WINE-BANKS: You would take out the
17 words physical harm?

18 DEAN ANDERSON: Bodily harm?

19 MS. WINE-BANKS: Bodily harm. And just

20 --

21 BGen SCHWENK: Right.

22 MS. WINE-BANKS: -- put the definition

1 there --

2 DEAN ANDERSON: Put the definition --

3 MS. WINE-BANKS: -- with the little

4 change.

5 DEAN ANDERSON: And the little change

6 would be --

7 MS. WINE-BANKS: Yes.

8 DEAN ANDERSON: -- the including --

9 MS. WINE-BANKS: Okay.

10 DEAN ANDERSON: -- which means --

11 MS. WINE-BANKS: Right.

12 DEAN ANDERSON: -- do we need an

13 additional?

14 MS. WINE-BANKS: Right.

15 DEAN ANDERSON: And change it to which

16 would include or which includes.

17 BGen SCHWENK: Yes. I mean we could

18 say to make a -- I don't know if we're going down

19 this road, but so it says an offensive touching

20 of another, however slight, including the charge

21 non-consensual -- the charged or any other non-

22 consensual sexual act. Something that -- I mean

1 --

2 MS. WINE-BANKS: Oh.

3 BGen SCHWENK: -- if we're trying to
4 get around that, why don't we try to get charged
5 in there so it's real clear to anybody --

6 MS. WINE-BANKS: Yes.

7 BGen SCHWENK: -- that even though this
8 is a convoluted, a sexual act by --

9 MS. WINE-BANKS: Right.

10 BGen SCHWENK: -- a sexual act, the
11 charged sexual act is sufficient.

12 MS. WINE-BANKS: Yes.

13 BGen SCHWENK: I mean, I'm probably not
14 as clear as --

15 MS. WINE-BANKS: That actually helps.

16 BGen SCHWENK: -- just putting it out
17 by itself.

18 Maj Gen WOODWARD: And I think -- the
19 other part of this is I think you should -- if
20 you're going to do all this, you should get rid
21 of the sexual -- any of the contact under the
22 sexual assault. Because that's what's addressed

1 in aggravated sexual contact or -- the difference
2 between the rape or sexual assault and the sexual
3 contact is that the sex act -- the penetration
4 did not occur, right? I mean, that's the
5 differentiation? So it's confusing to me that
6 you put the touching of --

7 CHAIR JONES: Does bodily harm show --

8 Maj Gen WOODWARD: -- in sexual assault

9 --

10 CHAIR JONES: -- up in contact?

11 Maj Gen WOODWARD: -- when --

12 BGen SCHWENK: Yes. Well, it's
13 incorporated down into it. Yes. And I think
14 that's where --

15 Maj Gen WOODWARD: So just leave it as
16 the sex act --

17 BGen SCHWENK: -- and that -- so going
18 to our --

19 Maj Gen WOODWARD: -- in that part and
20 put the contact --

21 BGen SCHWENK: -- second --

22 Maj Gen WOODWARD: -- in the contact.

1 BGen SCHWENK: So going to our second
2 confusion. The confusion is the sex act alone
3 sufficient? The fact that the sexual contact is
4 there can only mean that, well, you did the sex
5 act by sexual contact.

6 DEAN ANDERSON: Oh, I see.

7 BGen SCHWENK: The offensive touching

8 --

9 DEAN ANDERSON: Right.

10 BGen SCHWENK: -- is sexual contact.

11 DEAN ANDERSON: That's the mechanism by
12 which --

13 BGen SCHWENK: Grabbing somebody on the
14 buttocks or whatever you did. The mechanism --
15 well, if that's the case, then the sex act must
16 mean some other mechanism than the basic sex act
17 --

18 DEAN ANDERSON: Yes. That's --

19 BGen SCHWENK: -- and that's -- so it
20 gets -- I mean, I think that's their reasoning
21 that gets them into confusion about whether you
22 need, if it's sex acts, two of them.

1 MS. FRIEL: Which is why --

2 BGen SCHWENK: And --

3 MS. FRIEL: -- I want to just get rid
4 of the bodily harm --

5 BGen SCHWENK: -- so we all jump
6 through a hoop. It's -- so I think what we're
7 really trying to do is take the people who were
8 confused and try to find a way to make it so that
9 even somebody that -- I mean, personally, I don't
10 see the confusion. But they came in here and
11 testified. And it was more than one. That there
12 is confusion over it. And so we're trying to
13 find a way --

14 CHAIR JONES: Honestly, I have
15 forgotten that testimony. Who were these, the
16 JAG?

17 BGen SCHWENK: Yes, right. People who
18 practice and said there's confusion out there in
19 charging and it wasn't all of them, but it was a
20 few of them. And so we're trying to address the
21 bodily harm confusion and then the is the sex act
22 alone sufficient confusion.

1 CHAIR JONES: And there's no charge
2 that's in the bench book that clears this up?

3 BGen SCHWENK: That clarifies it, no.

4 CHAIR JONES: No?

5 BGen SCHWENK: They just repeat the
6 language. I mean --

7 CHAIR JONES: Right.

8 BGen SCHWENK: -- it's the bench book.

9 DEAN ANDERSON: So, here's another
10 easier --

11 BGen SCHWENK: There's a definition,
12 tell them the definition.

13 DEAN ANDERSON: -- I think. So (b)(1),
14 commits a sexual act upon another person. We
15 take the word by and we throw that in (A), (C),
16 and (D). And (B) just becomes without consent.

17 BGen SCHWENK: Right. Which is what I
18 was saying is one of the options is kill (B).
19 Kill that (B) and put your (4) in --

20 DEAN ANDERSON: Well, that's another
21 way of doing it, but what Congress has done here
22 is has analogized the level of gravity between

1 (A), (B), (C), and (D). My concern about
2 removing it from (B) and put it as (4) suggests
3 that it's a different kind of a crime.

4 BGen SCHWENK: So you would drop (B)
5 into (A), (C), and (D).

6 DEAN ANDERSON: Exactly. So --

7 BGen SCHWENK: And then --

8 DEAN ANDERSON: -- then the word by
9 just goes by threatening, by making, by inducing
10 --

11 BGen SCHWENK: Right.

12 DEAN ANDERSON: -- but then (B) just
13 says commits a sexual act upon another person
14 without consent.

15 Maj Gen WOODWARD: Yes. I think that
16 would be --

17 DEAN ANDERSON: That's the simplest --
18 that's the least --

19 HON. HOLTZMAN: Wait a minute. So --

20 DEAN ANDERSON: -- number of things.

21 HON. HOLTZMAN: -- (B) would say,
22 commits a sexual --

1 DEAN ANDERSON: No.

2 HON. HOLTZMAN: What would (B) say?

3 DEAN ANDERSON: (B) would just say
4 without consent. So when you read it --

5 HON. HOLTZMAN: Well, you can't have
6 the by, you have to have the by there.

7 DEAN ANDERSON: That's why I want to
8 pull the by out of the (1) and drop it into (A),
9 (C), and (D).

10 BGen SCHWENK: Yes. So (1) reads
11 commits a sexual act upon another person.

12 DEAN ANDERSON: (A) --

13 BGen SCHWENK: The by is gone.

14 DEAN ANDERSON: -- by threatening --

15 BGen SCHWENK: And then (A), you insert
16 --

17 DEAN ANDERSON: -- by placing -

18 BGen SCHWENK: -- by --

19 DEAN ANDERSON: Right, (C) -

20 BGen SCHWENK: -- (C) insert by -

21 DEAN ANDERSON: -- by making --

22 BGen SCHWENK: -- (D) insert by.

1 DEAN ANDERSON: -- (D) by inducing and
2 (B) is if you start with (1) --

3 HON. HOLTZMAN: Without --

4 DEAN ANDERSON: -- commits a sexual act
5 upon another person --

6 HON. HOLTZMAN: Right.

7 DEAN ANDERSON: -- (B) without consent.

8 HON. HOLTZMAN: Well, okay. So here --
9 my objection to that would be you changed the way
10 in which Congress phrases the nonconsent now.
11 Which they don't say without consent, so you're
12 using new language altogether.

13 DEAN ANDERSON: Okay.

14 HON. HOLTZMAN: So I don't think that's
15 a good -- personally --

16 DEAN ANDERSON: We're making it clear.

17 HON. HOLTZMAN: No. I think what they
18 say -- there's nothing unclear about non-
19 consensual act. What's the language? Any non-
20 consensual sexual act. There's nothing unclear
21 about that.

22 Maj Gen WOODWARD: I don't think we're

1 changing the -- what they are trying to have us
2 convict people for, we're changing the way it's -

3 -

4 HON. HOLTZMAN: I know, but the minute

5 --

6 Maj Gen WOODWARD: -- terminology.

7 HON. HOLTZMAN: -- you start changing
8 the language, if you don't need to, if there's no
9 problem with the existing language, you're just
10 asking for trouble.

11 Maj Gen WOODWARD: But there is.

12 Bodily harm has been proven to be a --

13 HON. HOLTZMAN: But the language --

14 Maj Gen WOODWARD: -- problem.

15 HON. HOLTZMAN: Right. But the
16 language used -- all I'm saying is that you're
17 saying without consent and here I'm saying that
18 the language in the existing statute is non-
19 consensual sexual act. So you should try to --
20 my view about that -- I have two views about it,
21 but number one I don't agree with the proposal as
22 a total proposal.

1 But I think if you are going to use
2 the -- if you want to change (b)(1) to have a
3 non-consensual act there, that you ought to use
4 the existing statutory language. I think that
5 gets you to the fullest extent possible. If
6 there's no way to do it, then I wouldn't do it.
7 But there is a way to do it and I don't think
8 there's anything confusing about non-consensual
9 sexual act.

10 DEAN ANDERSON: It's just --

11 MS. FRIEL: Well, it'd have to say non-
12 consensual sexual act or non-consensual sexual
13 contact. Right?

14 HON. HOLTZMAN: Well, with the sexual
15 contact is already -- you don't need that because
16 it's already pulled in --

17 MS. KEPROS: It's in (D).

18 BGen SCHWENK: It's in (D).

19 MS. KEPROS: That's why you don't need
20 to say it both ways.

21 BGen SCHWENK: Right.

22 MS. KEPROS: Because (D) says -- every

1 time we meant act in (B), we mean contact in (D)

2 DEAN ANDERSON: Yes. Right.

3 HON. HOLTZMAN: And that's easy.

4 DEAN ANDERSON: So let's use the word
5 non-consensual. And you could, because of the
6 objection that's just been lodged, so it could
7 say commits a sexual act upon another person,
8 forget the by, because we're dropping that into
9 (A) -- the proposal would be to drop that into
10 (A), (C), and (D), and it would be by causing or
11 that is non-consensual. Commits a sexual act
12 upon another person that is non-consensual.

13 HON. HOLTZMAN: Yes.

14 DEAN ANDERSON: And that's using the
15 language of the statute.

16 HON. HOLTZMAN: Yes.

17 DEAN ANDERSON: The same as non --

18 HON. HOLTZMAN: Well, I can't absorb
19 that.

20 MS. KEPROS: So is -- commits a sexual
21 act upon another person that is non-consensual?

22 DEAN ANDERSON: Because that's exactly

1 what the statute requires.

2 HON. HOLTZMAN: Yes.

3 DEAN ANDERSON: Any non-consensual
4 sexual act. So that is non-consensual.

5 MS. WINE-BANKS: It says a non-
6 consensual sexual act or contact.

7 HON. HOLTZMAN: Okay.

8 DEAN ANDERSON: Right, but the contact
9 --

10 MS. WINE-BANKS: The contact is covered
11 under --

12 DEAN ANDERSON: -- is already subsumed
13 within (B).

14 HON. HOLTZMAN: Okay. So, all right.
15 Now that there seems to be general agreement that
16 you want to have some kind of separate statement
17 about non-consensual sexual act and making it
18 clear that, that in and of itself is a crime,
19 what are you going to do about the existing
20 language of bodily harm and the offensive
21 touching?

22 Are you just going to say -- when they

1 say, well why have you eliminated this? Why did
2 you eliminate the implication that there is also
3 an ability to charge somebody with physical harm,
4 physical injury, less than grievous injury, why
5 have you eliminated that possibility in this --
6 in the reworking of the statute?

7 MS. FRIEL: We have that answer. The
8 answer is it's subsumed in the non-consensual.

9 HON. HOLTZMAN: But everything is --

10 MS. FRIEL: Because --

11 HON. HOLTZMAN: But then you don't need

12 --

13 MS. FRIEL: -- if it's contact, it's
14 non-consensual.

15 HON. HOLTZMAN: But then you don't
16 really need any of the -- then you don't really
17 need any of the other items under (1).

18 MS. FRIEL: No, because --

19 HON. HOLTZMAN: Under (b)(1).

20 MS. FRIEL: -- part of the problem is
21 people consent, like the fraudulent thing is
22 there --

1 BGen SCHWENK: Right.

2 MS. FRIEL: -- because somebody did
3 consent. They consented under a false
4 understanding of what had happened. So that's
5 the next --

6 BGen SCHWENK: The other three were all
7 --

8 MS. FRIEL: Right.

9 BGen SCHWENK: The other three are all
10 --

11 MS. FRIEL: Yes.

12 BGen SCHWENK: -- that theory.

13 MS. FRIEL: Yes. You consent because
14 you're --

15 BGen SCHWENK: Because the consent --

16 MS. FRIEL: -- placed in fear.

17 BGen SCHWENK: -- but --

18 DEAN ANDERSON: They're all --

19 MS. FRIEL: Okay. I'm consenting
20 factually --

21 BGen SCHWENK: Right.

22 MS. FRIEL: -- go ahead and do it.

1 BGen SCHWENK: (A), (C), and (D) are
2 all they had consent.

3 MS. FRIEL: Defective consent.

4 BGen SCHWENK: Right. Defective
5 consent.

6 MS. FRIEL: Defective consent, yes.

7 MS. WINE-BANKS: Okay. So what would
8 be the harm of adding the fourth thing, which is
9 the not physical harm? The physical harm?
10 Putting that back in?

11 DEAN ANDERSON: Because the physical
12 harm is --

13 MS. WINE-BANKS: Well, but --

14 DEAN ANDERSON: -- I guess there's a
15 difference in reading the statute that we've
16 articulated. One way to read the statute, that
17 it sounds like the three of you have, is that the
18 statute highlights physical harm. And that
19 there's -- that we -- that it should continue to
20 highlight it.

21 And I think our reading of the statute
22 is that the harm is just a term of art. The

1 bodily harm actually doesn't require any physical
2 harm and that it's not implicitly required and
3 that it shouldn't be separated out. Because it's
4 not currently separated out.

5 Maj Gen WOODWARD: Yes. And if we want
6 to talk political convenience versus not, my
7 understanding from spending so much time on the
8 Hill with people on the Sexual Assault Caucus is
9 if you separate it out, physical harm from non-
10 consensual sex act, that would be politically
11 incendiary because that implies that physical
12 harm is an important element or a more important
13 element just by separating it out.

14 If you don't separate it out, then it
15 doesn't matter and it's -- and I think that it
16 would be more incendiary to have one that says
17 physical harm in addition to non-consensual.
18 Whereas if you just leave it as non-consensual
19 sex act, it covers everything.

20 CHAIR JONES: I'm going to interrupt
21 because we have a schedule.

22 BGen SCHWENK: And you're the boss.

1 You can do that.

2 CHAIR JONES: And I'm the boss. That's
3 -- I like that, General. And I think -- now,
4 have we -- we've only gone through one of your
5 issues, is that right?

6 BGen SCHWENK: That's correct. The
7 good news is we punted on the other one. So you
8 can consider we went through both of them.

9 CHAIR JONES: Well, that's good. Why
10 don't we do this? Why don't you report your
11 others. We won't discuss them. We'll go to the
12 next group. And then we'll go to the next one.
13 And we can have a working lunch and talk some
14 more. And Rome wasn't built in a day, so we'll
15 see how we're doing. I'm especially interested
16 to hear what this other working group has done
17 with some definitions. So that may make a
18 difference.

19 MS. KEPROS: Okay. So our --

20 CHAIR JONES: Okay. Thanks, Laurie.

21 MS. KEPROS: -- other issue.

22 CHAIR JONES: Yes.

1 MS. KEPROS: Issue 8, is the definition
2 of force too narrow?

3 BGen SCHWENK: It's the last page of
4 your handout.

5 MS. KEPROS: And the comments around
6 this as it's summarized here had to do really
7 with two things. One was, what about a simulated
8 weapon scenario and what about the suggestion
9 that force requires a resistance requirement,
10 like the General just referenced. We said, well,
11 that first problem with the weapon, it's sort of
12 already covered by the threat provision that's
13 already there. So we don't really need to do
14 anything around the definition to make that
15 culpable.

16 And then the other issue around
17 resistance is actually addressed by the
18 definition of consent. So we need to see what
19 this group proposes in terms of addressing
20 consent. Because that may resolve any concerns
21 around that.

22 Our final point we noted was that to

1 the extent the group goes forward with Proposal
2 Two or what's now morphing into a variation of
3 Proposal Two, if we create a subsection that is
4 explicit in the fact that non-consensual sexual
5 acts or contacts are a crime in and of themselves,
6 the force issue becomes less important because
7 you're already capturing basically all the
8 behavior and you're not worried about things not
9 coming in within some kind of narrow definition.
10 So, we don't see any reason to make a
11 recommendation at this point to change the
12 definition. But we may revisit it depending on
13 what the consent definition is.

14 CHAIR JONES: Okay. Great. Thank you.

15 BGen SCHWENK: That was the good news.

16 MS. KEPROS: Right.

17 CHAIR JONES: That was the good news.

18 All right. Lisa?

19 MS. FRIEL: Okay.

20 CHAIR JONES: When is lunch? I'm
21 sorry. Glen?

22 BGen SCHWENK: We have the lunches

1 here. So --

2 LtCol HINES: We have it here and what
3 Sharon suggests is that before we turn to the
4 next group, just give everyone five minutes to go
5 get their lunch and they can bring it back in
6 here. If you want to do that right now and then
7 just get back on the record.

8 CHAIR JONES: Okay. Five minutes.
9 Bathroom break, lunch.

10 LtCol HINES: She's got them, I guess,
11 in the break room.

12 CHAIR JONES: Okay. Great. And then
13 we'll hear from the next working group.

14 (Whereupon, the above-entitled matter
15 went off the record at 12:14 p.m. and resumed at
16 12:51 p.m.)

17 CHAIR JONES: Do we have everybody
18 back? Great.

19 I just wanted to -- I found something
20 in my notes that is actually relevant to the
21 first discussion. I'm just going to report on it
22 and then we're going to move to my Working

1 Group's issues.

2 There is a charge in the charge book
3 that relates to this problem of bodily harm. And
4 it says that when the same physical act is
5 alleged as both the sexual act and the bodily
6 harm for the charged sexual assault, then you are
7 to include this lack of consent charge as a final
8 element.

9 And then, what the Panel is told, lack
10 of consent is an element of the crime of sexual
11 assault when there is no bodily harm alleged
12 beyond the act of sexual assault itself.

13 So, I guess -- and then the charge
14 goes on to read, the Government has the burden to
15 prove beyond a reasonable doubt the consent to
16 the physical act or acts did not exist.

17 And it also can say, under these
18 circumstances, the Government also has the burden
19 to prove beyond a reasonable doubt that the
20 victim did not consent to the physical acts.

21 I just wanted to put that in there
22 because apparently there is a charge out there

1 for this in an effort to straighten out what is
2 obviously a very weird use of words with respect
3 to bodily harm.

4 MS. WINE-BANKS: So, you're saying if
5 there's physical harm, the Government doesn't
6 have to prove absence of consent?

7 CHAIR JONES: I don't want to get into
8 that conversation. And, frankly, I'd have to
9 read -- look at this again.

10 The Government has the burden to prove
11 beyond a reasonable doubt the victim did not
12 consent to the physical act. They're not talking
13 about -- they don't talk about bodily harm in
14 here, which is refreshing. They're trying to
15 explain what that bodily harm element really
16 means.

17 Anyway, I'll send this around. I
18 forgot I had it.

19 Okay. So, our first issue was one
20 that we talked about at some length, whether the
21 current definition of consent is unclear or
22 ambiguous, and we went right to the portions of

1 120(g)(8) that talked about resisting.

2 And I think you probably all remember
3 the parts that were of concern. They are
4 awkwardly written. There's a phrase in Section A
5 and another part in Section C, and they could
6 cause people to -- these references to resistance
7 could cause people, as we discussed, to rely --
8 you know, make somebody think you had to have
9 resistance and we're trying to get away from that
10 implication.

11 There are lots of different ways to do
12 it. We discussed in full ---- in our last full
13 meeting that maybe all we wanted to do was ask
14 Congress to delete the offending language, and
15 there is also the possibility of an executive
16 order that would simply explain things in an
17 effort to make it clearer.

18 So, Dean Anderson with Maggie and I,
19 but mostly her, came up with our effort at -- and
20 I think what we chose was language for an
21 executive order here rather than even going to
22 Congress to ask Congress to delete the language.

1 But, we're really here to -- you know,
2 it could be either way or both. I guess both
3 wouldn't work, but Dean, why don't you go ahead?

4 DEAN ANDERSON: Sure. So, if you look
5 at the page that's just been passed out at the
6 top, it says Working Group 3: Jones, Anderson,
7 Woodward and you drop down to R.

8 What we've done here is draft language
9 for an explanatory note in the executive order.
10 The first portion of this is simply Article --
11 it's a recitation of Article 120(g)(8). Okay?

12 So, the first chunk is nothing new.
13 It's just what the Statute itself says.

14 CHAIR JONES: That's for your
15 reference now, so you know what we're talking
16 about.

17 DEAN ANDERSON: Yes, and it's not
18 going to be included in the explanatory note that
19 we submit, but it's here for you to take a look
20 at it as we go through this.

21 What we decided to do was to identify
22 the two sentences that included the word

1 resistance. It's midway through A and it's all
2 of C under 120(g)(8).

3 And then, what we did was we went
4 through and tried to explain each of the parts of
5 these two sentences to help them make sense and
6 to provide some guidance, and with the notion
7 that this would be the explanatory note in the
8 Benchbook that the President could issue by
9 executive order.

10 So, the beginning part on this takes
11 the first sentence of the two and takes the
12 portion that is clear and begins with the clear
13 statement that neither verbal nor physical
14 resistance is required to prove nonconsent and
15 then lists the language, lack of verbal or
16 physical resistance does not constitute consent,
17 that's from the Statute.

18 This is the key phrase because we
19 wanted to underscore that that's the importance
20 of identifying resistance at all. The absence of
21 verbal or physical resistance may not be
22 construed as agreement to the conduct at issue --

1 -- agreement to the conduct at issue is
2 essentially what consent is.

3 Resistance is not required, and
4 although its absence may be considered as a
5 factor among others, its absence alone does not
6 imply agreement to the conduct at issue.

7 So, this paragraph is just trying to
8 explicate the first portion of that sentence.
9 The lack of verbal or physical resistance does
10 not constitute consent.

11 The second paragraph is about the
12 exact same sentence, but the portion of the
13 sentence that's somewhat confusing, and may imply
14 something that we don't want it to imply, and
15 that is submission resulting from the use.

16 So, Section 120(g)(8)(A) also
17 indicates submission resulting from the use of
18 force, threat of force or placing another person
19 in fear does not constitute consent, and then
20 there's a simple sentence that clarifies what
21 this means. This clause means that when a person
22 submits to the will of another due to force,

1 threat of force or fear, they have not agreed to
2 the conduct at issue. Okay?

3 But then comes the part of how does
4 this tie with verbal or physical resistance?
5 This submission and force clause is independent
6 of the resistance clause in the same sentence.

7 In other words, the sentence does not
8 imply the lack of verbal or physical resistance
9 must be in response to force, a threat of force
10 or fear. The lack of verbal or physical
11 resistance may be caused by reasons other than
12 force, including disassociation or traumatic
13 paralysis, which we've talked about some before.

14 The next two paragraphs go on to try
15 to explicate C, which is the second sentence in
16 the Statute that has the word resistance. And it
17 begins with a pretty unobjectionable analysis
18 that comes from the Statute that any surrounding
19 circumstances to an alleged offense may be
20 considered in determining consent or a lack of
21 consent.

22 Both consent and a lack of consent may

1 be inferred by the circumstances surrounding an
2 alleged offense. And then lists the language of
3 120(g)(8)(C), which indicates all the surrounding
4 circumstances are to be considered in determining
5 whether a person did not resist or ceased to
6 resist only because of another person's actions.

7 And it indicates that that does not
8 imply that resistance is required or that its
9 absence indicates consent. Rather, this section
10 means that circumstances surrounding the alleged
11 offense may suggest why a person did not resist,
12 felt they could not resist or felt that
13 resistance would be futile and why acquiescence
14 to the conduct at issue may derive from the
15 alleged offenders or another person's actions.

16 So, this is an attempt to explain why
17 that language was included independent of a force
18 requirement. So, just kind of structurally --
19 before we get into arguing the merits,
20 structurally, the first two paragraphs of the
21 explanatory note are about the first sentence and
22 the second two paragraphs or the last two

1 paragraphs of the explanatory note are about the
2 second sentence in the Statute that uses the word
3 resistance.

4 Open for comments, challenges,
5 questions, concerns, et cetera.

6 COL SCHINASI: I've always wondered
7 about the term acquiescence. Is there another
8 way to say that?

9 DEAN ANDERSON: So, the Statute -- go
10 ahead.

11 COL SCHINASI: Because while we know
12 there's not consent, the acquiescence is a
13 concept very close to consent, and I'm just
14 wondering -- I realize it's in the Statute, would
15 there be another way to say that?

16 DEAN ANDERSON: Well, the Statute
17 actually uses the word submission. So, we could
18 use the word submission instead of acquiescence.
19 Would that help?

20 COL SCHINASI: Oh, yes. Yes, it shows
21 less voluntary, less consent.

22 DEAN ANDERSON: Yes, that makes sense,

1 thanks.

2 HON. HOLTZMAN: Where is that? Where
3 are we? I don't know what you're talking about.

4 DEAN ANDERSON: We're at the very last
5 sentence of the explanatory note, and the last
6 sentence -- the last part of the last sentence
7 says, and why acquiescence to the conduct at
8 issue may derive from the alleged offenders or
9 another person's actions.

10 Lee's saying, look, that --

11 CHAIR JONES: So, use the word
12 submission instead of acquiescence?

13 DEAN ANDERSON: Do I have a what?

14 CHAIR JONES: Do you have the previous
15 one we were using?

16 DEAN ANDERSON: Yes.

17 CHAIR JONES: I'm sorry.

18 DEAN ANDERSON: This is my version of
19 it.

20 CHAIR JONES: Great, thanks.

21 DEAN ANDERSON: Sure. So, that's
22 helpful, thanks.

1 MS. FRIEL: The one thing -- it's just
2 a word thing, too, is the last sentence on the
3 bottom of page 1 and moving into the -- it
4 finishes on the top of page 2.

5 DEAN ANDERSON: Yes?

6 MS. FRIEL: I would just change the
7 word agreed to consented because otherwise, we're
8 -- that's the real word, right, that these things
9 mean, you haven't consented, not agreed.

10 DEAN ANDERSON: So, that's a great
11 comment, a good suggestion.

12 MS. FRIEL: It's the terminology.

13 DEAN ANDERSON: I was trying to use
14 the terminology of the Statute itself of what
15 consent means, agreement to the conduct at issue.

16 MS. FRIEL: Oh, I see what you're --

17 Maj Gen WOODWARD: ---- freely given
18 agreement.

19 DEAN ANDERSON: So, has not agreed to
20 the conduct at issue, trying to use that
21 phraseology as a way to talk about it because the
22 sentence before says, does not constitute

1 consent.

2 So, I was trying to say, okay, well,
3 let's use the language of consent to try to
4 explain what does this mean? It means that when
5 a person submits for these three reasons, they
6 have not agreed to the conduct at issue, which is
7 the definition of consent. Does that make sense?

8 MS. KEPROS: Could somebody explain to
9 me how this would operate in life? Like what --
10 how is this language used if it's an executive
11 order?

12 CHAIR JONES: It would be used by the
13 judges to immediately put in the Benchbook to be
14 used and by the trial judges to charge the jury.

15 MS. KEPROS: So, it would become an
16 instruction?

17 CHAIR JONES: It would become an
18 instruction.

19 Maj Gen WOODWARD: When we list things
20 ---- when we say including disassociation or
21 traumatic paralysis, is that -- does that ever
22 bound it too much or when we say including, is

1 that enough inference that there are others?

2 DEAN ANDERSON: Such as maybe?

3 Maj Gen WOODWARD: Or --

4 DEAN ANDERSON: Would you prefer such
5 as?

6 Maj Gen WOODWARD: I don't know if
7 such as is any better than --

8 MS. WINE-BANKS: But not limited to?

9 DEAN ANDERSON: I don't know if that's
10 --

11 MS. WINE-BANKS: That's the general
12 way to say here's an example, but --

13 DEAN ANDERSON: Yes, that's good.

14 MS. WINE-BANKS: -- it's a sample.

15 HON. HOLTZMAN: I guess I have a
16 question here, which is resistance is not
17 required and although its absence may be
18 considered a factor among others ---- why should
19 its absence be considered a factor?

20 I mean, in a way, it's just
21 reinforcing the whole idea that resistance should
22 be thought of in terms of whether someone has

1 consented. It seems to me we're just reinforcing
2 that as opposed to saying it's not resistance.

3 MS. KEPROS: Well, I think it varies,
4 though, on the credibility of the claim there was
5 not consent. If that's what's alleged, that
6 there's not consent, I think the jury's going to
7 consider whether or not there was any indication
8 to the defendant there was not consent.

9 MS. FRIEL: It's certainly going to
10 come up practically in testimony.

11 MS. KEPROS: I think so.

12 MS. FRIEL: When -- we always say prep
13 the victim and you say to them ---- I'm not
14 saying you should have, you know, so don't quote
15 me ---- I'm not saying you should have, but the
16 defense is certainly going to ask: did you yell,
17 did you scream, did you try to get up and walk
18 away?

19 So, I need the answers and then I need
20 you to think about if you didn't do those things,
21 why not, so that when they ask you, we can
22 articulate why not. So, that always comes up.

1 MS. KEPROS: And where there was
2 resistance, the Government is always going to
3 present that evidence for the exact same reason.

4 It's the totality of whether or not
5 there was actually an agreement or whether this
6 is a later in time, maybe regretting the sexual
7 activity or ---- you know, whatever the defense
8 theory might be to that.

9 DEAN ANDERSON: And I think that's
10 exactly the totality of the circumstances idea is
11 what this language was designed to get to. If we
12 could say it better or whatever, that was the
13 theory.

14 MS. KEPROS: I actually like --

15 HON. HOLTZMAN: Well, I mean --

16 MS. KEPROS: Go ahead.

17 HON. HOLTZMAN: I'm just confused.

18 Because we say here, lack of verbal or physical
19 resistance does not constitute consent. And then
20 we go down four lines and we say, the absence of
21 resistance may be considered a factor among
22 others. Well, is it or isn't it? That's my

1 concern here.

2 I'm not saying ---- I have no problem
3 with the first part of the sentence, resistance
4 is not required, and I have no problem with the
5 end of the sentence, its absence alone does not
6 imply agreement.

7 But I am concerned with the language
8 in the middle, although its absence may be
9 considered a factor among others.

10 Maj Gen WOODWARD: Its absence alone
11 does not imply agreement. I mean, I think it's
12 acknowledging that it can be used, but that it
13 shouldn't be used on its own. It can't stand on
14 alone as evidence of lack of consent or of
15 consent.

16 COL SCHINASI: I think it's when the
17 judge is telling the court members how to
18 interpret those events and giving them, as best
19 he or she can, both sides of it. If you took
20 that out, I think the instruction might be too
21 slanted.

22 MS. KEPROS: I think the resistance is

1 not required sentence is actually really good
2 because it very succinctly says, you don't need
3 to resist. Here's how you can consider it.

4 I actually would probably recommend
5 removing the sentence right above that because I
6 think it gets a little confusing, like you're
7 almost contradicting yourself from one sentence
8 to the next.

9 DEAN ANDERSON: Which sentence would
10 you get rid of, Laurie?

11 MS. KEPROS: I would get rid of the
12 one that says the absence of verbal or physical
13 resistance because you've already quoted that out
14 of the Statute in the line above and just go from
15 this is the key phrase in the Statute in the
16 question of resistance.

17 Resistance is not required and
18 although its absence may be considered a factor
19 among others, its absence alone does not imply
20 agreement to the conduct at issue.

21 MS. FRIEL: I agree with Laurie
22 because that is the key point we're worried about

1 that we want to get across and it gets lost with
2 too much other verbiage in there. That'll make
3 it stand out much more.

4 HON. HOLTZMAN: I still think that
5 that last sentence is ---- there's a logical
6 contradiction between that and the beginning.

7 If you're saying that its absence
8 alone doesn't imply agreement, you have to make
9 that clear in the other parts of this paragraph
10 because the first sentence, the statutory
11 sentence, doesn't say that lack of verbal or
12 physical resistance does not in and of itself
13 constitute consent.

14 And here you're saying its absence
15 alone. I mean its absence alone doesn't imply
16 agreement. I mean I'm just --

17 MS. FRIEL: What if you said something
18 simpler like resistance is not required to prove
19 lack of consent?

20 COL SCHINASI: Don't you think giving
21 the court members both sides of the same thought
22 is helpful? Because that's what you're really

1 doing. You're giving them both sides of the same
2 thought.

3 CHAIR JONES: Yes, because one side is
4 going to be arguing there was no resistance here
5 and they can -- if they decide that's accurate,
6 then they have, its absence may be considered a
7 factor. That would be the defense's part of this
8 charge.

9 COL SCHINASI: Yes.

10 CHAIR JONES: Now, I don't know if it
11 makes -- so, I don't think it's incorrect. I
12 mean I suppose we could try resistance is not
13 required. Its absence alone does not imply
14 agreement to the conduct at issue, although its
15 absence may be considered a factor. So we could
16 invert it, but --

17 MS. KEPROS: I like the sentence that
18 starts, resistance is not required. I think it's
19 -- the whole sentence is good, actually, as you
20 guys have drafted it.

21 Maj Gen WOODWARD: As a layperson,
22 I'll tell you, I like it because -- I usually try

1 to add that as the person who's the most clueless
2 in the room. But, when I read it, it is a clear
3 understanding for me of what you're trying to
4 tell me.

5 COL SCHINASI: You know, when you
6 watch a judge give this instruction, who knows
7 what he or she is doing, they have focused on the
8 part of the case that is the most concern to the
9 court members, that part that was litigated the
10 most. And this is read very slowly. It may be
11 even embellished a little with the facts as they
12 go through it.

13 So, what we're looking at is probably
14 the linchpin of the case and I think the more the
15 judge can help the court members understand that,
16 the more effective it's going to be.

17 So, I think you're right -- exactly
18 right.

19 CHAIR JONES: So, what does that mean
20 now? Are we taking out the absence of verbal or
21 physical resistance? That's going to be read to
22 them in any event. It's part of the Statute,

1 right?

2 MS. KEPROS: Well, that's why I was
3 going to get rid of the next time that it's said
4 again just because I think it's confusing to hear
5 it kind of repeated.

6 CHAIR JONES: Right. So, we would
7 just go right to after we say, lack of verbal or
8 physical resistance does not constitute consent.
9 This is a key phrase in the Statute on the
10 question of resistance. Then -- I mean a judge
11 will say, let me explain, resistance is not
12 required, and although its absence may be
13 considered a factor, its absence alone does not
14 imply agreement.

15 So, that's how that would --

16 MS. FRIEL: And there's another use of
17 your word agreement, and I have the same issue
18 with it there, because although the word
19 agreement is used in the Statute, it's not
20 agreement. It's freely given agreement.

21 Consent is freely given agreement.

22 So, if you want to use the Statute words, you say

1 freely given agreement. Because you do end up
2 agreeing. The recourse is ---- in a factual way,
3 I've agreed. It wasn't freely given agreement.

4 DEAN ANDERSON: Then, could we end
5 that sentence by saying --

6 Maj Gen WOODWARD: Does not imply
7 consent?

8 DEAN ANDERSON: -- its absence alone
9 does not imply consent?

10 Maj Gen WOODWARD: That's what I --
11 yes.

12 MS. FRIEL: That's fine with me, it's
13 much clearer.

14 Maj Gen WOODWARD: Especially if
15 you're talking to jurors.

16 CHAIR JONES: The whole conduct at
17 issue piece is out.

18 MS. FRIEL: And that's why -- and then
19 it'll make sense in the next paragraph if you use
20 the word consent again.

21 COL SCHINASI: Do you think it would
22 be a technical issue in using agreed as opposed

1 to consent?

2 DEAN ANDERSON: You know, what I was
3 trying to do was explain something in as narrowly
4 a way as possible.

5 So, when the sentence said, this is
6 not required for ---- you know -- does not imply
7 consent or lack of -- does not constitute
8 consent. I would pretty much say the same thing
9 and just change the word consent to what the
10 definition of consent, which was agreement to the
11 conduct at issue.

12 But, I agree with the challenge, Lisa,
13 that to the extent that it confuses anyone, maybe
14 just sticking with the word consent.

15 MS. FRIEL: That's what we're trying
16 to get across to people, what is and is not
17 consent and I think

18 Maj Gen WOODWARD: -- you're right,
19 it's just clearer.

20 DEAN ANDERSON: And I'm fine with
21 that. I'm fine with that.

22 COL SCHINASI: Because you can agree

1 to something and maybe it wouldn't technically be
2 consent.

3 CHAIR JONES: No, I think you're
4 right.

5 MS. FRIEL: Right, legally effective
6 consent.

7 DEAN ANDERSON: So, the last sentence,
8 it will be -- the last part of it, does not imply
9 ---- instead of agreement to the conduct at issue
10 is, does not imply consent.

11 CHAIR JONES: And then on your second
12 paragraph there, it's a threat of force or fear,
13 they have not consented.

14 HON. HOLTZMAN: I still don't think
15 that that's strong enough in the last sentence.
16 I would --

17 DEAN ANDERSON: Which last sentence?

18 HON. HOLTZMAN: Of the --

19 CHAIR JONES: I think we're in the
20 first paragraph.

21 HON. HOLTZMAN: Yes, we're there. And
22 I would just -- something like its absence alone

1 does not -- I don't like the word imply. It's
2 not imply, maybe constitutes? If its absence
3 alone is not sufficient for you to find agreement
4 to the conduct at issue, maybe that's it.

5 MS. FRIEL: Or why don't we just stop
6 at the sentence that says, the clause means when
7 a person submits to the will of another due to
8 force, threat of force or fear, they have not
9 consented, period.

10 CHAIR JONES: We're in the first
11 paragraph.

12 MS. FRIEL: Okay. I'm sorry.

13 COL SCHINASI: I think the concept of
14 less wordy may be good when we're dealing with a
15 Statute. I think the concept of less wordy when
16 we're dealing with a jury instruction may not be
17 equally good.

18 Because when you watch a judge who
19 really knows what she's doing, you can see just
20 pulling the court members in with her
21 explanation. And so, the most --

22 DEAN ANDERSON: Slowing down,

1 emphasis, underscoring.

2 COL SCHINASI: Right.

3 MS. FRIEL: So, saying it repetitively
4 is helpful in the instruction?

5 COL SCHINASI: Yes, yes.

6 MS. FRIEL: Got it.

7 COL SCHINASI: As opposed to the
8 Statute where you might want to be as concise as
9 you can, but not an instruction.

10 MS. FRIEL: Got it.

11 CHAIR JONES: Well, you know, I think
12 we do need -- we're saying resistance isn't
13 required. Maybe we have to say, its absence
14 alone is insufficient to establish consent.

15 COL SCHINASI: Yes.

16 DEAN ANDERSON: That's a clear way to
17 put it.

18 CHAIR JONES: How about that?

19 DEAN ANDERSON: So, resistance is not
20 required, period.

21 CHAIR JONES: And I don't care about
22 the middle part.

1 DEAN ANDERSON: Yes.

2 CHAIR JONES: Right?

3 DEAN ANDERSON: Yes, its absence alone
4 is insufficient --

5 CHAIR JONES: To constitute consent.

6 HON. HOLTZMAN: Just what I had in
7 mind.

8 DEAN ANDERSON: Okay. Next paragraph,
9 we're on to paragraph two.

10 So, this is dealing with the awkward
11 reality which is that this provision in the
12 middle of the sentence is about force and we
13 don't want to require force in an analysis of
14 consent.

15 Maj Gen WOODWARD: I think you have
16 agreement.

17 LTC MCGOVERN: I believe the next
18 group sort of tackled this concept by using the
19 phrase totality of circumstances. We're on the
20 paragraph that the surrounding circumstances, is
21 that correct?

22 DEAN ANDERSON: No.

1 LTC McGOVERN: You're in Section
2 120(g). Never mind.

3 DEAN ANDERSON: So, no comments? Do
4 you think it's sufficient?

5 MS. WINE-BANKS: Well, the changes
6 that were recommended before.

7 DEAN ANDERSON: The totality?

8 COL SCHINASI: The acquiescence.

9 MS. WINE-BANKS: The consent of --

10 DEAN ANDERSON: Oh, yes, yes, yes, no
11 I've got those.

12 COL SCHINASI: Okay.

13 MS. WINE-BANKS: -- but not limited
14 to.

15 DEAN ANDERSON: Yes, got that, too.
16 Got that, too, including but not limited to
17 disassociation, traumatic paralysis ---- we've
18 got that.

19 We've also got acquiescence changed to
20 submission in the last paragraph, but in terms of
21 the second paragraph, are there other
22 suggestions?

1 HON. HOLTZMAN: I'm still on that
2 paragraph starting the submission paragraph.

3 DEAN ANDERSON: Yes.

4 HON. HOLTZMAN: I think that this --
5 I find the sentence to beginning on the top of
6 the page confusing. I mean submission for a
7 clause is -- I would -- it's too general and
8 confusing to me. So, I would take that out and
9 strike out the, in other words, and just say what
10 you want to say. The sentence ---- I don't even
11 --

12 Maj Gen WOODWARD: I agree.

13 HON. HOLTZMAN: I wouldn't even start
14 with the sentence does not imply, just say that
15 lack of verbal -- I would prefer that you phrased
16 the next two sentences not in response to the
17 sentence, but just in response to a general
18 statement, just as a statement.

19 MS. KEPROS: I guess I agree with
20 that. I don't understand what is being added by
21 the, this submission in the sentence --

22 HON. HOLTZMAN: Yes, well, that's

1 read.

2 MS. KEPROS: -- after that. I mean I
3 know what you're talking about -- you're making
4 reference to what's in the Statute, but I don't
5 think the Panel is going to be comparing it to
6 the Statute as it's read to them. But, you've
7 already describe it in the earlier two sentences.

8 Maj Gen WOODWARD: But what I liked
9 about it was it helped me understand that
10 sentence in the Statute that was so unclear, to
11 separate it out into two so that you realize that
12 it's two separate clauses.

13 So, I think somehow you have to
14 explain that, that the end of the submission
15 clause does not actually apply to the resistance
16 portion.

17 MS. KEPROS: I don't know. I'm just
18 trying to image how this is being read to the
19 Panel.

20 CHAIR JONES: It's hard.

21 MS. KEPROS: I think if I were a
22 juror, I wouldn't know what clause you're talking

1 about. I wouldn't be analyzing this language so
2 carefully.

3 Maj Gen WOODWARD: So, it has to be
4 written without the clause piece, but you still
5 need the information.

6 DEAN ANDERSON: Yes, and in my
7 defense, I wrote this in about five minutes. But
8 that's okay -- five minutes ago.

9 MS. KEPROS: Nobody's holding you to
10 that, Michelle. Not at all.

11 DEAN ANDERSON: Just kidding.

12 Okay. So, I agree, upon reflection,
13 that this language about clauses is a little too
14 law professor-ish, and therefore, problematic.

15 So, I'm thinking that -- work with me
16 on this, the first sentence remains. The second
17 sentence is, the clause means that when a person
18 submits to the will of another due to force or a
19 threat of force or fear, they have not consented,
20 period.

21 The next sentence drops down to, a
22 lack of verbal or physical resistance need not be

1 in response to force, a threat of force or fear.
2 Because what that -- because the sentence itself
3 ties into the one before because the sentence
4 before is now about force, fear, a threat of
5 force.

6 CHAIR JONES: This is one of those
7 ones where it takes you a while to figure out
8 what's so confusing about it.

9 Maj Gen WOODWARD: Yes, so, you're
10 just --

11 MS. FRIEL: Probably why I'm just
12 wondering what we need it for.

13 DEAN ANDERSON: It's really because
14 when we sat with this language for a long time --
15 and by the way, this didn't occur to us
16 initially.

17 When we sat with this language for a
18 long time, the three of us, and looked at that
19 sentence that says, a threat of force ---- or
20 starts with, lack of -- the sentence itself is
21 lack of verbal or physical resistance or
22 submission resulting from the use of force or

1 threat of force or placing another person in fear
2 does not constitute consent.

3 CHAIR JONES: This something Grammel
4 talked about, and the concern is that somebody
5 might think verbal, physical resistance --

6 DEAN ANDERSON: Or submission, comma.

7 CHAIR JONES: -- also required --

8 DEAN ANDERSON: Requires force, a
9 threat of force or placing another person in
10 fear. So, the problem with the sentence, the
11 third sentence in the Statute itself, is that
12 it's not clear what the phrase, resulting from
13 the use of force, threat of force, refers to.
14 Does it refer to submission or does it also refer
15 to verbal and physical resistance?

16 CHAIR JONES: Even divisionally --

17 COL SCHINASI: Glen, have you given
18 this instruction?

19 LtCol HINES: Yes, sir.

20 COL SCHINASI: Tell us about how it
21 works.

22 LtCol HINES: Well, I mean you just --

1 you don't -- you would take out -- and I think
2 all the Benchbook provisions are like this,
3 they'll restate what's in the Statute. You --

4 CHAIR JONES: Glen, I'm having trouble
5 hearing you.

6 LtCol HINES: You would remove from
7 the Benchbook section -- you know, all the way up
8 until ---- in the first paragraph, for instance.

9 You would just start with, lack of
10 verbal or physical resistance does not -- you're
11 not telling them what the law is or listing what
12 the code section is, you're just starting with,
13 neither verbal nor physical resistance is
14 required, lack of verbal or physical resistance
15 does not constitute consent, the rest of that.

16 And then on the second paragraph, it
17 would start ---- if that's what you wanted to
18 say, it would start with, submission resulting
19 from the use of force.

20 Maj Gen WOODWARD: Right, but
21 depending on how you read that one line, you can
22 either say lack of verbal or physical resistance

1 or submission resulting from the use of force.

2 See the comma there -- so all of the
3 use of force, threat of force or placing another
4 person in fear can apply to all of it. So, that
5 implies that, okay, if I didn't resist to force -
6 --- okay? But that's not the same as not
7 resisting if there wasn't force.

8 COL SCHINASI: So, how would you --
9 given that scenario, how would you instruct them
10 then?

11 LtCol HINES: Well, it's been a few
12 days since I've looked at it, but I think it's --
13 -- the instruction in the Benchbook is ----
14 basically follows the language of the Statute.
15 It hasn't been broken up or separated out like
16 we're talking about.

17 Maj Gen WOODWARD: So, it could be
18 confusing?

19 LtCol HINES: It could be.

20 BGen SCHWENK: What --

21 MS. WINE-BANKS: But, the way you were
22 just suggesting, I just -- you said skip the one

1 sentence and then start the other, lack of verbal
2 or physical need not be in response.

3 Isn't that the same as the last
4 sentence, the lack of -- may be caused by reasons
5 other than? It's sort of saying it two different
6 ways.

7 DEAN ANDERSON: It does. It is, but
8 it is a transition sentence between the sentence
9 that would precede it, which is when a person
10 submits to the will of another due to force,
11 fear, threat of force, whatever -- they have not
12 consented.

13 A lack of verbal resistance, however
14 -- maybe I should say, however need not --
15 because that would be a link --

16 MS. WINE-BANKS: Yes, yes.

17 DEAN ANDERSON: -- with the word
18 however.

19 COL SCHINASI: And the fact that you
20 say it two different ways --

21 DEAN ANDERSON: Yes.

22 COL SCHINASI: -- on the same complex

1 issue is very helpful.

2 MS. WINE-BANKS: Yes.

3 DEAN ANDERSON: So, it's the however
4 and --

5 MS. WINE-BANKS: Yes, okay, I think
6 that makes it -- yes.

7 DEAN ANDERSON: Great.

8 MS. WINE-BANKS: That solves it for
9 me.

10 DEAN ANDERSON: So, that's the
11 transition between the two sentences.

12 COL SCHINASI: Yes, yes.

13 DEAN ANDERSON: Then we get rid of the
14 sentence that --

15 MS. WINE-BANKS: In between, yes.

16 DEAN ANDERSON: -- law professor-ish,
17 you know, the clause one, right?

18 COL SCHINASI: Yes.

19 MS. WINE-BANKS: Yes, yes.

20 BGen SCHWENK: So, where are we now?

21 DEAN ANDERSON: So, where we are now
22 ---- let's back up.

1 BGen SCHWENK: Which paragraph?

2 DEAN ANDERSON: This says, Section
3 120(g)(8)(A) also indicates submission resulting
4 from the use of force, threat of force or placing
5 another person in fear does not constitute
6 consent.

7 This clause means that when a person
8 submits to the will of another due to force, a
9 threat of force or fear, they have not consented.
10 A lack of verbal or physical resistance, however,
11 need not be in response to fear -- to force, a
12 threat of force or fear.

13 The lack of verbal or physical
14 resistance may be caused by reasons other than
15 force including, but not limited to,
16 disassociation or traumatic paralysis.

17 MS. FRIEL: Can I make a suggestion
18 that we change the word imply? We change the
19 word imply to mean.

20 DEAN ANDERSON: Where's the --

21 MS. FRIEL: Instead of saying, in
22 other words, the sentence does not imply -- blah,

1 blah, blah. Frankly, it does imply that, which
2 is why we're trying to fix it.

3 DEAN ANDERSON: Where's the word
4 imply? Just tell me where you are.

5 MS. WINE-BANKS: We took it out.

6 MS. FRIEL: Oh, you just took that
7 sentence out, too?

8 MS. WINE-BANKS: Yes.

9 MS. FRIEL: I thought you took the
10 transition sentence out.

11 MS. WINE-BANKS: No, took it -- well

12 --

13 DEAN ANDERSON: We took it out.

14 MS. FRIEL: That sentence is gone?

15 DEAN ANDERSON: In other words --

16 MS. WINE-BANKS: In other words --

17 DEAN ANDERSON: Yes, we took out --

18 MS. WINE-BANKS: -- does not imply,
19 we took that out.

20 DEAN ANDERSON: We took out in other
21 words, the sentence does not imply that.

22 MS. FRIEL: Oh, and started -- okay.

1 DEAN ANDERSON: And it begins with, a
2 lack.

3 MS. WINE-BANKS: With a lack of.

4 DEAN ANDERSON: It's just simpler.

5 MS. FRIEL: Got it, got it, okay.

6 MS. KEPROS: I'm just -- I'm reading
7 those last two sentences, and I know what you're
8 getting at, but it's very confusing to the
9 listener when you just told them there is no need
10 to have evidence of resistance.

11 And now you're like saying, oh, but
12 here are reasons why there might be resistance.

13 MS. FRIEL: The other option is --

14 MS. KEPROS: And that's super
15 confusing.

16 COL SCHINASI: But that's what the
17 evidence is going to do.

18 MS. KEPROS: But that's the problem
19 with the Statute. That's the problem with the
20 Statute.

21 COL SCHINASI: That's what the trial's
22 going to be about, being able to link those two

1 thoughts.

2 Maj Gen WOODWARD: But read the
3 Statute, read that line in the Statute the way I
4 said it could be read and it could be confusing.

5 MS. KEPROS: But you just said,
6 resistance is not required and then you go on to
7 talk about, a lack of verbal/physical resistance,
8 however, need not be in response to force.

9 Why are you talking about a lack of
10 resistance now like it matters? I think it's
11 going to imply to the Panel that now you should
12 be looking for evidence of resistance, that it's
13 important and that's really not true.

14 MS. FRIEL: That's relevant to force,
15 but there are lots of things evidence that are
16 relative to force that we're not putting --

17 DEAN ANDERSON: How about this? How
18 about this? I've got another idea. I've got
19 another idea. We get rid of what is now, a lack
20 of verbal or physical resistance, however.

21 And check this out, so, then it goes,
22 Section 120(g)(8)(A) also indicates submission

1 resulting from -- blah, blah, blah -- does
2 constitute consent. This clause means that when
3 a person submits to the will of another due to
4 force, a threat or force or fear, they have not
5 consented.

6 The lack of verbal or physical
7 resistance ---- a lack of verbal or physical
8 resistance, however, may be caused by reasons
9 other than force including, but not limited to,
10 disassociation or traumatic paralysis.

11 So, that we skip that other -- do you
12 know what I mean? It just gets to the crux of
13 it.

14 CHAIR JONES: Maybe just --

15 BGen SCHWENK: What if we keep --

16 CHAIR JONES: Maybe just treating them
17 separately in the explanation will do it. So,
18 we're saying, lack of verbal or physical
19 resistance does not constitute consent, and
20 nobody disagrees with that.

21 And then, without getting into the
22 problem of how the Statute reads -- the

1 explanation would simply read, in addition,
2 submission resulting from the use of force does
3 not constitute consent.

4 So, I don't know if that makes it
5 worse or better, but we're just trying to
6 separate them out and I worry that trying to
7 explain it does get kind of confusing.

8 BGen SCHWENK: And that's my thought
9 is separate them out.

10 So, I would take the last sentence of
11 the second paragraph that's -- all the lack of
12 verbal or physical ---- all the resistance
13 language, put it all in the same paragraph. Just
14 talk about resistance and nail that down.

15 Then, the next paragraph just talks
16 about submission and you nail that down. And by
17 the way we talk about it, we've interpreted the
18 sentence to have the modifying phrase only modify
19 submission, not resistance.

20 And there it is, it's --

21 Maj Gen WOODWARD: So, the first
22 paragraph was resistance, the second paragraph is

1 submission.

2 BGen SCHWENK: Yes, so -- you know, so
3 right now, the first one says, neither verbal nor
4 physical resistance is required to prove consent.
5 Lack of verbal or physical resistance does not
6 constitute consent. This is -- okay.

7 The absence of verbal or physical
8 resistance may not be construed as agreement to
9 the conduct at issue. Resistance is not required
10 ---- and whatever -- its absence alone is
11 insufficient to constitute consent.

12 Then, jump to the end of the next
13 paragraph where it says your two sentences on a
14 lack of verbal or physical resistance so it's all
15 tied together and coherent and then submission is
16 what's left without trying to define it.

17 DEAN ANDERSON: Good.

18 HON. HOLTZMAN: Maybe ---- yes, but
19 I'm still a little ---- find the language still a
20 little confusing, the lack of verbal -- a lack of
21 verbal resistance must be in response to force.
22 You're saying that a lack -- what are you saying

1 there?

2 BGen SCHWENK: It doesn't have to be.

3 HON. HOLTZMAN: It doesn't have -- you
4 mean --

5 BGen SCHWENK: You read the last two
6 sentences?

7 HON. HOLTZMAN: Yes, the lack -- well,
8 but the -- at present --

9 DEAN ANDERSON: No, the word need --
10 or must has been changed to need not.

11 HON. HOLTZMAN: Okay, so a lack of
12 physical resistance need not be in response to
13 force. That's just --

14 BGen SCHWENK: So, those two --

15 HON. HOLTZMAN: That is just totally
16 confusing.

17 MS. FRIEL: I agree. I mean I think
18 that what we're doing is -- one, we're making an
19 argument that a trial lawyer's going to make.

20 You know, we're going to talk about --
21 because resistance is going to come up and
22 they're going to say she didn't resist and that

1 proves she consented. And the other side's going
2 to say, no, she didn't resist because she was
3 afraid or whatever the explanation is.

4 I don't know why in this explanation
5 here we're making trial arguments. I just think
6 it's much cleaner to do what you did with the
7 first paragraph about, you know, resistance is
8 not required to prove consent.

9 Submission, you know, that results
10 from force blah, blah, blah, is not consent and
11 then it's clean and take those extra sentences
12 out.

13 CHAIR JONES: And simply splitting
14 them may do it.

15 COL SCHINASI: I don't know that
16 that's making counsel's argument. I think what
17 that's doing is -- the judge is going to know
18 what closing arguments are going to be because
19 they would have had a session on arguments.

20 And the Judge is going to know that
21 that this is what's going to come up. This is
22 the essence of the case. And so, the Judge is

1 doing the best she can do to put it in
2 perspective from both sides.

3 That's all she's doing. She's not
4 arguing the case, she's just trying to explain
5 the law as it applies to these issues from the
6 defense's side and from the prosecution's side.

7 MS. FRIEL: I agree if we stop at the
8 word consented in the second paragraph, but
9 you're making one side's argument there. You're
10 making the argument about why lack of consent is
11 not relevant to the issue of consent. You're not
12 making the opposite argument about why sometimes
13 it is relevant to consent.

14 MS. KEPROS: That's what I was going
15 to say.

16 MS. FRIEL: And you can see the
17 confusion.

18 MS. KEPROS: If you do both sides,
19 then you can almost say --

20 MS. FRIEL: But only doing the one
21 side there and I think it just makes it more
22 confusing to the two points you want to make.

1 MS. KEPROS: Otherwise, you have to
2 say one reason for lack of resistance is that
3 there was consent.

4 MS. FRIEL: Right.

5 MS. KEPROS: Do you want to say that?
6 You don't want to say that, so don't say either.

7 DEAN ANDERSON: So, the only -- I'm
8 persuaded by a lot of this.

9 I think the only reason to say
10 something ---- and because ordinarily, you
11 wouldn't say anything about this, is the
12 confusion with the sentence itself which may
13 imply that force, threat of force and fear have
14 something to do with resistance. And all we want
15 to say is that they don't.

16 MS. KEPROS: And your sentence says
17 that, but it says, this clause means at the
18 bottom of the first page.

19 DEAN ANDERSON: Right, it explains the
20 clause, but it doesn't explain the relationship
21 between fear, force and threat of force and,
22 potentially, resistance.

1 Maj Gen WOODWARD: Yes, because if you
2 just take out the, or submission, you know, that
3 reads lack of verbal or physical resistance
4 resulting from the use of force, threat of force
5 or placing another person in fear does not
6 constitute consent.

7 Now, you guys don't read it that way,
8 but someone could and that's what we're trying to
9 make sure is that they can't read it that way by
10 just taking out the or submission.

11 DEAN ANDERSON: So, I have a possible
12 solution and that is going with General Schwenk's
13 argument that why don't you keep resistance stuff
14 together in the first paragraph and the
15 submission stuff as the second paragraph.

16 We simply take one sentence from the
17 end of what is now the second paragraph and the
18 one that's least objectionable, I think, is a
19 lack of verbal or physical resistance need not be
20 in response to force, a threat of force or fear
21 and simply put that at the end of the first
22 paragraph.

1 HON. HOLTZMAN: But what is the --

2 (Simultaneous speaking.)

3 LTC McGOVERN: Because isn't it just
4 restating everything in (8)(A)?

5 Maj Gen WOODWARD: No, because I'm
6 saying some people can read that wrong. If you
7 just take out the or submission, I mean you're
8 reading it as lack of verbal or physical
9 resistance, pause, or submission resulting from
10 the use of force, threat of force or placing a
11 person in fear does not constitute consent.

12 You're separating those two clauses
13 but some people are reading it and going, lack of
14 verbal or physical resistance resulting from the
15 use of force, threat of force or placing another
16 person in fear does not constitute consent.

17 So they're --

18 DEAN ANDERSON: Did we have testimony
19 on this? Didn't Grammel -- was Grammel the one
20 who talked about this?

21 CHAIR JONES: You know, it took me --
22 yes, Grammel mentions it.

1 DEAN ANDERSON: Okay.

2 CHAIR JONES: But I don't know how big
3 of a concern it is in the rest of the greater
4 military world. It wasn't one that we even
5 focused on, frankly, when we discussed this.

6 I think it's -- we're better off just
7 treating them separately and maybe saying
8 something like, in addition to -- you know, we
9 want to just -- all we want to say is, look,
10 physical and verbal and physical resistance is
11 one thing, but submission is a separate
12 consideration.

13 There's ways to do that and we just
14 need -- I think we just need to separate them
15 here in the explanation, unlike what the Statute
16 does which just screws everything up.

17 Maj Gen WOODWARD: I mean, if it can
18 be misinterpreted, I mean, yes, 90 percent -- if
19 90 percent of people don't misinterpret it, but
20 if even 1 percent does, shouldn't we clarify it?

21 MS. WINE-BANKS: What if you use the
22 word separately in Section 120(g)(8)?

1 CHAIR JONES: Yes, just anything, very
2 good, anything to distinguish that this is a
3 separate category.

4 COL SCHINASI: I think --

5 HON. HOLTZMAN: What is a separate --
6 I mean I'm confused. What is the problem here?
7 I'm not even sure I understand what the issue is.
8 What do you think -- how do you think people are
9 being confused?

10 MS. WINE-BANKS: Well, I also had a
11 grammatical question on this.

12 HON. HOLTZMAN: Yes, well, that's just
13 --

14 Maj Gen WOODWARD: Reading that line
15 because there's no semicolon or comma there, the
16 end of the clause could apply to the beginning,
17 i.e., lack of verbal or physical resistance.

18 So, someone could read this and think
19 that the resulting from use of force, threat of
20 force or placing another person in fear could
21 apply to the lack of verbal or physical
22 resistance and we want to make sure it's very

1 clear that that does not apply.

2 LTC McGOVERN: Why?

3 DEAN ANDERSON: Because resistance for
4 whatever reason does not constitute -- lack of
5 resistance --

6 MS. WINE-BANKS: Because you were
7 trained that if --

8 DEAN ANDERSON: -- for whatever
9 reason does not constitute --

10 MS. WINE-BANKS: -- if someone
11 attacks you, you shouldn't resist because they
12 might kill you.

13 HON. HOLTZMAN: I know, but that's not
14 what the Statute says. Even if it could be
15 confused, this section ---- this line here, lack
16 of physical or verbal resistance to submission --
17 it just addresses the issue of force. That's all
18 it does. And it's -- as I read it, it says, if
19 force is used, they can't -- any lack of
20 resistance does not constitute consent.

21 MS. WINE-BANKS: But that's the
22 confusion is it's two separate things.

1 (Simultaneous speaking.)

2 DEAN ANDERSON: One --

3 MS. WINE-BANKS: Lack of resistance
4 does not constitute consent. And submission,
5 because of force, does not constitute, they are
6 two separate things.

7 HON. HOLTZMAN: There's no -- so, what
8 you're saying is that the use of the word force
9 doesn't apply to --

10 MS. WINE-BANKS: Physical resistance.

11 HON. HOLTZMAN: -- doesn't apply to
12 the lack of verbal or physical resistance?

13 DEAN ANDERSON: Right.

14 MS. WINE-BANKS: But you might not
15 resist for reasons that are unrelated to the use
16 of force. You might not resist --

17 HON. HOLTZMAN: Why would that -- why
18 would such a reading be even -- I don't even see
19 such a reading.

20 CHAIR JONES: That's why this is
21 confusing. When I read this, I thought they were
22 all separate. You can read it as you're reading

1 it to make them all the same. Why don't we work
2 on this and come back?

3 COL SCHINASI: The way the Judge is
4 going to use this is not to read the whole thing,
5 Glen can correct me if I'm wrong, not to read the
6 whole thing as a treatise. What the Judge is
7 going to do is --

8 DEAN ANDERSON: Select.

9 COL SCHINASI: -- pick the pieces
10 from the instructions that are relevant to the
11 facts in the case. And so, what we have here is
12 the entire possibility of thought. But, the
13 Judge may -- unless the evidence suggests this
14 result, the Judge is not going to read that
15 instruction.

16 CHAIR JONES: So, a Judge is either
17 going to say lack of verbal resistance does not
18 constitute consent. Lack of physical resistance
19 does not constitute consent or submission
20 resulting from the use of force, threats, or
21 placing another person in fear does not
22 constitute consent.

1 COL SCHINASI: It depends on what the
2 facts show.

3 CHAIR JONES: That is the reading that
4 can be made and that's why it's confusing because
5 other people read it differently.

6 Maj Gen WOODWARD: So they would --
7 (Simultaneous speaking.)

8 DEAN ANDERSON: Yes, because I don't
9 think --

10 HON. HOLTZMAN: I don't see any reason
11 for -- I think that would be an illogical reading
12 of it because there's no -- there are no commas
13 there. There's nothing to suggest that the word
14 submission should be treated in any different way
15 from the lack of force or lack -- whatever the --
16 I think -- where is the language in front of me?

17 MS. KEPROS: It's under A, lack of
18 verbal or physical resistance --

19 HON. HOLTZMAN: Oh, yes, sorry.

20 MS. KEPROS: -- or submission
21 resulting from --

22 (Simultaneous speaking.)

1 Maj Gen WOODWARD: This is making the
2 point, we are reading this differently.

3 (Simultaneous speaking.)

4 MS. FRIEL: So, my question is why
5 doesn't it solve the part that some people read
6 it one way, all I'm saying is why doesn't the
7 first paragraph be written in the way we've
8 amended it? That works on the first part.

9 The submission, I think, paragraph
10 works if you just have the two lines as we've
11 changed them and stop at the word they have not
12 consented to the conduct at issue. I think that
13 clears up both things.

14 And then I think going down a rabbit
15 hole talking about lack of physical and verbal
16 resistance may be caused by other reasons and
17 blah, blah, blah.

18 DEAN ANDERSON: That's fine. That's
19 fine. That's fine.

20 MS. FRIEL: I'd just take those two
21 lines out.

22 DEAN ANDERSON: So, what I'd like to

1 do is clean this up and bring it back because
2 it's actually, we've made a lot of changes
3 already to this language and it would be easier
4 to discuss anything new or any additional
5 changes. I actually think we agree on most all
6 the changes that we've suggested. So, we should
7 look at the revision before we do anything else.

8 HON. HOLTZMAN: Can I just make one
9 other suggestion? I'm not sure I got this point
10 across. Not the last sentence, but the sentence
11 before that, that's also confusing to me.

12 DEAN ANDERSON: Which paragraph?

13 HON. HOLTZMAN: On the second page
14 which -- the submission paragraph.

15 CHAIR JONES: Oh, right, the
16 submission.

17 HON. HOLTZMAN: In other words, the
18 sentence does not imply that a lack of verbal or
19 physical resistance --

20 DEAN ANDERSON: That's already gone.

21 HON. HOLTZMAN: -- must be in
22 response to force.

1 DEAN ANDERSON: That's gone. It's
2 gone.

3 HON. HOLTZMAN: You're taking that
4 out?

5 DEAN ANDERSON: Yes, we already did.

6 CHAIR JONES: Let us give this another
7 shot in the assembly arena.

8 MS. WINE-BANKS: Also, question in the
9 third paragraph, the any surrounding
10 circumstances, shouldn't it be all surrounding?

11 Maj Gen WOODWARD: I like when you
12 guys said the totality of circumstances.

13 MS. WINE-BANKS: Yes.

14 Maj Gen WOODWARD: Is that --

15 MS. WINE-BANKS: Yes, that's --

16 MS. KEPROS: I like that.

17 MS. WINE-BANKS: Or to be considered?

18 Maj Gen WOODWARD: Yes.

19 HON. HOLTZMAN: Okay, if you're doing
20 grammar --

21 (Simultaneous speaking.)

22 HON. HOLTZMAN: -- person, they, it's

1 not grammatically correct. It should be a person
2 him or her.

3 DEAN ANDERSON: Where?

4 COL SCHINASI: We're not going to get
5 to disassociation or traumatic paralysis --

6 HON. HOLTZMAN: At the bottom of your
7 second paragraph, submission paragraph.

8 COL SCHINASI: -- unless it's raised
9 by the evidence.

10 DEAN ANDERSON: And we're not going to
11 include it in this. We've already --

12 MS. WINE-BANKS: Yes, she's going to
13 take it out.

14 COL SCHINASI: Yes. But if it is
15 raised by the evidence, then we'll have to deal
16 with it.

17 CHAIR JONES: And then last but not
18 least --

19 DEAN ANDERSON: No, that's the Statute
20 itself, I can't change the language of the
21 Statute.

22 CHAIR JONES: Oh, okay.

1 DEAN ANDERSON: So, the last two
2 paragraphs, here are the changes I already have.

3 It begins with any surrounding, it
4 will now be the totality of circumstances.

5 The second -- the last paragraph of
6 the proposal no longer uses the word imply but
7 uses the word mean, does not mean. Okay?

8 And then the word acquiescence in the
9 second to the last line has been changed to
10 submission which is the language from the
11 Statute.

12 Maj Gen WOODWARD: Yes.

13 DEAN ANDERSON: Are there other
14 changes to this?

15 COL SCHINASI: Did you say you were
16 taking out disassociation and traumatic
17 paralysis?

18 DEAN ANDERSON: That's gone.

19 COL SCHINASI: What happens if it's
20 raised by the evidence?

21 MS. KEPROS: It's argued by the
22 attorneys.

1 COL SCHINASI: What?

2 MS. KEPROS: Then it should be argued
3 by the attorneys.

4 DEAN ANDERSON: So, the first two
5 paragraphs --

6 COL SCHINASI: But, yes, but this is
7 about the Judge instructing on how to use it.

8 CHAIR JONES: Yes, but --

9 DEAN ANDERSON: The first two
10 paragraphs, we're going to come back with. The
11 first two paragraphs, we're going to revise and
12 come back with. We're trying to do the last two
13 paragraphs.

14 HON. HOLTZMAN: Can I go back on this
15 point of acquiescence versus submission?
16 Submission sounds like a more deliberate act as
17 opposed to acquiescence and I'm just concerned
18 that you've made the standard stronger. And
19 acquiescence, seems to me, to be better.

20 Somebody just goes along. Okay?
21 Maybe that's the same as submit, but it seems to
22 me slightly more passive than submit. So, I like

1 acquiescence better.

2 Maj Gen WOODWARD: I see it the other
3 way.

4 MS. KEPROS: I actually preferred
5 submission when Lee suggested it just because it,
6 to me, sounds like there are times that maybe the
7 person's intent is not to engage in sexual
8 activity but they go, fine, okay, they do
9 consent, they do agree to go along with it even
10 if that wasn't their initial thought process.

11 Submission is their will has been
12 overcome and that's why I actually prefer that
13 term.

14 CHAIR JONES: Well, where are we -- I
15 mean it's in the Statute, so --

16 HON. HOLTZMAN: Okay. Well, all
17 right. And so you think acquiescence is too
18 loose a standard?

19 MS. KEPROS: Yes, I think
20 acquiescence, it could just be somebody's
21 changing their mind as opposed to somebody having
22 their will overborne.

1 HON. HOLTZMAN: Okay, suppose they do
2 change their mind?

3 MS. KEPROS: Well, if they change
4 their mind to consent, then there is consent.

5 HON. HOLTZMAN: But if they don't
6 change their mind to unconsent.

7 MS. KEPROS: No, but that's my problem
8 is they're changing their mind to unconsent then
9 you don't have acquiescence you have nonconsent.

10 DEAN ANDERSON: So, I'm certainly
11 ready to go back and make all the changes that
12 have been suggested and be open to new ones.

13 CHAIR JONES: Okay. Our next issue is
14 Maggie's and she and I and Michelle have agreed
15 that the question about how should fear be
16 defined to acknowledge both subjective and
17 objective factors.

18 This seemed to us to get put into the
19 mix a little bit with the issue of
20 trainer/trainee and force and how 120 is going to
21 satisfy or doesn't -- if it doesn't satisfy the
22 needs to be able to charge a rape under certain

1 circumstances.

2 I guess if we just go back to our
3 conversations, most people decided, let's just
4 leave it alone and we weren't thinking about the
5 context of trainer/trainee at that point.

6 And there was a lot of back and forth
7 do you need -- I think we were talking about a
8 quid pro quo, weren't we with respect to this?

9 And I think at the end of the day,
10 most people thought, let's leave it alone.

11 I can say at this point, we're not
12 sure whether we can leave it alone but we want to
13 look -- only because we're going to look at it
14 from the perspective of whether it's problematic
15 if we wanted to use 120A with trainer/trainee or
16 120, I should say, the trainer/trainee. So,
17 we're punting to make a long story short.

18 Right comrades? Okay.

19 And then, the last one, I think is
20 another one where we had the concern from
21 Professor Schulhofer about using the language
22 should have known about the incapacity of the

1 victim. And, he cited as to the Elonis case.

2 Congress has written this Statute. We
3 know what their intent was and their intent in
4 this Statute was to use, if you want to call it,
5 a negligence standard.

6 So, and I read the Elonis case and
7 basically the Elonis case is a case where the
8 Congress didn't express its intent and the
9 Supreme Court had to decide. And so, they took a
10 lot of shots at using a negligence standard in
11 the criminal law context, but it really isn't
12 relevant to us because Congress has told us that
13 negligence in this area is just fine for a
14 criminal -- for the mens rea here.

15 Now, is that the end of the world if
16 you happen to think that someone shouldn't be
17 convicted of a very serious crime on the theory
18 that they should have known somebody was asleep
19 or totally incapacitated in some other way?

20 And the practical answer to that is,
21 of course, the defense of mistake of fact which
22 is what everyone seems to, you know, rely upon as

1 the safe haven here.

2 Whatever one may think about the
3 standard, it's clearly Congress' intent. So, I
4 think we have to leave it alone. But, you know,
5 I don't know if anyone disagrees.

6 And there are such things, as someone
7 reminded me, as negligent homicide. So, we have
8 what we have.

9 Okay, so, maybe that's one we have an
10 agreement.

11 MS. KEPROS: Well, I mean I think
12 there is a problem with it but I think the
13 affirmative mistake of fact defense cures the
14 problem.

15 CHAIR JONES: Right. Okay. So, we
16 have a presenter at 2:00 and I think we want to
17 honor his time schedule. So, we have 15 minutes
18 and we're not going to -- and we're going to come
19 back to you because Maggie is going to cede, you
20 know, a lot of her time in her presentation.

21 Maj Gen WOODWARD: Sure, I am.

22 (Simultaneous speaking.)

1 CHAIR JONES: And we can talk to you
2 any time we want. So, Lisa, do you want to at
3 least get us started on that?

4 MS. FRIEL: Okay, sure.

5 So, the first issue is should the
6 statute define incapable of consenting? And you
7 know that that language is in (b)(3) where it
8 says a person subject to this chapter who commits
9 a sexual act upon another person when the other
10 person is incapable of consenting to the sexual
11 act due to and it talks about impairment by
12 drugs, blah, blah, blah or mental disease defect.

13 So, I think many, if not most, of the
14 people we heard from said we need a definition of
15 incapable of consenting and we all thought that
16 we needed the definition of incapable of
17 consenting and we spent a lot of time figuring
18 out what that definition should be.

19 And, in the end, we adopted what is
20 language out of federal statute in sex act and
21 that is also Ms. Kepros' suggestion. It was
22 also, I forget what his rank is, Grammel's

1 suggestion as well.

2 So, what we took is -- and we would
3 add a definition so it would be under our
4 definition section which is (g). We would add a
5 definition that would be (9) and it would say
6 incapable of consenting. The term incapable of
7 consenting means unable to --

8 HON. HOLTZMAN: Could you tell us
9 where you are?

10 CHAIR JONES: Under this under (g).

11 HON. HOLTZMAN: Do you have this
12 terminology that you're reading someplace?

13 MS. WINE-BANKS: Our recommendations.

14 HON. HOLTZMAN: Okay, thank you.

15 MS. WINE-BANKS: Two alternative
16 recommendations.

17 HON. HOLTZMAN: Okay, got it. Thank
18 you.

19 MS. FRIEL: Okay. To go back, the
20 first one, when we say two alternatives, because
21 we said, in a perfect world, if we were starting
22 to write this Statute however many years ago, we

1 would have written it totally differently.

2 We would have written lack of consent
3 is force. Lack of consent -- we would have
4 covered every subsection as different kinds of
5 lack of consent and one of them would have said
6 incapable of consenting and then you would have
7 defined all the incapable of consenting.

8 That would take a major rewrite of
9 this, so we came to offer the other alternative
10 which we thought was much simpler which is add a
11 definition of incapable of consenting in your
12 definitional section, so that is to part (g), we
13 add a definition (9) incapable of consent.

14 And then this definition that you see
15 there that we added that has an (a) and a (b) to
16 it, that's language from the federal sexual
17 assault Statute, so lifted exactly, it's language
18 that Laurie suggested and it's also again,
19 whatever Grammel -- Colonel, thank you -- I don't
20 want to, you know, make him lower, they hate that
21 -- Colonel Grammel suggested.

22 And so, we looked at that language and

1 we came up with, you know, top scenarios and
2 thought it really did encompass all the scenarios
3 we wanted to make sure were covered and had the
4 attractiveness of already being in the federal
5 statute so there could be federal case law that
6 would apply to that.

7 So, that's what we did with incapable
8 of consent.

9 The other thing we did was, we wanted
10 to add, let me find this now, flip to the next
11 page.

12 So, something that would go as an
13 Executive Order and then would be something that
14 would be an explanation of this. Somebody could
15 give the charge, read the Statute again. This is
16 what it is and then add a totality of
17 circumstances standard applies when assessing
18 whether a person was incapable of consent.

19 In deciding whether a person was
20 incapable of consenting, many factors should be
21 considered and balanced to the extent they're
22 known, it should say including, including, but --

1 or include -- either including or include, not
2 limited to his or her.

3 And then we came up with these
4 different things that we think are the kinds of
5 things someone should consider.

6 Part of the reason we went to this is
7 the concern we heard expressed by a lot of people
8 that these cases have come down to what is
9 someone's blood alcohol content or how much did
10 they have to drink, as if that factor alone is
11 the only thing that matters towards incapacity
12 consent. It's not.

13 We had big discussion on, I drank a
14 couple of glasses of wine, my blood alcohol
15 content -- sounds like I already did -- will be
16 something. Somebody else who drinks a lot more
17 than me on a daily basis can have a high blood
18 alcohol content and be capable of consenting far
19 more than I can.

20 Alcohol affects our bodies
21 differently, depending on how much we drink
22 routinely, what we ate, a whole bunch of

1 different factors. And so, we want to get away
2 from this it's all about how much you drink or
3 what your blood alcohol is.

4 So, by giving this instruction and
5 saying, that's one of the things to look at, but
6 let's look at your tolerance to alcohol. Let's
7 look at somebody's level of consciousness. Let's
8 look at their decision making ability, their
9 ability to walk and talk.

10 I mean, these are all the kinds of
11 things that I've seen argued in these cases I've
12 heard Judges instruct on and the college
13 policies, I took some of these from college
14 policies that they're telling people you should
15 be looking at when you're deciding was somebody
16 capable of consenting.

17 So, we're certainly open to the idea
18 and maybe there are others we didn't think of and
19 part of the reason we wanted to say include and
20 not limited to, it's like the charge you get on
21 credibility. Consider demeanor, consider this,
22 consider that, but you can use other tests if

1 you, in your normal life do.

2 If people have some other things that
3 they think and, especially based on the facts of
4 the case they heard that are important
5 considerations to decide was this particular
6 person incapable of consent within the definition
7 that we just wrote, they can consider those as
8 well. But it really gives them some idea of
9 those things they should consider and gets away
10 from the one factor.

11 CHAIR JONES: Now, I may have missed
12 your alternative or another part, but what
13 bothers me about this is, it defines a number of
14 different things that can make you incapable of
15 consenting, but it doesn't tell you what
16 incapable of consenting is which I think is the
17 larger problem.

18 MS. WINE-BANKS: Well, that's up
19 above. We've defined capable of appraising the
20 nature.

21 CHAIR JONES: Oh, I'm sorry, where is
22 that?

1 MS. WINE-BANKS: Just above the list
2 in the same paragraph.

3 Maj Gen WOODWARD: Where it says for
4 purposes of Article of 120(b)(3).

5 BGen SCHWENK: Page 3.

6 CHAIR JONES: On page 3?

7 MS. WINE-BANKS: Yes.

8 CHAIR JONES: Okay.

9 MS. FRIEL: So, that language that's
10 at the top of page 3, we're suggesting that that
11 definition will be in the Statute, that that
12 would get added as a definition in the Statute.

13 CHAIR JONES: Probably go in two,
14 right, right, right.

15 MS. FRIEL: It will become (g)(9).

16 CHAIR JONES: Okay.

17 MS. FRIEL: And so the definition of
18 incapable of consenting in the Statute would now
19 be you're incapable of appraising the nature of
20 the conduct or physically incapable of declining
21 participation in or communicate unwillingness to
22 engage in the sexual act or attempts to do so.

1 And that definition, as I say, comes
2 from federal law on sexual act and it's also the
3 one Colonel Grammel and Laurie had suggested.

4 DEAN ANDERSON: So, I've got two
5 questions. One question is, can't we issue an
6 Executive Order or recommend an Executive Order
7 that explains incapacity, incapable of consenting
8 rather than adding language to the Statute?

9 I guess theoretically we could, I'll
10 just put that out there.

11 The second thing is, that the
12 incapable of consent Statute that you drafted, I
13 think, (a), incapable of appraising the nature of
14 the conduct means you are so out of it that you
15 do not know what is happening. You cannot
16 appraise accurately the nature of the conduct
17 that is happening.

18 That is a level of intoxication that
19 is way beyond incapacity to consent I believe.

20 And, (b) is --

21 MS. WINE-BANKS: It's also mental
22 incapacity.

1 DEAN ANDERSON: Indeed, indeed.

2 So, the second part is physically
3 incapable of declining participation. That means
4 you are physically incapable of speaking the word
5 no which, again, is so far beyond the point at
6 which -- I mean, you know, people falling down
7 drunk can say the word no.

8 So, why would you, if falling down
9 drunk and, you know, unable to walk or talk, I
10 mean I like very much this ability to walk, talk
11 and engage in other purposeful physical movements
12 is relevant on the question of whether or not
13 you're cognizant enough and have your faculties
14 enough to be able to consent.

15 But requiring for the purposes of
16 incapacity that the person be either unconscious
17 essentially, that is incapable of understanding
18 what is going on, the nature of what is going on
19 around them or unable to speak that is mute.
20 That seems too high a standard to me.

21 Notwithstanding the fact that it's in
22 the federal statute, I think that it's too --

1 that there are circumstances that we can all
2 think of that are in the popular news. Someone
3 is floating in and out of consciousness, they are
4 falling down drunk, someone needs to help them
5 stand up. They could say the word no. They do
6 understand what's going on around them and they
7 would fail this test. But they would not be a
8 person who you would think could consent, had the
9 capacity to consent to a sexual act.

10 COL SCHINASI: Do you think
11 intoxication eliminates consent?

12 DEAN ANDERSON: No, not at all.

13 COL SCHINASI: Okay, so what we're
14 dealing with here is the sliding scale.

15 DEAN ANDERSON: Exactly.

16 COL SCHINASI: Where are we going to
17 draw the line?

18 DEAN ANDERSON: Exactly, that's
19 exactly right.

20 COL SCHINASI: And, for our purposes,
21 we're going to have to be as general and precise
22 as we can because we're not going to be able to

1 cover every circumstance.

2 DEAN ANDERSON: I agree. I agree with
3 that, I just think that this Statute requires
4 unconsciousness or muteness and that that's too
5 high a standard physically and mentally to -- it
6 goes beyond the point at which capacity or
7 incapacity could attach.

8 LTC McGOVERN: Would (a) be better if
9 it was unable to fully appraise the nature of the
10 conduct? Does that soften it up a little bit?

11 DEAN ANDERSON: I guess appraising the
12 nature of the conduct comes from a test from
13 insanity. You know, it's a standard McNaughton
14 test, it's unable to even understand what is
15 happening.

16 Maj Gen WOODWARD: So, how do you
17 describe the level, you know, I don't know, I
18 mean how do you describe the level at which a
19 person is so intoxicated? What is it that makes
20 them unable to consent?

21 MS. FRIEL: Over the line for you.
22 Like if --

1 Maj Gen WOODWARD: How would you
2 describe the --

3 MS. FRIEL: I mean we can wordsmith
4 the words later, but if you just, from your gut,
5 how would you describe where that line is when
6 you're over that?

7 DEAN ANDERSON: Well, what these two
8 things do, the first is mental and the second is
9 physical. Right? And the first is mentally, you
10 can't even understand what's happening and I
11 don't think that should be required. I think
12 mentally, you're maybe not fully able to appraise
13 the conduct so you are --

14 You know, this says uses the word
15 incapable. You have no capacity, zero, to
16 understand -- to appraise the nature of the
17 conduct. If you said you're incapable of
18 consenting, if you're substantially unable to
19 appraise the nature of the conduct, that would
20 work for me.

21 Maj Gen WOODWARD: Okay.

22 DEAN ANDERSON: Because then that's,

1 again, not a bright-line, not a bright-line.

2 But, we're never going to find a bright-line, but
3 at least that gives somebody like you're
4 substantially confused, unable to --

5 Maj Gen WOODWARD: Instead of totally?

6 DEAN ANDERSON: Instead of incapable
7 completely.

8 Maj Gen WOODWARD: I got it. That's,
9 yes, that's right.

10 DEAN ANDERSON: So, in the second one,
11 physically incapable, that is unable to decline
12 participation which just means speak the word no,
13 that seems too harsh.

14 So, physically incapable of, you know,
15 I like this stuff here, walking, talking, or
16 maybe not incapable or substantially unable or
17 deeply compromised in one's ability to walk, talk
18 and engaged in appropriate behaviors.

19 Maj Gen WOODWARD: But these are
20 symptoms that lead you to assess A, you know, or
21 B. So, I mean that's why I like the way that
22 this is laid out, A or B talks about how --

1 DEAN ANDERSON: Exactly.

2 Maj Gen WOODWARD: You don't have the
3 mental capacity or you don't have the physical
4 capacity and then these lay out -- I mean I like,
5 you know, whether you limit the A and B, but I do
6 like the way it talks about there's a mental
7 piece of this and there's a physical piece.

8 DEAN ANDERSON: I'm not objecting to
9 that part at all.

10 HON. HOLTZMAN: Can I ask a question
11 about this? I think this language comes, and
12 maybe you would know the answer to this, Laurie,
13 but I think this language is used a lot.

14 And so, first I wanted to ask, in the
15 federal statute, did you have any chance to look
16 at the case law on this? Do we have any idea how
17 this has been interpreted?

18 MS. KEPROS: I mean I can tell you --

19 HON. HOLTZMAN: And maybe you spent --

20 MS. KEPROS: We use this in my State's
21 Statute, so I'm very comfortable with this
22 language. We have case law on it.

1 It's -- I don't know, it's not -- it
2 hasn't proven to be a major challenge for people.
3 We have had cases where people are in and out of
4 consciousness, you know, drinking, kind of up
5 walking around. There are factual questions that
6 the jury sorts through.

7 I guess, you know, I'm interested
8 because I did see, and I remember us hearing
9 about this earlier, previously, Article 120 uses
10 term substantially incapacitated in the 2007
11 Statute. I don't know that I'm totally clear on
12 what people disliked about that term, but that
13 might be worth revisiting.

14 But, but I guess what I really am not
15 -- I can't come up with a scenario that is
16 Michelle's problem. I'm not understanding what's
17 the case where you think someone should get a
18 potential life sentence for having sex with
19 somebody and they wouldn't fall within this
20 definition or that they should come within it?

21 DEAN ANDERSON: First of all, there's
22 not a life sentence, sexual assault is a maximum

1 of 30. Plus, we can't assume that the person's
2 going to get the maximum on the basis of what --
3 this isn't rape, it's sexual assault.

4 MS. KEPROS: Well, okay, 30 years. To
5 me, these are major penalties. We need to be
6 very clear about the prohibited behavior and what
7 that covers.

8 And I think we're all pretty clear,
9 the passed out victim who is being physically,
10 sexually assaulted, that's a really serious crime
11 we want to go after in a big way.

12 Some of these more ambiguous
13 situations, I'm less comfortable saying this high
14 level of culpability should attach.

15 So, I mean you can make the case, but
16 I'm just not -- I can't picture what are we
17 missing? What's the fact pattern we don't have
18 to have showed here?

19 DEAN ANDERSON: Someone who is capable
20 of understanding the nature of the conduct around
21 her. She's falling down drunk. Someone has to
22 pick her up. She's sort of floating in and out

1 of consciousness, falls on a bed and someone has
2 sex with her. She is not physically incapable of
3 declining participation. She's not physically
4 incapable of saying the word no. In fact, she's
5 groaning, she's saying this. I mean, these are
6 classic scenarios that we see all the time but
7 would not meet, I don't think, or I think there's
8 a --

9 LTC McGOVERN: Wouldn't it be A?

10 MS. FRIEL: Well, what about -- what
11 if you did this from just some of your language?
12 So, what if you changed -- if it became A was
13 substantially unable to appraise the nature of
14 the conduct or substantially unable to decline
15 participation?

16 LTC McGOVERN: I would --

17 MS. FRIEL: Instead of using the word
18 incapable?

19 LTC McGOVERN: Based on General Pede's
20 and other people's testimony, substantially
21 caused such problems --

22 MS. FRIEL: Just the word

1 substantially?

2 LTC McGOVERN: Yes, that's what led to
3 litigation. If we sent out the Pease, P-E-A-S-E,
4 a recent 2014 case that tried to handle incapable
5 of consenting, here, the Working Group took
6 incapable of consent as a phrase itself and tried
7 to define it.

8 If you go -- have a chance after this
9 meeting and go to page 12 where they look at it
10 as I reread it, you'll see they take apart --
11 they say there's a wealth of case law out there
12 about incapable of consent but what we really --
13 all we need to do is look at the definition of
14 consent and whether or not they can do that.

15 And they go back to the language of
16 the federal and Colorado statutes and say, well,
17 for consent, it must be freely given agreement.
18 A person must first possess cognitive ability to
19 appreciate the nature of the conduct then possess
20 the mental and physical ability to make and
21 communicate the decision whether regarding the
22 conduct of that person.

1 So, I think what the Working Group has
2 done is follow the most recent case law in
3 defining incapable of consent. Okay, what does
4 consent mean to what's incapable of consent as a
5 complete phrase in these types of circumstances
6 and then giving examples.

7 But, so, I mean the answer to your
8 question is there is a very recent case that
9 follows the Working Group's language.

10 MS. FRIEL: Do you like that language
11 better? Read it again, the cognitive ability --

12 DEAN ANDERSON: It's defining consent.

13 HON. HOLTZMAN: Where are they taking
14 that from?

15 DEAN ANDERSON: It's defining the
16 capability.

17 LTC McGOVERN: The capability of
18 consent. So it's --

19 MS. FRIEL: But you could write -- but
20 you can say incapable of consent is someone who
21 lacks the cognitive ability.

22 LTC McGOVERN: Right and that was the

1 sentence before. An incompetent person is a
2 person who lacks either mental or physical
3 ability to consent due to a cause enumerated in
4 the Statute to be able to give a freely given
5 agreement.

6 So --

7 DEAN ANDERSON: It's more carefully
8 tied to the Statute.

9 HON. HOLTZMAN: Where is that language
10 from? Did they take it from any place else?
11 Because it seems to me somehow that this language
12 that is in the federal statute has appeared
13 elsewhere besides in Colorado. Am I wrong?

14 MS. KEPROS: No, it's in lots of
15 jurisdictions. It's in -- I don't know if it was
16 --

17 HON. HOLTZMAN: I don't know if it was
18 standard, is my sense of that.

19 MS. KEPROS: Yes, it's in somebody's
20 model quote I'm sure at some point.

21 LTC McGOVERN: And it -- but it's the
22 same -- this court went through the same, I

1 think, analysis as Colorado and the federal but
2 first they look at that cognitive ability or the
3 physical to break it down.

4 Just for your reference, if you want
5 to take a look --

6 COL SCHINASI: It sounds like the
7 conversation about consenting to confess or a
8 search warrant. You have to have those abilities
9 before you consent.

10 MS. KEPROS: I feel like the Pease
11 case was unhelpful, no offense to the Court of
12 Appeals, because it just -- it says incapable of
13 consent is when you don't consent because you're
14 not competent. So, they just kind say, incapable
15 of consent is somebody who's not competent to
16 consent.

17 Well, if you're going to do that, it's
18 totally circular, right, then you don't need a
19 definition.

20 MS. FRIEL: Yes, they have some
21 language about competent because they talk about
22 cognitive ability to what?

1 MS. KEPROS: They say that's what a
2 competent person has and, therefore, a competent
3 person, which is in the definition of consent,
4 can do so and an incompetent person cannot do so.

5 MS. FRIEL: I guess what I'm trying to
6 get to, the cognitive ability to do what? What
7 is it that we think you need the mental or
8 physical ability to do that makes you competent?

9 COL SCHINASI: To consent.

10 LTC McGOVERN: In the federal statute,
11 is the cognitive ability to appraise the nature
12 of the conduct.

13 MS. FRIEL: That's where the language
14 came from.

15 HON. HOLTZMAN: Yes, so, they're just
16 reinterpreting the federal statute. Is that
17 basically what they're doing?

18 DEAN ANDERSON: No, actually, they're
19 not. They never talk about the nature of the
20 conduct. They talk about free, you know, the
21 mental and physical ability to consent. So, the
22 cognitive ability to consent.

1 Again, the problem with this, the
2 challenge with this is that it's circular or
3 potentially circular. The cognitive ability to
4 appreciate -- or actually, they say to appreciate
5 the nature of the conduct in question.

6 That's, again, the affirmative,
7 someone is competent if they have the cognitive
8 ability to understand the nature of the conduct
9 in question and possess the mental and physical
10 ability to make and to communicate a decision
11 regarding the conduct.

12 LTC McGOVERN: But the federal statute
13 does not go on to actually define incapable of
14 consenting. They just say if someone engages in
15 the sexual act with another person, if that
16 person is incapable of appraising the nature of
17 the conduct or is physically incapable of
18 declining participation or to attempts to do so.

19 HON. HOLTZMAN: So, it seems to me
20 that what this court has done in Pease is very
21 similar to the federal statute. Am I wrong? I
22 don't have the Pease language in front of me. Am

1 I wrong about that?

2 LTC McGOVERN: I think actually,
3 ma'am, that Dean Anderson and Ms. Kepros are
4 closer to the right track that they focus on the
5 consent rather than the phrase as a whole of
6 incapable of consent. So, they looked at the
7 negative of consent unless the --

8 HON. HOLTZMAN: I understand that.
9 So, we're just going to invert -- but, aren't
10 they basically very similar? What the court did
11 there and the federal statute or am I wrong?
12 They didn't call it incapable of consent or you
13 call it incompetent, aren't they the same things
14 basically? No? Am I missing something?

15 MS. KEPROS: Well, I think if you're
16 incompetent --

17 HON. HOLTZMAN: Yes?

18 MS. KEPROS: -- you lack cognitive
19 ability.

20 HON. HOLTZMAN: Of course.

21 MS. KEPROS: If you're incompetent,
22 you know, I mean that's what that phrase means to

1 us whether it's the defendant, a witness. Like,
2 I don't know what else that means. So, to me,
3 that is equivalent.

4 What I just said was unhelpful about
5 Pease is that they don't expand, you know, they
6 don't go on to say here's what we think is
7 relevant to determine competence. We just say
8 there must be competence for there to be consent.

9 HON. HOLTZMAN: Okay.

10 MS. KEPROS: So, that's what it just
11 -- I don't feel like it advances to what this
12 proposal gives us which is a little more meat to
13 what does incapable of consent include.

14 I will say in Colorado, and I don't
15 know if this is true of the other places that use
16 the incapable of appraising language, we don't
17 have it as a definition of incapable of consent.
18 It's its own substantive offense. If you have
19 sex with somebody who is incapable of appraising,
20 I think that's the federal situation.

21 LTC McGOVERN: Right, that's what we
22 use too. Do you change -- do you make it a

1 separate definition or do you just go back and
2 change Section (b)(3) to read that they're
3 incapable by impairment of drug or --

4 MS. KEPROS: And we got our Statute in
5 1975 so I think that's why you see it in a lot of
6 other jurisdictions from around that era. It was
7 just a model that was being circulated at that
8 time.

9 COL SCHINASI: Is it in the same
10 category as statutory rape?

11 MS. KEPROS: It is. Actually, the
12 same category as rape. I mean it's a --

13 COL SCHINASI: But does it set out
14 especially that these are categories where the
15 victim cannot consent?

16 MS. KEPROS: It isn't described as
17 that. It is you commit a sex assault if the
18 victim is incapable of appraising. If the victim
19 did consent, then that might negate that right.
20 It's the presence of consent would show an
21 ability to consent and, therefore, that wouldn't
22 apply.

1 COL SCHINASI: So, could you have a
2 person who's incapable of consenting who
3 consents?

4 MS. KEPROS: No, the defendant would
5 be guilty if that's what the evidence showed.
6 The fact that somebody said yes, but if they were
7 incapable of appraising the nature of their
8 situation, they would be culpable. They would be
9 guilty.

10 DEAN ANDERSON: So I don't think
11 there's any problem with that. Right? I mean if
12 we don't have a Statute that does that, but the
13 Colorado Statute that identifies that having sex
14 with someone who is incapable of appraising the
15 nature of the conduct, surely is a problem.

16 COL SCHINASI: Well, to that extent,
17 it's not statutory rape.

18 DEAN ANDERSON: But the question is --
19 exactly.

20 COL SCHINASI: The victim can consent
21 but it doesn't matter.

22 MS. FRIEL: Actually, they consent,

1 we're not -- we're saying it's not legally
2 effective consent.

3 MS. KEPROS: Right.

4 COL SCHINASI: Because they're
5 incapable.

6 MS. FRIEL: Right. And the other
7 language we might want to consider, I just looked
8 back that I know is in some statutes, we have
9 appraised the nature of the conduct and I've also
10 seen appraise or control --

11 MS. KEPROS: I've seen that, too.

12 LTC McGOVERN: And do the person --

13 MS. FRIEL: There are a number of
14 places that use the word control your own conduct
15 as well.

16 LTC McGOVERN: The difference also is
17 this incapable of consenting definition is not
18 the end. It's not just whether or not they can
19 appraise the situation, can they appraise it due
20 to an impairment by drug, intoxicant or similar
21 substance?

22 So, that does take it into the more

1 common realm of military sexual assault. It's
2 not just --

3 DEAN ANDERSON: But it requires -- I
4 understand that it's due to a drug or intoxicant
5 or it's due to a mental disease or defect, but
6 it's essentially a McNaughton rule as to the
7 mental disease or defect. It's requiring
8 absolute incapacity, incapable of appraising the
9 nature of the conduct.

10 I think if we could find a verb that
11 is less than or an adjective, right.

12 MS. FRIEL: Or is less than totally
13 incapable.

14 DEAN ANDERSON: Exactly.

15 MS. FRIEL: Incapable even without
16 using the word totally incapable.

17 DEAN ANDERSON: Exactly. Yes, well,
18 incapable is the incapable of consent that we're
19 defining that. And that doesn't have to use the
20 word incapable. We've used the word incapable
21 here twice, but we don't have to use the word
22 incapable, it could be substantially unable to

1 sufficiently whatever.

2 COL SCHINASI: But the --

3 (Simultaneous speaking.)

4 DEAN ANDERSON: I understand. But, we
5 could put it in. We could choose to adopt that
6 problem as opposed to this one. It's a question
7 of what's, you know, what's the worst if there's
8 a different way of talking about this rather than
9 incapable, it does not mean -- it does not have
10 to go to the adverb.

11 MS. FRIEL: What are other synonyms
12 for substantially unable?

13 HON. HOLTZMAN: But the point is, the
14 other of looking at this is to say that this
15 doesn't mean, when you say incapable of
16 appraising, it doesn't necessarily mean that
17 you're incapable of completely appraising it just
18 says incapable of appraising.

19 Well, maybe somewhat appraising or
20 partially appraising or substantially appraising.
21 You just put the word substantially different in
22 a different place.

1 DEAN ANDERSON: But that was the
2 suggestion Lisa made which is fine.

3 HON. HOLTZMAN: But I wouldn't do that
4 because I don't think it's necessary because I
5 don't know that you have to spell out that it's
6 not complete. It doesn't say incapable of fully
7 appraising or totally appraising I mean or just
8 in any way appraising, I mean the jury can make
9 its decision about that. It isn't incomplete. I
10 mean it doesn't mean that you have to have total
11 understanding.

12 Maj Gen WOODWARD: You know, one
13 question is, is that, you know, what is it about
14 somebody's incapability that makes us feel like
15 they have been raped in essence? You know, I
16 know rape is not the right term, but you know.

17 So, if you're drunk, you know, why am
18 I offended if I go and sexually assault you?
19 Well, because you are incapable of assessing what
20 is happening so that makes you --

21 COL SCHINASI: Is it like a light
22 switch?

1 Maj Gen WOODWARD: It's an impaired
2 ability.

3 COL SCHINASI: Is consent a light
4 switch? Is it on or off? Are there degrees of
5 consent that avoid culpability? Or is it just on
6 or off? You can either consent or you cant --

7 DEAN ANDERSON: This --

8 COL SCHINASI: -- which would, if it
9 is a light switch, then it supports the language
10 that we've used.

11 DEAN ANDERSON: Well, the language of
12 incapable of consent is a light switch that is
13 absolute total incapacity to consent. But then
14 we define what that means and we don't have to
15 use absolute language.

16 COL SCHINASI: Okay, well that's what
17 follows. That's --

18 DEAN ANDERSON: Right.

19 COL SCHINASI: That's what follows.

20 DEAN ANDERSON: Right. And I'm saying
21 that --

22 Maj Gen WOODWARD: But isn't that why

1 we're offended I mean not offended, I guess
2 that's not the right term, but why we think it's
3 heinous for somebody to --

4 DEAN ANDERSON: Of course.

5 Maj Gen WOODWARD: -- sexually
6 assault somebody is because they are incapable of
7 making the determination of what is going on,
8 right?

9 DEAN ANDERSON: Right. But that
10 extreme circumstance surely is sexual assault.
11 But there are many circumstances, I'm thinking of
12 the Pena case. Pena, I'm not sure, it's a case
13 in which police officers took a woman home. She
14 asked for them to take her home because she was
15 very drunk. They went to her house and came in
16 and out and had sex with her and what she
17 remembers is being on the bed face down floating
18 in and out consciousness, you know, moaning,
19 talking some, but, you know, would that meet?
20 Well, she knew exactly what was going on. She
21 could appraise the conduct, the nature of the
22 conduct at issue. She knew that she was being

1 raped at the time.

2 MS. FRIEL: Was she saying no?

3 CHAIR JONES: She was physically
4 helpless to resist.

5 DEAN ANDERSON: I hear you. I hear
6 you, right, right.

7 MS. FRIEL: And that would fit in the
8 second part. She was physically incapable of
9 declining participation.

10 DEAN ANDERSON: This doesn't say
11 physically incapable of resisting, it says
12 physically incapable of saying no, communicating
13 any unwillingness.

14 HON. HOLTZMAN: Yes, communicate
15 unwillingness which she couldn't do.

16 MS. KEPROS: Which she couldn't do
17 because of her intoxication.

18 MS. FRIEL: But she's right, it was
19 also resisting, so let's say -- let's make those
20 facts that someone is moaning and saying no and
21 they're indicating a lack of consent, but they
22 can't get it to stop because they're so drunk

1 they can't move. We could -- you could add some
2 language here then.

3 DEAN ANDERSON: Right and this --
4 under this provision, they would know --

5 HON. HOLTZMAN: I don't understand
6 that point.

7 DEAN ANDERSON: -- that it's rape and
8 not meet A and be able to say no but not meet B.

9 Now, maybe this is not as big an
10 important issue because we have a non-consensual,
11 a sexual provision, but I do think that what we
12 want to capture here, we want to capture
13 circumstances in which someone is highly drunk,
14 they understand what's going on but cannot
15 communicate and cannot fend it off and cannot --

16 COL SCHINASI: Isn't that B?

17 HON. HOLTZMAN: Why isn't that B?
18 That's what I'm not understanding.

19 DEAN ANDERSON: Because you might be
20 able to say no and not be able to have physical
21 capacity to maneuver.

22 COL SCHINASI: But doesn't B -- in

1 other words --

2 (Simultaneous speaking.)

3 HON. HOLTZMAN: You say no. That's
4 communicating.

5 COL SCHINASI: I mean what would you
6 weigh on that that would take something?

7 DEAN ANDERSON: Yes, I'm not sure. I
8 think what I object to is the absolutism of A and
9 B. And I think that the word incapable is an
10 on/off switch as you've articulated but I don't
11 think that the definition of that has to be
12 incapable of speaking or incapable of knowing
13 what's going on. Because I think there are
14 circumstances in which you do know what's going
15 on or you can speak and yet you still don't --
16 you're totally unable to consent.

17 MS. WINE-BANKS: We actually -- I mean
18 we saw this as a continuum of, you know, at some
19 point, you're unconscious and that's clear.

20 DEAN ANDERSON: Right.

21 MS. WINE-BANKS: And so, where below
22 unconscious is a level of intoxication, for

1 example, that would make you guilty of a sex
2 crime? But how -- and how to define that?

3 I mean we're trying to look for
4 functional definitions that would explain what it
5 was that's a lesser degree than unconscious but
6 enough to make it a crime.

7 MS. FRIEL: And here's one of the
8 things that -- because we would get caught in
9 this situation a lot, if you were physically able
10 to indicate a lack of consent then you weren't
11 physically helpless under the New York State
12 Statute.

13 And so, in your scenario, if somebody
14 could say no, I don't want to do it, but it was
15 still happening, that became a forcible case.
16 Yes, it took a lot less force, but because of
17 their condition, they couldn't get up and this
18 person was able to accomplish it.

19 And so, we would charge both to give
20 us the either/or depending what happened here.

21 So, in your scenario, wouldn't that
22 become force then if somebody's moaning and

1 saying, you know, no, no, no, indicating I don't
2 want to do it?

3 DEAN ANDERSON: Yes, I wonder how much
4 I'm actually, by this conversation, wondering how
5 much it matters if you have the non-consensual
6 sex provisions?

7 And it's possible that we get around
8 the problem by just modifying this slightly. We
9 say incapable of consent is a person who's
10 incapable of consenting if he or she is incapable
11 of fully appraising, fully would do the work for
12 me. It avoids the problem of substantially but
13 it says you cannot fully appraise, you know.

14 MS. FRIEL: And do you like appraise
15 better? The other word I just came out is or
16 understanding. Do you like the word
17 understanding better than appraise? You seem to
18 --

19 HON. HOLTZMAN: I think there are --

20 MS. FRIEL: -- it's just because it
21 was the McNaughton law and it has a different
22 meaning and --

1 HON. HOLTZMAN: I think the -- using
2 standard existing language, particularly a
3 federal statute, makes it easier to swallow as
4 you had started out with. So, why change it? I
5 don't think an understanding is such a dramatic
6 change that it -- you know, that it's worth.

7 MS. FRIEL: So, it's to fully --

8 COL SCHINASI: I don't think fully
9 gets you any clearer to that situation than
10 substantially.

11 MS. KEPROS: I agree with that. I
12 also --

13 DEAN ANDERSON: But substantially, I
14 thought was modifying incapable not modifying
15 appraised, right?

16 COL SCHINASI: Right, but it's --

17 MS. KEPROS: Substantially
18 incapacitated was the full language.

19 COL SCHINASI: It's the same.

20 MS. KEPROS: But it's going to be too
21 vague. It's always going to be a fight in court.

22 COL SCHINASI: Yes, I don't think that

1 really helps you any if you do the light switch
2 analogy. It really doesn't help you any. It
3 just injects uncertainty into the standard. The
4 federal standard doesn't have it probably for
5 that reason.

6 LTC McGOVERN: And they explained to
7 me it's uncertainty if you have to consider all
8 these factors.

9 COL SCHINASI: Right, right.

10 Maj Gen WOODWARD: And that would be
11 my thing is, you know, if I'm going out with
12 somebody on the first date, you know, how do I
13 know what they're tolerance to the ingestion of
14 alcohol or, you know, intoxicants? Or I might
15 have no idea how much alcohol they've had if I
16 just met them in a bar. You know, so, I'm a
17 little bit worried that --

18 COL SCHINASI: Well, in that case --

19 Maj Gen WOODWARD: -- that's a laundry
20 list that --

21 COL SCHINASI: In that case, this
22 situation is not going to be applicable. What

1 we're doing is drafting words and concepts in the
2 jury instruction that, again, are selected based
3 on the facts of the case.

4 Maj Gen WOODWARD: Yes, so it's a
5 laundry list that they could pull from.

6 COL SCHINASI: Based on the facts of
7 the case. So, you wouldn't use that one.

8 MS. KEPROS: I mean I can tell you, we
9 have not had a single case I can think of in the
10 like 30 years we've had this Statute, well, more
11 than that now I guess, right, 40 years, where
12 there was a successful insufficiency challenge
13 where a victim was coming in and out of an
14 alcohol induced unconsciousness.

15 I mean those scenarios that were just
16 described, we have not had any problem having the
17 convictions stick with the incapable of
18 appraising language.

19 I do think it's helpful to have an
20 existing body of case law, even if it's outside
21 the military system that upholds the language
22 just for certainty in terms of outcomes.

1 The other thing is, you know, these
2 scenarios where the person is potentially
3 engaging or seems to be with accused to some
4 extent, the fight's going to be about the mistake
5 of fact stuff. The fight's going to be about the
6 perception of the accused. And that's really
7 what the case is going to be.

8 And whether or not the person may have
9 been totally incapable of appraising but if he or
10 she had accused didn't perceived it, there's no
11 crime there.

12 HON. HOLTZMAN: Well, you have a
13 should here, however. So, it's got to be
14 different.

15 MS. KEPROS: Well, it's still going to
16 be subject to mistake of fact defense, though,
17 because of how the military is -

18 HON. HOLTZMAN: Well, you're right.

19 MS. KEPROS: -- the courts martial
20 book is written.

21 Maj Gen WOODWARD: What were you
22 saying, Michelle?

1 DEAN ANDERSON: Well, I will stand by
2 my disagreement with the federal statute Statute,
3 but obviously, we'll concede to majority will
4 here.

5 If we go with this defective Statute,
6 I will say that it holds too high a standard. I
7 will say that we should put in some language for
8 the Executive Order that talks about these
9 factors that you guys have listed because then at
10 least we're talking about the same kind of stuff.
11 These are the things that need to be looked at,
12 if it provides more clarification that there are
13 -- that each of these kinds of factors is
14 important, it doesn't do violence to the federal
15 statute, it takes whatever benefit we get from
16 receiving that.

17 COL SCHINASI: So, we have to be aware
18 that this happens in two places. It doesn't just
19 happen in the Judge's Benchbook, it also happens
20 in the commentary to the UCMJ where this is
21 explained.

22 DEAN ANDERSON: Yes.

1 COL SCHINASI: So, there's enough
2 information in both of these alternative sources
3 to flesh this out and, you know, we have a
4 committee who writes all that stuff.

5 Maj Gen WOODWARD: I'll tell you, it's
6 still pretty unclear for the people who have to
7 go out there and teach it. So, I mean more
8 clarity would be really helpful and, you know, I
9 just wonder if it'd be useful to have folks who
10 can, you know, psychologists or whatever who
11 could lay out, you know, what actually is a level
12 --

13 COL SCHINASI: That would be outside
14 the Manual for Courts Martial. That would be
15 somebody else's job.

16 MS. WINE-BANKS: So, do we need to
17 take this back and have another Working Group
18 discussion?

19 LtCol HINES: I was just going to make
20 a quick modest and humble suggestion.

21 In order to be fair to our witnesses,
22 we've got General Shadley, what I think, if I

1 could just succinctly sum this up, I would
2 suggest we break until 2:30. That would give
3 General Shadley and General Woodward their one
4 hour.

5 And then, we've got three General
6 Officers and an Admiral that I'd like for us to
7 get on at 3:30. We'd pull them --

8 CHAIR JONES: Get on at 3:30?

9 LtCol HINES: Start at 3:30, Judge,
10 just to accommodate -- they've traveled out, most
11 of them, to be fair to them.

12 And then what I would suggest is
13 since, by my notes, it seems like there's still
14 significant work to be done on Issue 5, 1 and 3
15 that I've talked with Colonel Green and Kelly
16 about building time into future meetings
17 scheduled. In fact, we can do that next month.
18 We can build in more deliberative time at the
19 beginning of that meeting and that would give Ms.
20 Friel's group a chance to, you know, get to Issue
21 4 and 9 and then the other groups can go back and
22 work on everything that's been discussed today

1 and then rejoin these issues then. I think it
2 would be maybe a good plan and that way, we can
3 still be fair to our witnesses here this
4 afternoon and have the subcommittee Members --

5 MS. FRIEL: That works.

6 LtCol HINES: -- have enough time to
7 question them.

8 CHAIR JONES: All right. So, I'm
9 going to go ahead and get General Shadley in then
10 now?

11 LtCol HINES: Yes, General Shadley and
12 then probably the Secretary and then the General.

13 CHAIR JONES: Great.

14 LtCol HINES: They're here, yes,
15 ma'am.

16 CHAIR JONES: Okay.

17 (Whereon, the above-entitled matter
18 went off the record at 2:24 p.m. and resumed at
19 2:35 p.m.)

20 CHAIR JONES: All right, we're now
21 going to start our afternoon session, late
22 afternoon session, and I want to thank General

1 Robert Shadley for joining us today and apologize
2 that we're running a little late, sir. And I
3 don't have to apologize to General Woodward, so I
4 won't, but we're also very pleased --

5 Maj Gen WOODWARD: It's all her fault
6 we're running late.

7 CHAIR JONES: --- we're very pleased
8 to have you also, General, in your other capacity
9 as an expert. We --- the topic of this is case
10 studies on abuse of authority and coercive sexual
11 offenses in the training environment, and it's
12 obviously a topic that I think we're mandated to
13 get into, but that we're also extremely
14 interested in. And so having said that, General
15 Shadley, would you like to begin?

16 MG SHADLEY: I would, thank you Madam
17 Chairman. My name is Bob Shadley, and thank you
18 very much for allowing me to add my thoughts on
19 how the military judicial system can best help
20 rid our military of the cancer of sexual assault
21 and its precursor, sexual harassment. While
22 serving as a commanding general in the United

1 States Army Ordnance Center and Schools at
2 Aberdeen Proving Ground, Maryland, we uncovered a
3 situation in which primarily drill sergeants
4 were having a contest to see who could have sex
5 with the most trainees or students. These cadre
6 members either abused their positions of
7 authority or took advantage of trainee
8 weaknesses. I personally worked this issue 14
9 hours a day, seven days a week for 10 months. It
10 doesn't get any worse than having leaders abuse
11 those in their charge.

12 I continued my involvement through my
13 retirement in May of 2000 and beyond. For
14 example, from 2004 to 2010, I served as a mentor
15 for the Army's Battle Command Training Program
16 and worked with 35 colonel and general officer
17 level commands. My advice on preventing and
18 responding to sexual misconduct was included in
19 officer and noncommissioned officer professional
20 development program presentations to several
21 hundred leaders. In the fall of 2000, I began
22 writing a book about my experiences. The first

1 draft was over 980 pages, and when it was self-
2 published in 2013, it was pared down to 315, but
3 it still exposed my experiences in great detail.
4 The book, titled "The GAME: Unraveling the
5 Military Sex Scandal," was placed on the Army
6 Chief of Staff's Professional Reading List in
7 2014 and is currently being used as a reference
8 at the U.S. Army SHARP Academy, where I serve as
9 a guest presenter for each of the classes.

10 I currently talk with and support both
11 military and non-military organizations, schools,
12 religious groups, nonprofits and private sector
13 businesses. In addition to scores of survivors I
14 have met with, I have spoken to thousands of
15 military leaders and SHARP program staff members
16 since June of 2013. Commanders, family members,
17 and survivors contact me directly for advice and
18 comment. I just wanted to let you know all this
19 up front, that while the Aberdeen sex scandal
20 occurred 19 years ago, I am still current in this
21 issue with sexual assault in the military. I
22 respectfully submit that no senior commander past

1 or present has more hands-on experience with
2 regard to dealing with sexual misconduct in the
3 military than I do. I am prepared to answer your
4 questions and to elaborate on my position with
5 regard to four points.

6 First, there is no such thing as
7 consensual sex between a student and a cadre
8 member in a training environment. Drill
9 sergeants and other school cadre members who
10 abuse their positions of authority or take
11 advantage of the weaknesses of young trainees are
12 perpetrators of sexual assault. As a minimum,
13 the young student is a victim of bad leadership,
14 even if he or she initiated the conduct. Young
15 people need positive, adult leadership to show
16 them the hard right, not the easy wrong. At
17 Aberdeen, our rape charges were based on the
18 concept of constructive force; leaders abused
19 their positions of power. This is still going on
20 today.

21 I was not --- third point --- I was
22 not the general court-martial convening authority

1 at Aberdeen Proving Ground; the installation
2 commander fulfilled that role. While it has
3 plusses and minuses, I am convinced that a
4 separate legal chain within the military to
5 handle not only felony sexual misconduct, but
6 also selected other felonies like murder, armed
7 robbery, et cetera, is the way to go. Not all,
8 but certainly the majority of commanders and
9 Staff Judge Advocates that I've talked to agree.
10 Our separate legal chain at Aberdeen enabled me
11 to focus on my number one priority: identify and
12 get help for the victims or survivors. Our
13 separate legal chain also eliminated even the
14 appearance of command influence, and assured the
15 rights of both the alleged victims and the
16 alleged perpetrators were fully protected.

17 Fourthly, this is a leadership and
18 force protection issue, but not a personnel
19 issue. I believe the SHARP programs at OSD and
20 the Services should be supervised by the
21 operations officers J3, G3, S3. Again, thanks a
22 lot for allowing me to be of assistance in any

1 way I can to help prevent the damage sexual
2 misconduct offenders do to their survivors in
3 particular and our military as an institution in
4 general.

5 CHAIR JONES: All right.

6 Maj Gen WOODWARD: Do you want me ---
7 I was going to cede my time at least, to go to
8 the end here because I don't want to be here
9 until --

10 CHAIR JONES: Well, I think --- I
11 would like to begin with some questions of
12 General Shadley; that would be great.

13 MG SHADLEY: Okay.

14 CHAIR JONES: I'm very interested in
15 the use of constructive force, which I assume was
16 the charge --- well, it was the element that
17 permitted --- was it used in rape for 120,
18 Article 120 cases?

19 MG SHADLEY: Yes.

20 CHAIR JONES: Okay, and it supplied
21 all that was needed in order to establish the
22 elements?

1 MG SHADLEY: Our main perpetrator,
2 Staff Sergeant Delmar Simpson, was convicted of
3 19 charges of rape.

4 CHAIR JONES: And then could you tell
5 us a little bit about how that worked? I mean,
6 was there --- the Panel was told that there need
7 not have been --- you don't need to consider
8 consent? I mean, do you recall exactly how this
9 was phrased?

10 MG SHADLEY: I don't --- I didn't sit
11 in on any courts-martial.

12 CHAIR JONES: Okay.

13 MG SHADLEY: I did read all the court-
14 martial packets --

15 CHAIR JONES: Right.

16 MG SHADLEY: --- we went out and
17 interviewed all 990 young women who went to our
18 school over a two-year period, I read every one
19 of those statements. I stopped counting when I
20 passed 5,000 pages of sworn statements. In my
21 book, I quote this one young lady who was from my
22 hometown, Circleville, Ohio; I never met anybody

1 from Circleville, Ohio before. And so after she
2 testified, I called her in. She came in, and I
3 asked her, I said, "Why didn't you come and see
4 me or have your aunt call my mom?" They were in
5 the same bridge club. And she said, and I quote,
6 "Oh sir, you won't believe the hold that Drill
7 Sergeant Simpson had over all of us." And what
8 do we do in basic training? We tell young
9 trainees follow the chain of command, follow the
10 chain of command, you got a problem, go to the
11 chain of command. Well, what happens when the
12 first link in the chain of command is rotten, and
13 the young member is scared to come forward?

14 And that's the situation we had. And
15 of course, this was right after the first Gulf
16 War, and we were looking for the peace dividend,
17 so what did we do? We cut out all the fluff
18 stuff, like chaplains, equal opportunity
19 officers, executive officers in the companies.
20 So the young women --- in my case, it was all men
21 on women. The young women had no escape valve,
22 no relief, no one to talk to, and the detailed --

1 - again, I was --- the lawyers didn't work for
2 me, CID didn't work for me. MPs didn't work for
3 me. I was purely a tenant. They worked for
4 another two-star general. My --- I set three
5 criteria or three objectives: one, identify and
6 take care of the survivors. From them, we will
7 learn who the perpetrators were, and I turned
8 those over to a separate judicial system to let
9 that work, and then I would work on taking
10 corrective action and doing everything I could to
11 preclude recurrence and solving this issue in my
12 command.

13 CHAIR JONES: Well do you know, did
14 you have any situations where the victim said
15 that she consented to the relationship, she was
16 happy about it, it was wonderful, and there was a
17 court-martial under 120 and a conviction on the
18 constructive force theory? I'm just trying to
19 figure out how this can work in 120.

20 MG SHADLEY: Well, let me read you the
21 quote of one young lady, a student who --- it's
22 kind of a long story; you can read about it in

1 the book. I would talk to as many of the victims
2 as I could, and in the book, I call them Private
3 Doe 1, 2, 3; I don't use names. Private Doe 3's
4 final comment really struck home with me. She
5 said the drill sergeants did everything for them,
6 and they were wonderful. When they asked for
7 sex, she thought she owed it to them. It wasn't
8 rape, and it wasn't consensual. She concluded
9 with, "There's a big gray area in between." And
10 again, in my humble opinion, and at that time, 51
11 percent of young women coming into the military
12 were --- met at least one of the two sets of
13 criteria for sexual abuse as a child. And in my
14 case, our cases, all the victims were 19 to 21-
15 year-old young women, and the perpetrators were
16 35-year-old married drill sergeants.

17 And my position is that there's no
18 such thing as consensual sex between a 19-year-
19 old private and a 35-year-old drill sergeant who
20 has got ultimate control over them. Like I said,
21 even if the young woman walked into the drill
22 sergeant's office butt naked, she should come

1 flying out of there with a counseling statement
2 on what the proper behavior of a Soldier in the
3 United States Army is, not to have the guy say
4 well, why don't you close the door, sweetheart,
5 and let's work on your career advancement. And
6 to me, these guys not only abused their position,
7 I mean, not only abuse their position by force
8 and intimidation and coercion, but they also
9 abused it just by the mere fact that they were
10 there and found a person with a weakness. And I
11 think, if I were king for the day, I would say
12 absolutely no sexual contact is consensual
13 between a trainee in basic training or Advanced
14 Individual Training. Maybe up to, you know, 30
15 or 40 days into AIT or whatever. But if we want
16 the young people today, and I was -- like I said,
17 I was shocked to read what's socially acceptable
18 for young people, and I thought I was a pretty
19 worldly guy. But I would take stacks of the
20 statements with me on every flight and I'd read
21 them; sometimes I'd get physically sick. I said
22 I can't believe young people do that. I guess I

1 was naive.

2 But I think it's up to all of us, if
3 we're going to have a military that's a cut
4 above, not like society, it's a special
5 organization that instills the trust and
6 confidence of the American people to take care of
7 their sons and daughters, we need to do a better
8 job of showing young kids the right way as
9 opposed to exploiting their weaknesses and taking
10 advantage of them. Does that help out a little,
11 maybe?

12 CHAIR JONES: No, it does. Michelle,
13 go ahead.

14 DEAN ANDERSON: Sure. I very much
15 appreciate your willingness to speak with us here
16 today, and thank you for your expertise. I'm
17 wondering if you could articulate a little bit
18 more fully, I want to flesh out what the fear is
19 that the recruits might have, why they felt
20 obligated, "He did everything for us. When he
21 asked for sex, we felt we owed him," or "You
22 cannot believe the hold he had over us," right,

1 so this is the language you've referred to, which
2 is extremely helpful, and I wonder if we might
3 articulate, or if you have a sense of what the
4 fear is that the recruits might have that would
5 compel them to submit to sex under those
6 circumstances.

7 MG SHADLEY: The fear, the biggest
8 fear that the young women had was the threat that
9 they would be recycled.

10 DEAN ANDERSON: And tell me explicitly
11 --- sorry about this ignorance --- what that
12 means?

13 MG SHADLEY: We trained about 25,000
14 students a year, 64 military occupational
15 specialties at 11 different installations around
16 the country. Our courses range from anywhere
17 from eight weeks to 50 weeks. So say you're a
18 generator mechanic, that's a 13-week course. So
19 you're in the 12th week, and the guy says hey, if
20 you don't have sex with me, I'm going to recycle
21 you and start all over again. They say hey, I'll
22 do anything to get out of here.

1 DEAN ANDERSON: So that's an explicit
2 --- right, so that's an explicit threat. Let's
3 say there was no explicit threat. It's simply,
4 "I've been watching you for 12 weeks, and I want
5 to have sex with you," and the recruit feels "You
6 can't believe the hold he had over us," that's
7 why I didn't go to you, and, "I felt I owed it to
8 him." The fear still is implicit, the recycling
9 fear?

10 MG SHADLEY: The recycling fear, the
11 fear that they could withhold weekend passes --

12 DEAN ANDERSON: Okay.

13 MG SHADLEY: --- extra duties. You
14 know, the drill sergeant --- in basic, the drill
15 sergeant, now platoon sergeants, in Advanced
16 Individual Training have almost complete control
17 over the young men and women when they're not in
18 the classroom. I mean, they control when they go
19 to bed, when they get up in the morning, what
20 they can do at night, what they can't do at
21 night. It is --- and again, part of the
22 challenge is our young people come in today

1 differently than when I came into the Army. A
2 lot of them don't have --- some of them do not
3 have adult leadership at home. And so here is a
4 young woman, again, 51 percent were the victims
5 of sexual abuse, the drill sergeant says well,
6 you've got to sleep with me, and she says well, I
7 had to sleep with dad, so I guess I've got to
8 sleep with the drill sergeant.

9 DEAN ANDERSON: Right, and even
10 independent of having been sexually abused,
11 because not all were sexually abused as children,
12 although that's a huge problem in society
13 generally; I agree with you, and it certainly
14 leads to or has correlation with sexual abuse as
15 an adult as well, so I think that's an important
16 point. But even without that, even absent that,
17 I think what I'm hearing you say is that there is
18 no analogy in the civilian world for the amount
19 of control that a drill sergeant has over a young
20 recruit.

21 MG SHADLEY: Absolutely. And then the
22 other thing is, the lady who helped me write this

1 book was in the Navy. Or the publisher, her name
2 is Lily Coyle. Lily said she went to her first
3 duty station after she got out of basic in the
4 Navy, and the captain, the skipper called her in
5 and said "Lily, everywhere I go, I select the
6 prettiest young woman to be my mistress, and I'm
7 very pleased to let you know that I've selected
8 you to be my mistress during this command tour."

9 DEAN ANDERSON: Good heavens.

10 MG SHADLEY: And Lily --- Lily is from
11 Philadelphia, big city girl. She said "Captain,
12 you lay one hand on me, I'm going to put you in
13 dry dock forever." And he stormed out.

14 DEAN ANDERSON: She's rare.

15 (Simultaneous speaking.)

16 MG SHADLEY: I think there's been some
17 studies done, you might want to look at it, but
18 young women from the Midwest, average family
19 income less than \$36,000 a year are more
20 susceptible than women or men from big cities who
21 know how to --- these guys, in my humble opinion,
22 if the young woman said buzz off, First Sergeant

1 or Drill Sergeant, leave me, they thought that
2 they were cool enough that they could go find
3 another. So if you're not strong-willed, you had
4 a problem, and these guys seemed to sense that.

5 DEAN ANDERSON: Sure. For sure. For
6 sure.

7 MS. FRIEL: Michelle, the correlation,
8 I wonder if you think this, is your correction
9 officer in a jail or a prison.

10 DEAN ANDERSON: That's what I was
11 going to say, prison --

12 MS. FRIEL: --- to an inmate.

13 DEAN ANDERSON: Absolutely.

14 MS. FRIEL: Your parole officer to a
15 parolee; they don't have to make the overt
16 threat. The victim -- person knows the control
17 they have over them. In New York State, you are
18 incapable of consent in those relationships just
19 because of that.

20 MG SHADLEY: And I'm not that much
21 involved, but I've worked with the Archdiocese of
22 Minneapolis and St. Paul, and they, you know, 175

1 lawsuits; the Archdiocese is in bankruptcy. The
2 Archbishop resigned, and my advice to him was
3 stop worrying about yourself. Stop worrying about
4 the Church; the Church will survive. Take care of
5 your victims. And also what was happening at
6 this time is the drill sergeants in basic
7 training would identify the young women who were
8 players. They would pass their names on--

9 DEAN ANDERSON: To the next --

10 MG SHADLEY: --- to the folks in AIT.

11 DEAN ANDERSON: And AIT stands for?

12 MG SHADLEY: Advanced Individual
13 Training. So initial entry training is composed
14 of Basic Combat Training and Advanced Individual
15 Training, at least in the Army. And these guys -
16 -- and they would also at one installation, they
17 would pass the young women around from unit to
18 unit. That was going on at Fort McClellan. It
19 was not going on at Aberdeen, throughout the Army
20 at the time. It was called GAM, game a la
21 military, or playing the game. And that came out
22 --- and we figured this out at Aberdeen, and then

1 I read in various press reports the same thing
2 was going on at Fort Leonard Wood, Missouri; it
3 was documented in the press, and in Somalia.

4 So this was --- to tell you how
5 insidious this is, I'm getting out of a van at
6 Fort Hood, Texas two years after I leave
7 Aberdeen. The van driver, whose name is Keith
8 Conyers, says to me, "General, can we talk about
9 the Aberdeen sex scandal?" I said, "Sure,
10 Keith." He said, "Delmar Simpson, the guy with
11 the 19 rapes, was in my unit here, and he was
12 doing the same stuff here." And he said, "One
13 day Delmar came to work all smiles, and I said
14 'Delmar, how come you're so happy?' And he says
15 'I'm going off to be a drill sergeant and have me
16 a whole lot of fun.'" He said "A year, I see on
17 TV sex scandal at Aberdeen. I turned to my wife
18 and I said, 'I bet Delmar is right in the middle
19 of this.'" Twenty-five percent of the
20 individuals that we sent to court-martial, I
21 found out later had been doing this previously
22 and been passed off. So again, that's just my

1 experience. We've made a lot of progress. You
2 know, like I said, I've talked to a lot of people
3 who are working the issue hard, but we've still
4 got the challenge.

5 Maj Gen WOODWARD: Power corrupts;
6 absolute power corrupts absolutely, and a lot of
7 the people are attracted to being drill
8 instructors because they know how much control
9 that they have. We had trainees who literally
10 described their TIs, training instructors as
11 gods. I mean that --- so it's not just fear, you
12 know, so I think we can't just use that they're
13 afraid of them, but there is a power over them
14 that is overwhelming.

15 DEAN ANDERSON: Well that's --

16 MG SHADLEY: There's also --- back in
17 the 1980s at Fort Benjamin Harrison, the drill
18 sergeants were doing the same thing, only in that
19 case, each of the young women thought they were
20 their girlfriends, and they would have a
21 different girlfriend each class. I know at one
22 Army installation, the drill sergeants at that

1 time had secretaries to help them with their
2 workload, and I even know for a fact that
3 sometimes young men would go to the female drill
4 sergeants and offer to be their secretaries. So
5 it is insidious, and that's why in my mind, if
6 there's a noncommissioned officer or an officer
7 in the Army who takes advantage of a young
8 person's weakness, they're guilty of sexual
9 assault.

10 DEAN ANDERSON: So currently, the
11 Article 120 does not include a provision that
12 allows this to be characterized either as force
13 or as non-consent.

14 MG SHADLEY: That's correct. That was
15 going to be my comment. I think --- you all are
16 experts; I'm just, you know, an old engineer Army
17 guy, but I think you've got to tighten up 120
18 with regard to that gray area that Doe 3 talked
19 about. To tighten up --- particularly in the
20 training environment. Now in my humble opinion,
21 you've got sexual misconduct in basically three
22 categories. You've got the training environment,

1 you've got the active force, and then you've got
2 the adults. You've got the general sleeping with
3 the other --- somebody's wife or whatever. But I
4 think it's so important if we're going to have a
5 strong military, to have the young people get off
6 on the right foot, and we can't have that if we
7 don't have adult leaders. And whatever we can
8 do, and you all are the experts. I have no idea.
9 This is all above me. I'm just an old industrial
10 engineer like I said. Numbers make me happy; all
11 this other stuff confuses me. But however you do
12 that, to help protect the young men and women, I
13 think it's absolutely essential, and I feel very
14 strongly about it. Like I said, I go out and
15 about talking to folks and that's sort of -- my
16 bottom line is we owe it to America's sons and
17 daughters to give them more than they're getting.

18 CHAIR JONES: So --- well, I have two
19 questions really.

20 Maj Gen WOODWARD: No, I want you to

21 --

22 (Simultaneous speaking.)

1 MG SHADLEY: I'm very emotional about
2 this, so I keep --- and I'm sorry.

3 CHAIR JONES: Well I'm just going to
4 show my ignorance now. Was it the fact that
5 constructive force was part of 120 before this
6 latest, or the previous --

7 MS. FRIEL: And how were you able to
8 convict them of rape?

9 DEAN ANDERSON: It wasn't under 120.

10 MS. FRIEL: Oh, because you didn't do
11 it under 120?

12 MG SHADLEY: I'm not --

13 (Simultaneous speaking.)

14 CHAIR JONES: I'm asking whoever may
15 know the answer to this question.

16 MG SHADLEY: I've got all the charges-

17 -

18 LtCol HINES: Judge? Okay.

19 CHAIR JONES: Glen?

20 LtCol HINES: Okay, so the cases that
21 General Shadley is talking about, that was under
22 what we call the old version of Article 120, the

1 pre-2007 version.

2 CHAIR JONES: Pre-2007?

3 LtCol HINES: Right. In that one, the
4 Government had to prove both force and without
5 consent, and so there was an instruction in the
6 Bench book, and I'll route this around. I walked
7 out and grabbed it when you asked the question.

8 CHAIR JONES: Thank you.

9 LtCol HINES: But I'll route this
10 around to the Subcommittee, but --- and I'm not
11 going to insult your intelligence by reading it
12 all, but there were two notes, when that was the
13 Government's theory that force was established
14 not by actual force, but by abuse of power of
15 rank. There was actually a couple of notes in
16 the Bench book for the judge to give that
17 instruction where the judge would charge the
18 members and tell them the government's theory
19 here is that the accused abused his or her rank
20 and caused -- but it was a pretty high standard.
21 It had to create a reasonable belief in the
22 victim's mind that death or physical injury would

1 be inflicted on her, and that further resistance
2 would be futile, and words to that effect. So it
3 was --- it had to create almost that fear, that
4 reasonable fear of death or serious bodily
5 injury. But that's the theory that the
6 Government used on all of these --

7 CHAIR JONES: But that's interesting,
8 because that's not at all what I was thinking.

9 Maj Gen WOODWARD: So at Lackland, you
10 know, which happened generally in the 2009 to
11 2010-11 time frame, there was only one instructor
12 that we were able to --- that they took to an
13 Article 120, that they charged an Article 120,
14 and he had --- was convicted on 10 or 11 cases or
15 specifications of that, but he was the only one,
16 and I'll read you later the charge and also the
17 witness statements for one that they really
18 wanted to take to a 120, but they didn't feel
19 that they could under the current 120.

20 MG SHADLEY: Well, I had put in here
21 all the press releases for the folks that we
22 court-martialed, and I'm sorry I just can't find

1 them. But like I said, I --- my lawyer, Susan
2 Gibson, who is now the Deputy General Counsel for
3 the Director of National Intelligence, Susan was
4 the brightest lawyer I've ever met, with all due
5 respect to the lawyers in the room. She's just
6 wonderful, and I did everything she said, and she
7 was spot on in every instance. And so the
8 specifics, I don't know.

9 DEAN ANDERSON: I think it's safe to
10 say, it sounds like, that the problem was larger
11 than one person at Lackland, and it sounds like
12 there was one person who was convicted under
13 Article 120 at Aberdeen?

14 MG SHADLEY: No, we convicted 12.

15 DEAN ANDERSON: 12? Okay.

16 MS. WINE-BANKS: Was it under 120?

17 MG SHADLEY: Ma'am, I don't know. I
18 don't want to say something and lie to you.

19 DEAN ANDERSON: So, well that's
20 helpful because it sounds like what we're looking
21 at is, there's at least an issue that we should
22 be examining on whether or not we want to develop

1 a theory under 120 and --

2 CHAIR JONES: Maggie, could you
3 describe the difference between the guy who could
4 be convicted under 120 and the cases or the case
5 that didn't work under 120?

6 MAJ. GEN WOODWARD: Walker was the one
7 who first --- everything came to light at
8 Lackland with this one training instructor when a
9 woman reported on a friend of hers who was no
10 longer in instructor training that she had been
11 raped by her instructor. And that went through
12 the chain of command, and it's interesting to
13 note that she wasn't able to even report that
14 until she moved out of her squadron, and she was
15 actually recycled back to a different squadron,
16 and then, only then did she feel she had
17 leadership that she trusted to give them that
18 information. And when they went back and looked,
19 and I think it's really instructive that even
20 when they had --- it wasn't the individual
21 herself who reported, it was her friend who did.
22 And even when they had that, it took

1 several interviews and attempts to get the woman
2 to admit that she had been raped. And then when
3 they looked into all the other, they found --- I
4 can't remember, it was either ultimately 10 or 11
5 victims --- how hard it was to get their --- the
6 information from them that they had been
7 assaulted. So that's the level --- I mean, even
8 after it comes to light, to get the victims to
9 admit that they were victims was really
10 difficult.

11 And so he was able to be convicted on
12 120 because he had one case where he physically
13 held down a trainee in bed, and she fought him,
14 he held her down, and there was penetration. So
15 we got the 120 with him easily. For another
16 scenario, if I can take the time to describe it -
17 -

18 CHAIR JONES: No, please. Yes.

19 Maj Gen WOODWARD: --- because I think
20 it's kind of instructive, where two drill
21 instructors, and they were very good as we said
22 about grooming. They picked their charges as

1 they went through training, and then they would
2 get them either at the end of training, or what
3 could be a little bit problematic is that they
4 would maintain their hold over them as they
5 graduated and went into their next level of
6 training, but they were still able to have a
7 sexual relationship with them after that. So
8 part of this is if we make it, they can't
9 consent, then we also have to look at okay, at
10 what point does that end, and at what point are
11 they free and clear of that influence of that
12 instructor.

13 But these two military training
14 instructors, the night that their students were
15 graduating and going on to their next training
16 assignment, called those two young women down and
17 told them to report to the PT locker. And the
18 women knew that they were being called down there
19 not just for training, and they actually said to
20 each other, "We're not going to have sex with
21 them when we go down there." They went in there,
22 and they ultimately, each training instructor

1 took the student he wanted, and they had sex, and
2 they were unable to try them for 120 though
3 because they couldn't, or they didn't want to
4 take them to court for 120 because they didn't
5 feel that the issue of consent was --- or force
6 was there, or not a strong enough lack of
7 consent.

8 So they actually charged them with
9 Article 92, and I can read the charges just so
10 you can see. I won't get into the on or abouts:
11 "violate a lawful general regulation, to wit,
12 Paragraph 4.3.3 and 4.3.6, Air Education Training
13 Command Instruction, Professional and
14 Unprofessional Relationships, by wrongfully
15 seeking to develop a personal, intimate or sexual
16 relationship with Airman First Class by
17 performing oral sex on her, penetrating her
18 vagina with his finger, kissing her, by asking
19 her to perform oral sex on him and by texting and
20 calling her on the telephone." And then there's
21 other specifications where he tried to get her to
22 lie as the investigation went on. So with all of

1 the rest of the Lackland ones, they actually had
2 to go with this unlawful orders, general
3 regulation.

4 CHAIR JONES: Orders. Right.

5 MS. FRIEL: Maggie, when you asked
6 those two, who obviously went there with the
7 intent not to do what they ended up doing, and
8 when you asked them what happened that you ended
9 up doing it, what was the explanation?

10 Maj Gen WOODWARD: They just felt like
11 they have no control. And that was the hardest
12 thing for me; when I first went down to Lackland,
13 the first thing I did was read through the
14 witness statements, and I'll be honest with you,
15 I was kind of disgusted because almost all of
16 them read like they're consensual sexual
17 relationships, and I'm like, you know, my first
18 thought was well, you know, these women all
19 consented; look what they did, look at, you know,
20 they put themselves into. And then ultimately
21 over time, I --

22 CHAIR JONES: You saw the power.

1 Maj Gen WOODWARD: --- saw the light,
2 you know, I was better educated and I understood
3 the pressure they were under. But I do think
4 it's kind of instructive, and I probably don't
5 want to read this whole thing, but just a couple
6 of lines in some of these, and I feel bad I don't
7 have the one from --- the Estacio one, where they
8 went to the PT locker , but in that, if I recall,
9 she --- you know, they talked about we went down
10 there, and I just --- I couldn't say no. He's my
11 drill instructor, you know, and they just feel
12 like they don't even have the power to say no to
13 them. This is a different one where they went
14 off base right as they were graduating with two
15 drill instructors, and they had been set up and
16 all that. And this woman had originally, when
17 she was --- when they were doing the
18 investigation originally said no, you know, I had
19 nothing to do with this guy, and then ultimately
20 she came back and testified on her second
21 interview.

22 And she says, I thought this was

1 pretty interesting, "I have to be" --- "As I sit
2 here and write this statement, I have to be true
3 with myself and for other young Airmen that will
4 be future leaders. I did have sex with Sergeant
5 Crawford, and the intimacy was consensual. I was
6 not afraid, and I wanted to. I knew it was
7 wrong, he was wrong and so was I because I was
8 fully aware that this kind of behavior was not to
9 go on. However, younger ladies straight out of
10 high school do not --- I do not agree with that,
11 and this is why I can't lie on this statement."

12 And so her sense is the other young
13 woman who was there, she really felt like you
14 know, she was forced to do it, even thought that
15 might come across as consensual because she was
16 so young and inexperienced, and she just didn't
17 have the ability to say no. And the line I
18 wanted to read from her statement is, "I never
19 told him I felt awkward, I don't think, but I was
20 always very uncomfortable around him after he
21 started texting me. I never felt forced
22 completely to carry on this sordid relationship,

1 but I did feel pressured and sometimes like I had
2 no choice." And I think it's just they don't
3 know how to get out of it.

4 HON. HOLTZMAN: Can I ask a question?

5 CHAIR JONES: Yes please, Liz. Go
6 ahead.

7 HON. HOLTZMAN: So we've been at
8 various points, we've received suggestions that
9 there be a specific section of 120 that makes it
10 clear that it's kind of automatic, like statutory
11 rape, so that if there's a relationship between a
12 superior and a trainee during the basic training
13 period, that it's non-consensual, and it's sexual
14 assault. Do you agree with that? Should it be
15 automatic, I mean --

16 MG SHADLEY: Absolutely.

17 MAJ. GEN. WOODWARD; And the Judge has
18 heard me go back and forth on this issue, and you
19 know we've had different conversations, but I do
20 think, and I was really --- that New York
21 legislation, you know, that the guy sent us, I
22 really appreciated that, because reading that

1 piece about the parole officers and the
2 corrections officers, to me, it just really fit.
3 I mean there's obviously a line at some point,
4 and I believe after basic training, you know,
5 there's always going to be power, you know,
6 disparate power relationships, and those are
7 problematic, and I think those you're going to
8 have to probably capture in 92. But in basic, is
9 such a different scenario that I think you can
10 probably draw the line at basic and say it is,
11 you know, trainees are unable to consent, and you
12 could write it in that way, and that will give
13 you a little bit more teeth.

14 HON. HOLTZMAN: And do you think your
15 view is a generally accepted view, or do you
16 think your view is aberrational?

17 MAJ. GEN WOODWARD: Well, it was
18 interesting when I was reading the responses of
19 the Services to the JPP, it seemed to me that
20 most of the Services were saying they felt that
21 they could get as good a conviction out of the
22 Article 92 as the 120, so I'm not sure that --

1 HON. HOLTZMAN: 120 has some extra
2 penalties with it, which means that if you're a
3 sex offender, which is what 120 calls you, you
4 have to register as a sex offender --

5 Maj Gen WOODWARD: Right.

6 HON. HOLTZMAN: --- for a very long
7 time, perhaps the rest of your life, so it's got
8 a much more serious penalty than --

9 MAJ. GEN. WOODWORD: Which would have
10 a real --

11 HON. HOLTZMAN: General deterrent
12 effect if you really want to stamp this behavior
13 out.

14 Maj Gen WOODWARD: Right, but what my
15 sense is, the testimony from the Services is that
16 they --- you know, when you asked if there's
17 consensus there, is when I was reading at least,
18 I haven't been tied in, and Gina I'm going to ask
19 you to jump in, what you think the Air Force's
20 current policy is, but I know when I was there,
21 there was a yes, if Congress --- because I know
22 Jackie Spears was hitting us up as we were

1 talking about this, and we were debriefing this,
2 and she said well, it should, you know, they
3 shouldn't be able to do this. And we said well
4 yes, but these are adults, so if you want to say
5 that trainees can't consent, you're going to have
6 to put that in a statute, and I think there was -
7 -- you know, we would be perfectly happy with
8 that at the time I was there. I don't know;
9 Gina, has that changed at all, or do you think
10 that would be a --

11 MajGen GROSSO: No, I mean the
12 consensus from prepping for this is that it's --
13 they --- we --- I would say that the consensus
14 decision from leadership is that you are correct,
15 that we think we can get what we need with a 120
16 and an Article 92. I think there's real concern
17 that if you go in with the strict liability with
18 the statutory rape with adults as a precedent,
19 that you basically are putting trainees in the
20 category of children when they're adults. So
21 there is concern there; there's also concern that
22 the facts don't get --- I mean it's ipso facto,

1 in essence in black and white. So there's no
2 looking at any facts; it's just a done deal. I
3 think the constructive force, I would think would
4 be much more palatable because at least there's
5 facts that people consider, so if there is some
6 extenuating, it's considered as opposed to this
7 black and white, it's a done deal.

8 MG SHADLEY: But if --- people will
9 often say well you know, commanders are
10 responsible, but part of the training in the
11 training environment is training of the drill
12 sergeants and instructors to be leaders. And so
13 there has to be a learning process for them to
14 understand as leaders, don't abuse subordinates.
15 And so I think --- and I probably have to go back
16 and dig out the 981 page version to get the
17 specific charges, but not all of those that we
18 court-martialed were for rape. Some forced
19 sodomy, aggravated assault, adultery, but I know
20 19 charges on Simpson. Gamble had like 12.
21 Simpson got 25 years in jail. But I'll burn
22 those copies off with the exact charges and

1 specifications.

2 CHAIR JONES: I'd appreciate that,
3 thank you.

4 MG SHADLEY: I can do that.

5 CHAIR JONES: Thanks.

6 MG SHADLEY: I did away with all the
7 sworn statements stuff, because I didn't want to
8 have those at the house.

9 Maj Gen WOODWARD: Yes, yes I didn't,
10 either. I was surprised when I got them. But --

11 CHAIR JONES: Colonel, do you have a
12 question?

13 COL SCHINASI: This is a question with
14 some pieces, so you can enter at any place you
15 want and leave any place you want. The first
16 thing that would occur to someone is what was the
17 culture like of the NCOs that were drill
18 instructors? What was the discernable culture?
19 What was the supervision of the drill
20 instructors? The NCO supervision, the officer
21 supervision. And then third, what was the IG
22 doing? The Army, the military has built in a

1 very effective structure for making sure that
2 what we do, we do the right way. What happened
3 to those three issues?

4 MG SHADLEY: Okay. With regard to the
5 drill sergeant structure --

6 COL SCHINASI: Culture.

7 MG SHADLEY: --- culture. Of the 80
8 drill sergeants that were at Aberdeen through a
9 three-year period of time, 31 of them or almost
10 40 percent had misconduct in their records which
11 should have precluded them from ever being a
12 drill sergeant. Duh. So I told the Army they
13 had a problem with drill sergeant selection; they
14 argued with me, and I had the CID do an analysis
15 for me, and I sent it to the Department of the
16 Army, and I said here's my report. So this had
17 been going on for a while. Supervision, again,
18 after the first Gulf War, we did --- we took ---
19 so if you had a drill sergeant, and we were short
20 drill sergeants, then you had a senior drill
21 sergeant, then you had the First Sergeant, we did
22 away --- and then you had a company commander and

1 then a battalion --- I had no IG, I had no equal
2 opportunity officers, I had no chaplain. There
3 was no --- there was nothing available to my
4 command to ferret this stuff out, even though
5 people knew what was going on. I'll give you a
6 prime example.

7 A First Sergeant, as it evolved north
8 of Aberdeen --- and remember, this is a sworn
9 statement --- his statement is "My wife and I are
10 at the mall, and we see Drill Sergeant X going
11 into Victoria's Secret store with Trainee Y."
12 Now, and what did he do about it? Nothing. And
13 I said to myself, I said do you think the drill
14 sergeant is helping this young lady get a
15 Mother's Day present for mom? Give me a break.
16 And I had --- so I had all the drill sergeants in
17 after we found out, and they're all, "Oh sir,
18 we're put upon, you know, everybody's --- " and I
19 said "Okay gang, who in this room did not know
20 what was going on? If you did not know, raise
21 your hand." Not one hand went up. I said "Each
22 and every one of you is just as guilty as the guy

1 who's facing a court-martial." And then it
2 really got nasty; two of them broke down in tears
3 and left, and I had my answer right then. But
4 people --- nothing goes on in a training company
5 or battalion that other people don't know about
6 it.

7 COL SCHINASI: So what was the company
8 commander doing? What was the battalion
9 commander doing? Weren't they involved in the
10 leadership structure and knowing what's going on
11 in their organizations?

12 MG SHADLEY: Not as much as they
13 should have been. We did discipline a battalion
14 commander, although I --- they gave me a letter
15 of reprimand for failure to do an accurate
16 command climate assessment upon assumption of
17 command, and I said guilty. But I had --- and
18 then I was precluded from taking any action
19 against the chain of command. I had one company
20 commander that I thought should have been court-
21 martialed or at least a general officer letter of
22 reprimand, but he was later promoted below the

1 zone to major. But I couldn't do anything about
2 it; that was taken away from me. So there was a
3 culture, like when I left Aberdeen, at my
4 farewell party, one of the civilians came up and
5 said, "Sir, we're really sorry you had to go
6 through this, because this has been going on up
7 here a long time." And I wanted to choke him.
8 So why didn't you do something about it? We see
9 this, and that's why I'm adamant about if you ---
10 it's up to each and every person in our military
11 to set and enforce the highest standards. In
12 Proverbs 27:6 or 22:6, "Wounds from a friend are
13 better than many kisses from an enemy." So if
14 you're really somebody's friend, you'll call them
15 out on it and say that's bad behavior; you don't
16 let them get by with bad behavior. So we are not
17 policing our own, and we're reaping the benefits
18 of that, because people just don't want to get
19 involved.

20 Maj Gen WOODWARD: And an interesting
21 thing from Lackland is, you know, some of the
22 issues that we cited that were problems,

1 especially in leadership. And I know you guys
2 read, you know, the executive report, not having
3 any ops officers in the squadron, for instance,
4 were things that we learned from Aberdeen. And
5 the frustration --- the frustrating part is we
6 learn, or we don't learn from previous things,
7 which is why putting things into place
8 statutorily I think is probably pretty important.
9 Right now, I feel really confident that what
10 they're doing at Lackland is paying attention to
11 it and has really put such a scrutiny on the
12 issue that things are not happening, you know,
13 and it's not a problem. But as we've seen, you
14 know, that will come and go as attention is on
15 the problem, as different leadership is there,
16 you know.

17 So even though right now we just threw
18 a whole bunch of manpower, you know, at it to
19 take away the ability --- and that's the problem
20 with the drill instructor. They have not just a
21 lot of power, but they have a lot of autonomy,
22 you know, much like a police officer if you will.

1 And one of the things that we talked about is,
2 for instance, the Dallas Police track even
3 allegations of abuse on their police officers so
4 that one might not be proved, but a record of
5 even allegations becomes, you know, something to
6 take a look at, and we recommend the same thing.
7 Just because of that autonomy, not just the pure
8 power, but the autonomy is problematic, because
9 you can't keep an eye on these guys 24/7 as
10 they're working their trainees. So over time,
11 when the focus is on it, you fix it, and we learn
12 from what Aberdeen says over time, you know, as
13 strengths come, we get away from that, and that's
14 where the statutory piece of this I think becomes
15 really problematic, whether it's you know, we can
16 cover everything with Article 92 or not, you
17 know. I think there's something to be said for
18 trainees are such a special circumstance that you
19 could actually put them in a category where they
20 just don't have the ability to consent, and
21 that's a very powerful thing to do for an adult,
22 but I think there's a case to be made for that,

1 just protects them for a certain period of time.

2 MS. KEPROS: In your report, you
3 talked about one of the reforms at Lackland was
4 to increase the number of trainers --

5 Maj Gen WOODWARD: Yes.

6 MS. KEPROS: --- was it like four to
7 two or --

8 Maj Gen WOODWARD: To take away that
9 autonomy.

10 MS. KEPROS: Yes, and I was curious
11 when that happened ,and are there metrics in
12 place there now trying to track whether that
13 policy is having any effect?

14 Maj Gen WOODWARD: Yes, Gina can talk
15 to that, but yes, that actually --- General Rice
16 fixed that a lot faster than anybody thought he
17 could because I mean it was a huge bill to take,
18 but he did that fairly quickly because he thought
19 it was so important. And I don't know Gina, I
20 know last year he was telling me that we hadn't
21 had any more allegations whatsoever, but how's it
22 looking?

1 MajGen GROSSO: Yes, that's true.
2 Since November of '12, there's not been--well
3 there's been allegations of sexual assault, but
4 no --- none that have been founded. It's ---
5 that's actually all of the things I have in my
6 opening statement. So it's proven to --- I would
7 say as you think about this, there's no one
8 thing. So even if you change the law, when you
9 look at the sweeping recommendations that General
10 Woodward made and that have been implemented, it
11 gets to your point about culture. You need all
12 of it; it's not enough just to --- because even
13 in the case of Sergeant Walker, someone had to
14 come forward, and so you have to have a system
15 that has --- you know it turns out the anonymous
16 reporting now is 65 percent, so there's been
17 about 1,350ish allegations that have come
18 through; 65 percent of them are anonymous, and
19 that's a new process that's put in as a result of
20 General Woodward's recommendations. Now they've
21 all been investigated independently and are
22 unfounded, but it's clear those structures need

1 to be in place, and the training of training
2 instructors, and those --- there's so many pieces
3 that contribute to that environment; it's not
4 just going to be the legal piece.

5 MG SHADLEY: And I didn't give you a
6 complete answer. We did have the TRADOC IG come
7 in at the 90-day mark. Their comment was there's
8 no chance of sexual misconduct occurring at
9 Aberdeen; Aberdeen is perfect. We did a DEOMI
10 Survey of both of them, came out we were in the
11 highest percentile, no chance of any sexual
12 misconduct occurring at Aberdeen Proving Ground
13 at all. And when that came out, I wrote him
14 back, well if we're at the top, I'd hate to see
15 who's at the bottom.

16 COL SCHINASI: So what you're saying
17 is that in part, the procedures are defective,
18 the systems are defective, and in part the
19 personnel decisions that put people in command
20 are defective. If you say 40 percent of them had
21 disciplinary actions and would have --

22 MG SHADLEY: And the Army's corrected

1 that. There's much --- that is one thing that
2 has changed is the drill sergeant selection.
3 Whether they're all perfect or not, probably not,
4 you know, but it's better than it was.

5 COL SCHINASI: Let me extend that a
6 bunch. I came into the Army during Vietnam. I
7 didn't serve in Vietnam, I just came in during
8 Vietnam. Drinking, drunk driving, womanizing,
9 all kinds of adultery were the rule. The
10 Officer's Club would open at 11:00 in the
11 morning; chain of command would be in there. Now
12 little by little during the time that I was on
13 active duty --- I retired in '95 --- what the
14 military did was make each one of --- the Army
15 did was make --- you probably know this, sir ---
16 each one a cause celebre. So for instance, in
17 the OER, your superior had to comment on whether
18 or not you adhere to the Army Equal Opportunity
19 program. And so what happened is the Army and
20 structure all the way down focused attention on
21 what they perceived the problems to be in the 22
22 years I was on active duty. Okay now, has

1 anything like that happened in the Army or the
2 Air Force or the Services anywhere with respect
3 to trainee abuse? Because once you put it in an
4 OER, once you make that a condition precedent to
5 success, everything changes. Officer's Club
6 closes, there's no alcohol, there's no adultery;
7 everything changes.

8 Maj Gen WOODWARD: I think each of the
9 Services has changed that.

10 MAJ. GEN SHADLEY: When people ask me
11 what I think is we've made a lot of progress.
12 Are we there yet? Absolutely not, but we have
13 made progress. I talk to each of the SHARP
14 classes at the SHARP Academy at Fort Leavenworth.
15 They're a bunch of dedicated, hard-working people
16 who want to do the right thing, but that's in the
17 reporting and stuff that's --- there's the
18 prevention part. It would be nice not to have
19 anybody go to court-martial because nobody did
20 anything wrong. I mean, that should probably be
21 our objective, but that will never happen, but we
22 can get a lot closer than what we're doing now.

1 COL SCHINASI: My sense of it in other
2 areas, watching other areas, is that it's --- at
3 first blush, it's a personnel issue. If you make
4 the right people drill instructors, it's never
5 going to be perfect; nothing we do is going to be
6 perfect, but the incidence of abuse is going to
7 reduce down below the significant level. If you
8 don't or can't because of a draw down or because
9 of lack of resources, which appears to be what
10 you had, then you get what you get.

11 Maj Gen WOODWARD: You know I'll tell
12 you at Lackland, we looked at it, and the records
13 of the guys who --- or at least while we were
14 doing our report, there were a lot more after we
15 left, but they had exceptional records. I mean,
16 they were picking, you know, really good folks.
17 Now, we said they were too young and too
18 inexperienced, so easier for them to fall into
19 the trap of abusing their power because of their
20 youth. But you know, the big thing we found is
21 it's really hard to weed these guys out from
22 looking at them, you know. And we see that

1 whether you're talking about training instructors
2 or the serial perpetrators we see out in the
3 field, you know. It always shocks somebody when
4 you find somebody. It's like the Bill Cosbys of
5 the world, you know, they just don't --

6 COL SCHINASI: The issue is, is it an
7 anomaly? If it's an --- we're never going to get
8 100 percent of anything, but if the abuse is the
9 product of an anomaly, I think we have to live
10 with that. If the abuse is a product of a
11 systemic failure, that's what we have to change,
12 and that's, you know, that's --- Bill Cosby's an
13 anomaly, but is the selection of the --- I
14 shouldn't say that so fast, yes. I shouldn't
15 say --- but if those structures are in place, and
16 the personnel selection process is where it
17 should be, because I guess in theory, the
18 instance of abuse would go down.

19 Maj Gen WOODWARD: Well, that's what
20 we found in the report we did. We said you know,
21 it's no one thing as Gina articulated, and it's
22 not just --- we have to have really strong

1 leadership that's involved, that's paying
2 attention to the culture, you know. You have to
3 do selection and manning correctly. You have to
4 have detection and reporting in place. So I mean
5 there's any number of different levels, and any
6 of them can break through. What you all are
7 working on is just --- is honestly the end of the
8 line, you know, it might be a little bit of a
9 preventive because it's a --- but they aren't
10 deterred. You know when I interviewed one of the
11 -- the only MTI I could interview, because he had
12 already been charged and sentenced, you know when
13 we sat and talked to him, we said did you ever
14 think you'd get caught, you know. And he was in
15 this mode, they think they're gods, you know, and
16 he's like you know, we're above all that, you
17 know. Nobody's ever going to hold us
18 accountable. And they really get into that --

19 COL SCHINASI: That's where the
20 culture is an issue to me.

21 MS. FRIEL: Let me say something.

22 COL SCHINASI: I can't imagine --

1 MS. FRIEL: It's a power thing.

2 COL SCHINASI: I served in the 3rd IG
3 and in Panama. This is combat organizations. I
4 can't imagine the CG or the chain of command any
5 place tolerating one incidence of this. What it
6 meant to be an NCO in those situations.

7 Maj Gen WOODWARD: It's not
8 tolerating, it's being able to find out about it,
9 and when he talked about at the very beginning,
10 nobody reports it, and it's very easy for these
11 guys to hide it.

12 MS. FRIEL: This is not just a
13 military issue. I was a prosecutor for 30 years.
14 This is a power issue, and anywhere you have an
15 imbalance of power, you are always going to have
16 people who are going to take advantage of that in
17 a sexual way. You can do all the deterrence you
18 want and all the prevention and all the reporting
19 mechanisms; there are people who take advantage
20 of that. Teachers take advantage of it with
21 students, professors with their grad students,
22 you name the power situation, police officer --

1 it is. So in the end, I think that's why you
2 have a statute that says at least with your
3 trainees who are so vulnerable, who will always
4 be so vulnerable, you need to say something
5 about that, because I don't care what else you
6 do, you're never going to stamp it all out.

7 COL. SCHINASI: You can't.

8 CHAIR JONES: Okay, last --- no, no,
9 last question and go ahead, Liz, and then we'll
10 go to --

11 HON. HOLTZMAN: You mentioned, this is
12 something that I've been thinking about for some
13 time now, you said 50 percent was the statistic
14 used, in some places I've heard 40 percent, of
15 the people who have been sexual assault victims
16 had been sexually assaulted before. What's ---
17 if there's some --- so somehow the perpetrators
18 are sensing who's vulnerable, who's not going to
19 resist, who's not going to fight back, that for
20 some reason this group seems to be more
21 vulnerable than others. What are the solutions
22 to that? How can we help this group begin to

1 have the emotional, psychological, other kinds of
2 resources that they need to avoid this
3 vulnerability?

4 MG SHADLEY: Gina was anxious to jump
5 in to --

6 CHAIR JONES: I think Gina's going to
7 talk about it here.

8 LtCol HINES: I was just going to
9 suggest we're starting to get into a series of
10 questions that I think that the training
11 commander --

12 CHAIR JONES: The next panel --

13 LtCol HINES: --- and you can ask --

14 Maj Gen WOODWARD: But that is
15 something that we've been addressing in the Air
16 Force at least for a while now.

17 MG SHADLEY: This is an old study, I
18 haven't seen anything more recent, but this was
19 done back in the mid '90s by Dr. Leora Rosen at
20 the Department of Psychiatry at Walter Reed, and
21 she reported that of the young folks coming in
22 the Army, 48 percent of female Soldiers and 50

1 percent of male Soldiers met the criteria for
2 childhood physical abuse; 51 percent of female
3 Soldiers and 17 percent of male Soldiers met at
4 least one of the two sets of criteria of
5 childhood sexual abuse. And then the AMA
6 reported a survey of 14-year-olds who are now
7 mid-term leaders; 51 percent of the boys and
8 girls said forced sex is acceptable if a boy
9 spent a lot of money on a girl. 31 percent of
10 the boys and the girls, I think I've seen this.
11 So that is the culture, and it appeared ---
12 Delmar Simpson in a sworn statement says, "I'm
13 going to keep doing this S-H-I-T until I get
14 caught." That was the attitude. The folks that
15 I talked at Aberdeen are convinced that the guys
16 who were the perpetrators were convinced that
17 they could identify the female players, and often
18 they were wrong, and that's when we got into the
19 constructive force. Sometimes they were right,
20 but that may have demonstrated bad leadership.
21 So to me, in any case, if a drill sergeant or
22 anyone, particularly basic and even into Advanced

1 Individual Training, that takes advantage of
2 these young kids, they have no place in our
3 military.

4 CHAIR JONES: Thank you very much.
5 Thank you particularly General Shadley, not that
6 I don't like you, Maggie, but it was great for
7 you to come.

8 All right, we're very pleased to
9 continue the afternoon with a number of former
10 training commanders who are going to talk to us
11 about their perspectives on preventing and
12 prosecuting abuse of authority/coercive sexual
13 offenses.

14 And I'm going to just go in the order
15 that you're listed on our agenda here and ask if
16 I could hear from General Combs? Would you mind
17 beginning?

18 MG COMBS: Sure.

19 CHAIR JONES: Thanks.

20 MG COMBS: Good afternoon, everyone.
21 And first of all, I want to thank you for the
22 work that you're doing because it's incredibly

1 important to all of us as commanders and the
2 toolboxes that we need to actually deal with this
3 issue. It's a very, very important topic and I'm
4 thrilled to be here today to talk about it a
5 little bit.

6 I am Major General Peggy Combs. I
7 currently serve as the Commanding General for the
8 United States Army Cadet Command in Fort Knox,
9 Kentucky. The Cadet Command is our reserve
10 officer training command.

11 It consists of programs on 275 college
12 campuses as hosts with students on 1,066
13 campuses. We have about 36,000 cadets in our
14 Army ROTC program.

15 I also have responsibility for the
16 Junior ROTC program that has cadets on 1,709 high
17 school campuses and about 314,000 Junior ROTC
18 cadets as well.

19 I also, as the Commanding General of
20 Cadet Command at Fort Knox, I wear two hats. I
21 also have general officer convening authority for
22 general court-martial convening authority for

1 Fort Knox, Kentucky, which has several units on
2 it to include the recruiting command, our human
3 resources command, a couple of force comm units
4 and many reserve component units to include my
5 own.

6 I have been in our Army for 30 years.
7 I have the unique distinction of being the Army's
8 most experienced General Officer in initial entry
9 training.

10 I have spent nine of my 30 years as a
11 Commander in initial entry training, whether that
12 be basic combat training, advanced individual
13 training, basic officer training, and advanced
14 officer training, and now Cadet Command, which is
15 initial entry for officers before they actually
16 commission.

17 So I have seen a lot of these issues
18 up close and personal. I have dealt with them as
19 the capacity and commander for nine years, and I
20 really just look forward to talking to each and
21 every one of you about some of the issues.

22 As I was looking at one of the

1 questions, and the question I would be most
2 interested in talking about, one of the questions
3 surrounds criminalizing the sexual relationships
4 between trainers and trainees in the form of
5 strict liability, and I am very interested in
6 talking to you about that issue.

7 You know, like I said, I have been
8 around it for a long time, and it is an issue
9 that has frustrated me for many years, so I look
10 forward to talking to you all about that.

11 CHAIR JONES: Well, you know, perhaps
12 what we could do, because that is the question
13 for us at the moment, is ask you what your
14 opinion is and each of you could introduce
15 yourselves and give us your opinion on the same
16 question.

17 MG COMBS: Okay.

18 CHAIR JONES: That would work just
19 great.

20 MG COMBS: Yes, ma'am. I believe that
21 we do need to formally criminalize the
22 relationship between trainee and trainer, and the

1 prohibition on sexual relationships between the
2 two. I believe that would help us as commanders
3 have another tool in our tool kit to deal with
4 the situation.

5 I know there are other articles of the
6 UCMJ that can be used, but in my experience in
7 having to prosecute these cases for many years,
8 when we go under those two articles we don't get
9 the effect we want.

10 For instance, in Article 92, which is
11 just failure to obey an order -- because we have
12 policies that say you don't do that. I mean,
13 every one of us has a policy to say you don't do
14 that.

15 And somebody that does do that and
16 then we try to prosecute it for what it is, and
17 the Soldier comes forward and says, oh, it was
18 consensual. Now I can no longer prosecute it as
19 a sexual offense.

20 It is a breach of trust and it is
21 absolutely a breach of the regulation or our
22 local policy, so I have to prosecute it under

1 Article 92 and sometimes under Article 134 as
2 well with conduct unbecoming.

3 We can make those charges, but I can't
4 bring those to a court-martial. If I bring them
5 to a court-martial, I don't get a kick. I don't
6 get the effect that we want.

7 CHAIR JONES: Well, what's the
8 punishment -- I'm confused here -- if you charge
9 somebody under 92?

10 MG COMBS: Yes, ma'am, they may get
11 punished. They may get a fine or reduced in
12 rank, but they're not getting kicked out of our
13 Army.

14 CHAIR JONES: And they're not getting
15 any time in jail?

16 MG COMBS: No.

17 CHAIR JONES: Is 92 up to two years?

18 MG COMBS: It is only up to two years.
19 In my experience --

20 CHAIR JONES: And nobody's getting any
21 time is what you're saying.

22 MG COMBS: Yes, ma'am, right. In my

1 experience, ma'am, we've never gotten any jail
2 time for that because the Soldier will say it was
3 consensual, and we've never gotten a kick. We've
4 never gotten a service release.

5 Maj Gen WOODWARD: I will tell you at
6 Lackland, we did. Not to interrupt, I'm sorry,
7 but I just wanted to make sure. We got a lot --

8 MajGen GROSSO: I have the stats.

9 Maj Gen WOODWARD: Yes, and Gina will
10 cover those. So it is possible, but it's
11 certainly not the -0

12 MG COMBS: It's possible but it's not
13 the norm I guess is the way to say it.

14 CHAIR JONES: But if they say it was
15 consensual and everybody believes that, it's
16 still a violation of orders, right?

17 MG COMBS: Yes, of Article 92.

18 CHAIR JONES: And they could still get
19 two years if people viewed it, should I say,
20 correctly? I don't know how else to put it.

21 MG COMBS: Yes, ma'am.

22 COL SCHINASI: Do you send them to a

1 GCM?

2 MG COMBS: We have sent them to GCMs.

3 MS. WINE-BANKS: What's GCM?

4 MG COMBS: General court-martial.

5 MS. WINE-BANKS: Oh, all right. I

6 knew that.

7 MG COMBS: So you know, what we end up
8 doing with a lot of those cases is accepting a
9 Chapter 10 and allowing them to leave the Army
10 with no benefits, because the desired effect is
11 to separate that Soldier from the Army and
12 hopefully get them in jail before that, but if
13 not, we just have that.

14 So I just believe if you criminalize
15 it, it might not be under Article 120 or
16 wherever, but just to say that there are no
17 sexual relationships between trainers and
18 trainees and not to specify basic training, AIT,
19 or cadets, but just trainers and trainees or
20 people in training status.

21 I really believe it would give us
22 another tool kit to help us greater get after

1 this problem, and then the deterrent effect that
2 you probably would need a little bit more of. I
3 mean, we all do have policies.

4 MS. WINE-BANKS: Could you --

5 MG COMBS: Every one of us has a
6 policy.

7 MS. WINE-BANKS: Could you just talk
8 a little bit more about why you can't go just
9 because they say it's consensual? Because in
10 almost all 120s someone is saying it was
11 consensual, and then the issue is the prosecutor
12 has to prove that it wasn't actually consensual.

13 MG COMBS: Yes, right, right, and you
14 can go, ma'am, but you know, in my experience,
15 the panels come back with nothing, reduced in
16 rank maybe just for the violation of orders,
17 because if the Soldier gets up there and says,
18 no, I wanted to have sex with my drill sergeant -
19 -

20 MS. WINE-BANKS: Okay.

21 MG COMBS: It's just difficult to get
22 the effect that you want from that particular

1 breach of trust. I believe it's a breach of
2 trust.

3 MS. KEPROS: You used that phrase, the
4 effect that you want.

5 MG COMBS: Yes.

6 MS. KEPROS: And I just want to make
7 sure I understood your earlier comment. The
8 effect that you want is for them to be out of the
9 Service? That is the objective.

10 CHAIR JONES: Deterrent.

11 MG COMBS: We'd love for them to have
12 a little bit of jail time too, but the effect is
13 we want them punished and out of the Service.
14 That's what I personally want because I believe
15 they have breached the trust of the American
16 people, and they should no longer serve.

17 CHAIR JONES: So can you --- I
18 apologize, I used to know this. At what point
19 must you go to courts-martial, a year or more for
20 the punishment? I mean, if 92 is a violation of
21 orders, can a commander just adjudicate it, and
22 if so, how high can a commander go?

1 MG COMBS: Absolutely, ma'am, you can
2 do non-judicial punishment. If you decided to --

3 CHAIR JONES: But you can only go so
4 high.

5 MG COMBS: Right, with non-judicial
6 punishment, ma'am, I can't take any rank above --
7 - E-7 ---

8 CHAIR JONES: I'm talking about the
9 time.

10 MG COMBS: Time, yes, we have - non-
11 judicial punishment, no time.

12 CHAIR JONES: Right, so everything is
13 a court-martial. If you're going to --

14 MG COMBS: Well -

15 CHAIR JONES: I'm just trying to
16 figure out what you need to do to put someone in
17 prison for somewhere within the two-year time
18 frame.

19 MG COMBS: That, you must go to court-
20 martial.

21 CHAIR JONES: That's a court-martial,
22 okay. And so, when they say to you it was

1 consensual, you just don't take it because you're
2 not getting good -- you don't take a 92 to court-
3 martial because you don't get good results. Is
4 that what I'm hearing?

5 MG COMBS: Well, ma'am, it depends.
6 Sometimes we take it just to take it. But I will
7 just say that we don't have great results in just
8 the 92 if there's no more aggravation than just
9 the 92, and the Soldier says it was consensual,
10 and of course the trainer is going to say it was
11 consensual whether it was or was not.

12 CHAIR JONES: But isn't that panel
13 told that this is a violation of orders?

14 MG COMBS: Absolutely.

15 CHAIR JONES: And so would they might
16 even come back and say, we agree it was a
17 violation of orders, but they don't impose any -

18 MG COMBS: Like in other words, it's
19 not --

20 CHAIR JONES: -- significant sentence.

21 MG COMBS: It's not a sexual crime --

22 CHAIR JONES: Yes, right.

1 MG COMBS: -- to them. It is just,
2 okay, they violated an order.

3 CHAIR JONES: I got it. I got it.

4 MG COMBS: You know, just like anyone
5 can violate any order --

6 CHAIR JONES: Right.

7 MG COMBS: -- and still go to the same
8 procedure, but we don't necessarily get the
9 desired effects.

10 CHAIR JONES: Got it, thank you.

11 MG COMBS: And so for years I have
12 asked for a, you know, just another thing in the
13 UCMJ that says this is absolutely prohibited
14 legally, so that whether it's consensual or it's
15 not consensual, it's still --

16 CHAIR JONES: It doesn't matter.

17 MG COMBS: -- a crime.

18 HON. HOLTZMAN: So in other words what
19 you're saying is that there is no deterrent
20 effect in your experience, in your service, and
21 in what you've seen from the existing statutory
22 structure?

1 MG COMBS: For consensual cases.

2 HON. HOLTZMAN: For consensual
3 relations with a --- so-called consensual
4 relationships between a trainee and trainer. Is
5 that what you're saying?

6 MG COMBS: Yes, ma'am.

7 HON. HOLTZMAN: Okay, thank you.

8 MG COMBS: If -- absolutely. If the
9 Soldier says it's consensual and gets up and
10 testifies in that way, absolutely.

11 BGen SCHWENK: Do you think they're
12 really consensual?

13 MG COMBS: No, I don't believe -- in
14 my personal opinion, and this is a personal
15 opinion, there can never be a consensual
16 relationship between a trainer and a trainee due
17 to the power differential. There's a power
18 differential there that I don't believe ever
19 there could be a consensual relationship.

20 Maj Gen WOODWARD: And you think this
21 should apply to any trainer/trainee relationship
22 beyond IET?

1 MG COMBS: Yes, I do.

2 BGen SCHWENK: But maybe not at a War
3 College?

4 MG COMBS: I would think even during
5 the War College.

6 BG RENFORTH: We need to wait our turn
7 or ---

8 MG COMBS: I don't have a problem with
9 down the row.

10 CHAIR JONES: All right, thank you.
11 Thank you, General Combs. Now we'll hear from
12 General Grosso.

13 BG RENFORTH: Yes, ma'am, I do believe
14 that there has to be a very clear outcome and it
15 needs to be known by -- really I would constrict
16 my thoughts to the training environment, so I do
17 not agree with expanding it as far as General
18 Combs.

19 CHAIR JONES: I'm sorry, I'm having
20 trouble hearing you.

21 MajGen GROSSO: My belief is in the
22 training environment. I think the MTI, I agree,

1 is a specific vulnerable population, and it does
2 -- I think the outcomes of misconduct, in
3 particular sexual misconduct, need to be very
4 clear.

5 But we have had, in the case that,
6 again, that General Woodward investigated, we had
7 great success with Article 92 and Article 120.
8 So in the end, there were 36 court-martialed.
9 Well, there were 36 subjects that were
10 investigated and found guilty of something.

11 Thirty-one of those went to a court-
12 martial with a conviction rate of 94 percent. I
13 believe four of them were Article 120, and I will
14 get you that information, ma'am. Three of them
15 got the conviction on the Article 120. One, I
16 think, was an acquittal.

17 And so, all the other convictions were
18 on Article 92. And I did not count the number
19 that got jail time, but we also had a discharge
20 rate of 72 percent.

21 So the Air Force's perspective is that
22 in the cases we've had, we've had some success

1 with Article 92. We have separated people. They
2 have gotten jail time. And we believe it is a
3 criminal offense to violate an order and have had
4 success in that arena.

5 CHAIR JONES: And this is within the
6 Lackland experience?

7 MajGen GROSSO: Yes, ma'am.

8 CHAIR JONES: And how much was the
9 heightened awareness of what was going on
10 responsible for those results do you think?

11 MajGen GROSSO: It's hard to say.
12 That's a fair question. But I think the average
13 person doesn't want this to happen. I mean, it
14 is -- I think we all believe these people are
15 vulnerable and it's not -- Airmen should not be
16 doing this to other Airmen, so you can certainly,
17 I think, make that assumption.

18 CHAIR JONES: But essentially you're
19 saying they got convicted of the 92, which even
20 happens sometimes in your cases --

21 MajGen GROSSO: Oh, it does.

22 CHAIR JONES: -- but they also got

1 sentenced to prison?

2 MajGen GROSSO: They did. Some of
3 them, and I can get you the exact numbers, yes.

4 CHAIR JONES: Okay.

5 MajGen GROSSO: And actually there
6 were cases of 120s and I will get you the exact
7 numbers, and it gets to that, this concept of
8 consent and non-consent, so we did get some 120s
9 in a trainee/trainer inappropriate relationship
10 in the basic training environment.

11 But I would ask that you think about
12 the military justice system has to be perceived
13 as fair, and so to get competent people to want
14 to be training instructors -- and we don't have a
15 volunteer process, and we can talk about that.

16 But it could have a chilling effect to
17 have someone convicted as a sex offender when
18 both the trainee and the trainer think it's
19 consensual. And I don't disagree with what
20 you're saying, but I don't think it's as simple
21 as you want to make it out.

22 And ma'am, you mentioned about

1 professors and students. Well, they may lose
2 their job, but they certainly don't get a felony
3 conviction. So with an Article 92, you do have a
4 felony conviction.

5 You do have a negative -- I mean,
6 several people got bad conduct discharges from
7 the Article 92. The 120 got to the dishonorable
8 discharge. So there's significant negative
9 consequences and it did have some deterrent
10 effect.

11 CHAIR JONES: So let me ask you this,
12 and I'm sorry I'm hogging things here. Those
13 who, however many there were, who were actually
14 convicted under 120, and they obviously got some
15 jail time presumably.

16 MajGen GROSSO: Yes, ma'am, three of
17 them got dishonorable discharges and I can get
18 you the jail time.

19 CHAIR JONES: Was the distinction
20 between the 120 cases and the others who were
21 only charged with 92s, force, the use of force as
22 we know it as opposed to, sort of the power issue

1 that we've been discussing?

2 MajGen GROSSO: Exactly, exactly, and
3 I am way out of my league on the law piece. But
4 I actually believe there were many of them that
5 were charged with both 120 and 92.

6 CHAIR JONES: Right.

7 MajGen GROSSO: So it's not mutually
8 exclusive.

9 CHAIR JONES: Right.

10 MajGen GROSSO: But the success of the
11 120 was much more narrow.

12 CHAIR JONES: Right.

13 MajGen GROSSO: So they were charged
14 with both violating an order and 120, but we
15 weren't getting convictions on the 120, so -- and
16 I can get you all of that.

17 CHAIR JONES: So they weren't -- the
18 panels were not finding strict liability because
19 of the relationship. It sounds like they were
20 looking for force --

21 MajGen GROSSO: Right.

22 CHAIR JONES: -- physical force.

1 MajGen GROSSO: Some indication that,
2 and I'm not sure how much force it was, but the
3 trainee that talked about it, were they
4 convincing that it wasn't consensual? So I can't
5 give you the threshold because I wasn't there.

6 CHAIR JONES: Okay.

7 MajGen GROSSO: But we did have
8 success. But in the end, the justice system has
9 to be perceived as fair, and so I think that's a
10 very important thing to think about as you weigh
11 this. I don't think it's an easy decision.

12 Maj Gen WOODWARD: Do you think MTIs
13 would not come to -- people would not volunteer
14 to be MTIs if they thought that something that
15 was a violation of regulation ended up being a
16 violation of law instead really?

17 MajGen GROSSO: I don't think it's
18 about the violation of law. Frankly, I think
19 it's about being on a convicted sex offender list
20 for what was inappropriate in our world, but
21 consensual sex that would never in the nation
22 that they live in put somebody on a sex ---

1 MS. FRIEL: Unless you were a parole
2 officer and a parolee or a corrections officer
3 and an inmate. There are certainly different
4 states that have made certain relationships
5 because of the relationship and the power
6 imbalance.

7 And they go out and they say, here's
8 the notice. It will become fair when we give you
9 fair notice that we're serious about this, and
10 then it's fair. You know. We told you what it
11 is.

12 Maj Gen WOODWARD: And do you think
13 you'd want any of those people as instructors if
14 they don't want to be instructors because it's
15 illegal for them to have sex with their trainees?

16 MajGen GROSSO: No, but I also think
17 there's -- I talked to a lot of people because
18 frankly, I'd never heard of the term strict
19 liability.

20 So if you're thinking about a
21 deterrent effect, what does a Tech Sergeant who
22 is, what, maybe a ten, depending on who you are,

1 do you even know what strict liability is? So of
2 course we'll train to that. But also, it could
3 be a chilling effect. There has to be a healthy
4 relationship between trainer and trainee, but not
5 unhealthy.

6 DEAN ANDERSON: A chilling effect on
7 what?

8 MS. FRIEL: So sex is kind of out of
9 the line.

10 MajGen GROSSO: On the ability for
11 that instructor to create a relationship with
12 that trainee, and obviously it has to be
13 professional.

14 But there's a lot at stake and that's
15 why I am much more a fan of increasing 120 where
16 there's at least a process where facts by
17 competent investigators, and it goes to a jury
18 where all these facts come out.

19 So if something strange actually
20 happens in that case, both the subject and the
21 victim have a fair -- in the process we have set
22 up in the United States, the adversarial process,

1 the facts come out as opposed to this carte
2 blanche, black and white, it doesn't matter what
3 the facts were, by adults, so I think that's the
4 other thing.

5 The average age of a person at basic
6 military training today is 22 years old. And
7 General Woodward pointed out we are bringing in
8 older people, but when those cases happen, the
9 age differential is not great. So I don't think
10 it's as clear cut as it sounds, I would say.

11 DEAN ANDERSON: So General Grosso,
12 just to clarify, it sounds like you are skeptical
13 of a strict liability standard, but that you're
14 not opposed to the expansion of 120 under a
15 theory of constructive force due to the
16 differential power relationships at least between
17 new recruits. You reserve judgment on other
18 kinds of training situations, but at least in
19 terms on basic training and new recruits?

20 MajGen GROSSO: Absolutely, and I would
21 have no issue with going to tech training because
22 there's at least -- the facts come out. They are

1 deliberative. There's a prosecution. There's a
2 defense.

3 We now have a Special Victims' Council
4 so that they can get special representation, and
5 it's the way the justice process works. It's not
6 this de facto outcome that we only have for
7 children.

8 MS. FRIEL: Can I ask you what about --
9 what do you think about -- let's say it's totally
10 consensual. All the facts come out and this
11 person says, I wanted to do it with my drill
12 instructor.

13 What about the ill effect on all the
14 other people in that class that watched the drill
15 instructor have a relationship with one of the
16 trainees? That doesn't have a great effect.

17 Do you see that as a problem, what the
18 others are all looking at and the favors that
19 oftentimes the one is getting and the others
20 aren't?

21 MajGen GROSSO: Yes, absolutely, I
22 think it does, and now they all have a

1 responsibility to report. So like some things
2 General Woodward has -- I mean, a lot, multiple
3 changes have been made, so absolutely. I mean, I
4 think it's much less likely.

5 The question is how long can the
6 institution, as she said -- it was very
7 interesting listening to General Shadley because
8 I think a lot of what happened at basic training
9 happened because we had to cut money and we cut
10 all of the overhead positions, and not
11 surprisingly, what happened, it happened again.

12 So I think the checks and balances
13 that are in place, I think will prevent that.
14 And in that situation, that should be reported by
15 every other trainee that sees that. We've got
16 lots of anonymous reporting now.

17 COL SCHINASI: Let me go back to the
18 closer and fair --

19 CHAIR JONES: I'd like to keep moving
20 just on the initial reactions and then we could
21 come back if that's okay.

22 COL SCHINASI: Sure.

1 CHAIR JONES: So Admiral Thomas?

2 RADM THOMAS: Thank you, ma'am. I've
3 been asked really to reflect on my position when
4 I was a commander of our boot camp from 2008 to
5 2010. And I can talk specifically about a case
6 and give you my personal opinions on this matter.

7 So I had a case that involved 92. It
8 involved maltreatment. It involved 134, and it
9 involved a suite of offenses. I did not charge
10 the offender -- we called it company commanders
11 in that case -- with a 120 because she said it
12 was consensual and I knew I couldn't prove it.

13 I absolutely believe that the
14 relationship between a recruit and a company
15 commander is so powerful, and that a recruit
16 cannot say it was consensual, because the
17 psychology behind the transition when you are at
18 boot camp, you are looking to these leaders for
19 absolutely everything.

20 They're looking to them for guidance.
21 You're looking to them to tell you what you did
22 wrong. You're looking to them to make you better

1 than you were as part of your transition into the
2 military, and that relationship is so important.

3 And honestly, the recruits sort of
4 fall in love with their company commanders, and I
5 remember it happening to me. And you just hold
6 it in such regard that they ask you to jump five
7 feet, you're going to jump five feet, and ask,
8 what else do you want from me?

9 And so, that relationship is so, so
10 important, and that thing of trust that General
11 Combs was talking about it, very, very important.

12 I'm not a lawyer, so I don't quite
13 understand the nuances of strict liability, but I
14 do support an expansion of 120 to be able to
15 accommodate for this imbalance of power.

16 As far as the other training areas,
17 the war colleges, I think there is room for
18 dialogue on those because they are different
19 environments and it's not the same. It's not the
20 same kind of relationship in my own opinion.

21 CHAIR JONES: Any questions?

22 RADM THOMAS: I did get, by the way,

1 a bad conduct discharge, some number of months in
2 jail, you know, before he was discharged from the
3 Coast Guard as well from that case.

4 CHAIR JONES: Liz?

5 HON. HOLTZMAN: Just a quick question.
6 So strict reliability means that you don't have
7 to -- that the person, the trainer, if you could
8 just prove the trainer had a sex act with the
9 trainee, you don't have to prove consent. You
10 don't have to prove anything. They'd be guilty.
11 You just have to prove that fact. Is that
12 something you approve of?

13 RADM THOMAS: As opposed to -- what
14 was the expansion that you were talking about?

15 DEAN ANDERSON: So the alternative
16 theory would be one of constructive force that
17 would take into account a variety of factors that
18 would include the relationship between -- this is
19 actually a fairly sophisticated question.

20 I teach criminal law, and I don't know
21 that in a few moments we can communicate it. But
22 it would be -- there are two ways to do it. One,

1 anytime there's a relationship, it's always non-
2 consensual, or in these circumstances you might
3 have a totality of the circumstances that would
4 constitute constructive force, and this might be
5 one of those circumstances that would be
6 evaluated.

7 RADM THOMAS: I think as a commander
8 you get more flexibility to achieve the desired
9 effect from the second construct that you
10 indicated to me.

11 DEAN ANDERSON: I'm not sure that it
12 shakes out to a difference if the factors
13 included a relationship --

14 CHAIR JONES: Well, I mean, let's talk
15 about what would you ask the Panel to decide if
16 the law was that if, you know, the trainer had
17 sex with the trainee and you find that. Okay,
18 good, you have a verdict, yes, because there's
19 almost no contest about that, right? Neither of
20 them are going to deny that.

21 Then the question is you say okay, now
22 go back. The maximum is two years for violating

1 92, right? What sentence are they going to come
2 back with? And I assume that at least, and
3 General Combs, you've seen that they come back
4 with virtually no sentence.

5 So we could achieve, I guess, possibly
6 a deterrent effect by saying this is going to be
7 -- it's sort of strict liability except it
8 doesn't -- it only puts you into the sentenceable
9 category. And 120 was where, I assume, is where
10 we'd use the constructive force theory, and that
11 could -- well, constructive force would make them
12 guilty of rape.

13 DEAN ANDERSON: Right, or we could
14 conceptualize it as an inability to consent. So
15 it could go either under consent or force.

16 CHAIR JONES: You mean under a 92?

17 HON. HOLTZMAN: No under 120.

18 (Simultaneous speaking.)

19 CHAIR JONES: So it could be sexual
20 abuse or --

21 HON. HOLTZMAN: Sexual assault,
22 rather.

1 DEAN ANDERSON: Right, sexual assault.

2 RADM THOMAS: Interestingly, at the
3 time, we weren't required to send them to the
4 first flag, and so in this case I made the
5 decision to send this to a special court-martial
6 for this reason alone, is that I wanted that
7 court-martial on my base.

8 And if I sent it to the Admiral down
9 the street from me, it wasn't going to be on my
10 base. So I sent it to special court-martial.

11 I opened it up to the press expecting
12 to be on the front page of the Washington Post
13 because it was right on the heels of what was
14 going on in the Air Force, and guess what? When
15 the reporters heard it was consensual sex, it
16 became a non-story.

17 CHAIR JONES: For them.

18 RADM THOMAS: For them. So that was
19 interesting to me.

20 CHAIR JONES: What was the result of
21 that case?

22 RADM THOMAS: He got eight months in

1 jail, a bad conduct discharge, and a bunch of
2 other things.

3 CHAIR JONES: And that was a 92?

4 RADM THOMAS: This was -- no, under
5 92, I had a --

6 (Simultaneous speaking.)

7 CHAIR JONES: Oh, that's right. You
8 told us. You had the whole --

9 RADM THOMAS: -- maltreatment.

10 CHAIR JONES: Right, right. All
11 right, last but not least --

12 BGen RENFORTH: Yes, ma'am.

13 CHAIR JONES: General Renforth?

14 BGen RENFORTH: Yes, ma'am, my name is
15 General Renforth. I'm the Commanding General of
16 our training command, which is every one of our
17 entry level schools in the United States Marine
18 Corps, which comprises 71 formal learning centers
19 which has 6,800 approximately instructors, and
20 officers, and enlisted, and we have 35,000 a year
21 put through our system.

22 So I'll just cut to the chase and

1 won't go through some of this stuff I had for
2 background. But right now, I believe the UCMJ is
3 providing me the full breadth of military justice
4 options to prosecute cases to a justice position
5 right now.

6 I do understand the question with
7 Article 120, and I am not opposed to strict
8 liability inside boot camp, and I say boot camp
9 alone. I do believe, and agree with my colleague
10 here, that they have an inability to consent
11 under the physiological, environmental, all of
12 the stresses that they are under.

13 They are just learning to be part of
14 the military and part of that Service. They're
15 not even part of it truly yet. And there are so
16 many factors where I really don't believe they
17 can properly consent. So I would be in agreement
18 under 120 in that case.

19 I think we need to be real careful
20 about one size fits all across all of the DoD for
21 sure. I can give you cases in some of my schools
22 where the students are being taught by somebody

1 junior to them, you know, and then we're going to
2 cause that -- you know, where does that power go?

3 The person that holds -- the
4 instructors, some of them are majors and
5 lieutenant colonels at our war colleges teaching
6 colonels in some of these cases. There are PhDs,
7 you know, but what do you do there? And then
8 they can't make caveats all the way through.

9 Where I'm really having an issue with
10 under 120 is what the Major General said about
11 them being a sex offender under that. If we say
12 to them that they're guilty under 120, all right,
13 because the person can't consent, and then we
14 want to make them a sex offender under that
15 article, I just think that's a slippery slope.

16 And I think we need to be real careful
17 about making a blanket, really, an Article across
18 the board that we're one size fits all. That's
19 what I'm concerned about.

20 Maj Gen WOODWARD: To make sure though
21 I understand you, but you would be comfortable
22 with that distinction for basic training?

1 BGen RENFORTH: Yes, ma'am, just in
2 basic training alone. Once they get through --
3 you know, I struggled back and forth initially.
4 We spent a few days on this where I was just
5 studying it completely.

6 I read the last JPP soup to nuts and
7 I was almost on the edge of saying yes, and then
8 I just thought of so many other situations in our
9 schools where I just wasn't comfortable. And
10 then I said, leave it up to the commander. I can
11 adjudicate properly under Article 92 and 93, you
12 know, to prosecute and run good order and
13 discipline in our units.

14 And really, our deterrence is the
15 major factor. If I can get that predator out of
16 the Marine Corps, they see accountability. The
17 Marines see that Marine's been held accountable.
18 They don't care if it's under 120 or 92. They
19 don't know the difference. Ma'am?

20 DEAN ANDERSON: General, I appreciate
21 you being here, and I would -- it sounds like you
22 and General Combs are head of training for your

1 respective Services, is that correct?

2 BGen RENFORTH: No, ma'am.

3 DEAN ANDERSON: Okay.

4 BGen RENFORTH: There's a slight
5 difference --

6 DEAN ANDERSON: Okay.

7 BGen RENFORTH: -- with what we do.

8 She does the -- I don't want to speak for you.

9 DEAN ANDERSON: All of the training.

10 She does all of the training.

11 BGen RENFORTH: Not necessarily.

12 BGen SCHWENK: ROTC.

13 DEAN ANDERSON: Oh, yes, right, okay.

14 But let's say it this way, you're both the head
15 of a lot of training within your respective
16 Services, okay? So I'm wondering over the past
17 12 months, do you know how many allegations have
18 been brought against the 6,800 instructors that
19 you supervise?

20 BGen RENFORTH: I do. Under Article
21 120?

22 DEAN ANDERSON: Under anything.

1 BGen RENFORTH: Well, we have -- it
2 was 12 that came under the 120 and six were
3 actually processed under 120.

4 DEAN ANDERSON: Okay, so those are
5 forcible cases.

6 BGen RENFORTH: Well, not necessarily
7 forcible cases. We were able to get it down to a
8 pretrial agreement for four, and two were
9 dismissed completely.

10 DEAN ANDERSON: And do you think that
11 those numbers would be different if Article 120
12 had a provision that prohibited even consensual
13 sex between trainers and trainees in the boot
14 camp context?

15 BGen RENFORTH: No, I don't, ma'am.
16 I don't think our -- now, certainly we would
17 educate to that just like the General said. We
18 would educate to that. They don't know the
19 different now. They just know it's wrong.

20 So they don't know whether they're
21 getting prosecuted under 120, 92, or 93. The
22 fact is if we can hold them accountable, if we

1 can hold them accountable now.

2 DEAN ANDERSON: So let me understand.
3 So you're saying that -- your opening statement
4 was that the UCMJ provides me with a full breadth
5 of what I need --

6 BGen RENFORTH: They do.

7 DEAN ANDERSON: -- to do this work.
8 And you're saying that over the past 12 months --
9 I'm sorry, what was the number?

10 BGen RENFORTH: Twelve. Yes ma'am.

11 DEAN ANDERSON: 12 allegations have
12 come forward of over 6,800 instructors, and that
13 some number of those went forward successfully.
14 Those were the only allegations. Do you think
15 that those are the only instances in which these
16 6,800 instructors have had consensual sex with
17 folks in boot camp?

18 BGen RENFORTH: Well, ma'am, I can't
19 prove a negative. I just can't. I would hope
20 that the systems we have in place --

21 DEAN ANDERSON: You know, the only
22 reason I'm asking it as a negative is whether it

1 would be different if there were -- in other
2 words, I guess I'm wondering if your statement
3 initially that the UCMJ provides you with all of
4 the --

5 BGen RENFORTH: Yes, ma'am.

6 DEAN ANDERSON: -- things that you
7 need -- maybe I should say it this way. Were any
8 of those 12, or all of those 12, or none of those
9 12 instances of consensual sex?

10 BGen RENFORTH: I don't know.

11 DEAN ANDERSON: What were the
12 allegations?

13 BGen RENFORTH: I just have the stats.
14 Well, Mike, do you have them? My lawyer is here
15 too.

16 LT. COL. SAYEGH: Yes sir. I can answer
17 that question. Actually -- I'm sorry. The
18 number is, actually since 2012 we've had about
19 125 allegations against Marines within our
20 command. Of those, I think it was six or seven
21 were against instructors by students.

22 Of those allegations, we have yet to

1 be able to take a case to trial where the victim
2 is claiming constructive force because the
3 victims, for some reason in all of those
4 particular cases, refused to participate in
5 prosecution.

6 However, in six cases the victims did
7 participate, but not under that theory. It was
8 consensual, but we went under the 92 theory. Of
9 those six, I think all but one ended up being
10 discharged. Three got BCDs. Two got jail time
11 of six and four months. One got just a BCD as a
12 punishment.

13 And the only person that survived the
14 process, whether it be lower form or otherwise,
15 because we would do NJP board waivers and we'd
16 get them out because that person was retirement
17 eligible.

18 And as everybody knows, you don't get
19 the punitive discharge if you're past your EAS.
20 There is not a provision for us to hold them and
21 then handle it administratively. So one person
22 was able to kind of slip through.

1 DEAN ANDERSON: So there were six? Am
2 I understanding since 2012 there were six?

3 LT. COL. SAYEGH: Six allegations from
4 a student against an instructor.

5 DEAN ANDERSON: Okay, and that is both
6 the 6,800 instructors in the ---

7 LT. COL. SAYEGH: 6,800 instructors at
8 one time, right, but we had 125 allegations. You
9 know, there are student on student. There's --

10 DEAN ANDERSON: Yes, right, and we're
11 not --

12 BGen RENFORTH: You're talking about
13 instructors.

14 DEAN ANDERSON: Right, we're talking
15 about this boot camp situation that is so
16 crucial.

17 BGen RENFORTH: Yes, ma'am, but mine's
18 not a boot camp situation.

19 DEAN ANDERSON: Right, I'm sorry, the
20 terminology wasn't apparent.

21 HON. HOLTZMAN: May I ask one question
22 about it? You said that in cases of force that

1 you had -- or cases under 120, that none of the
2 alleged victims would cooperate?

3 LT. COL. SAYEGH: Yes, ma'am, we have
4 had ---

5 HON. HOLTZMAN: Could you explain that
6 please?

7 LT. COL. SAYEGH: Yes, ma'am, the
8 example is, I'm having sex with my instructor
9 because I feared if I said no it would negatively
10 impact my grades or my ability to do what I want.

11 HON. HOLTZMAN: Right.

12 LT. COL. SAYEGH: But when it comes
13 time to prosecute and move forward the victims
14 say, I don't want to participate in prosecution.
15 They sign a consent form or -- I'm sorry, it
16 slips me now, a victim preference statement, and
17 they refuse to participate further in prosecution
18 or to provide statements.

19 The rules do not allow us to force
20 someone to take the stand against -- a victim
21 against their will.

22 HON. HOLTZMAN: And do you know why

1 this is the case?

2 LT. COL. SAYEGH: I can't speak to why
3 the victims don't do that, ma'am. I'm sorry, I
4 don't know. It's frustrating to us as it is to
5 anyone else, but no, I'm sorry. I don't know why
6 a victim ---

7 HON. HOLTZMAN: Do they think they
8 fear retaliation of some sort?

9 LT. COL. SAYEGH: Again, I'm just
10 totally speculating, ma'am. It could be anything
11 from not wanting to take the stand to deal with
12 having to go through that. It could be to maybe
13 not being honest with themselves. I just don't
14 know. We just don't know.

15 Maj Gen WOODWARD: Would it be
16 possible -- with all the lawyers in the room,
17 this would be a great chance for me to ask this.
18 But would it be possible if we change 120 where
19 we said it is -- all we have to do is prove that
20 there was sex between the trainer and the
21 trainee, would you be able to take those to a
22 court even if the victims didn't participate in

1 that case?

2 LT. COL. SAYEGH: Not at all, ma'am.

3 The Constitution requires --

4 Maj Gen WOODWARD: The Government
5 can't be the --

6 LT. COL. SAYEGH: No, ma'am.

7 Maj Gen WOODWARD: Okay.

8 DEAN ANDERSON: General Combs, I
9 wanted to ask you maybe the same thing. You're
10 dealing with a different slice of the population,
11 but there are trainers and trainees, and you
12 obviously have a lot of folks under your watch.
13 How many people in the past, well, since 2012,
14 six?

15 MG COMBS: Goodness, I couldn't speak
16 for the whole Army. I think if you all want
17 those, we could certainly get those for you. But
18 I know in my command over the last 14 months
19 there's been probably eight allegations between
20 -- and these are -- and this is why I say please
21 don't limit it to just trainees because cadets
22 have different status.

1 They're not trainees, but they are
2 still very much in a sort of a training status
3 with their cadre members who are in the Army, and
4 so we have a different problem set there.

5 But I've also seen the basic training
6 environment. I've been in it for four years, and
7 so I can talk about that experience as well. But
8 I can't talk numbers for the Army, but about
9 eight in my command.

10 DEAN ANDERSON: And would those
11 numbers be different if Article 120 had a
12 provision that prohibited sex between trainers
13 and trainees whether or not it was consensual?

14 MG COMBS: You know, it would be
15 different, not to bring charges but to adjudicate
16 charges. That's the way I see it, only because
17 we can bring the charge under 92, and under
18 conduct unbecoming, and 134.

19 We can bring all of that, but all it
20 carries with it is when they're found guilty,
21 they're found guilty of violating a policy or an
22 order, and there's nothing more to it than that.

1 And I will tell you particularly with
2 cadets and military folks, we have multi-
3 jurisdictions that are involved with cadets based
4 on their status.

5 If a cadet has absolutely no --
6 they're not under a contract to the Army, but an
7 Army NCO or officer sexually assaults them, of
8 course we do the investigation on the person and
9 we can kind of prosecute that, but the civilian
10 guys have the first bite of the apple.

11 And so, what we see is when our
12 civilians, our civilian courts take the
13 jurisdiction and they say, okay, it's on that
14 college campus. It belongs to us, we lose, and
15 then we have to attach some sort of jurisdiction
16 back under policy violation, and that's what we
17 end up doing.

18 So we will lose the rape charge, for
19 instance, because the civilians will see it as,
20 you know, well, that was consensual and, you
21 know, they're both consenting adults, and all of
22 that. Then we get it back. We will just charge,

1 because now we can't charge the rape, so what we
2 will charge is, you know, Article 92, 134.

3 That's all we can do.

4 And so it's frustrating for us because
5 we can't get a good result. All we really get
6 is, okay, this is a bad person. Yes, they did
7 that, but they were exonerated in civil court for
8 X. Yes, they disobeyed the order. Time served
9 and something else.

10 CHAIR JONES: Well, if we somehow
11 rejiggered 120 so that the mere act of a trainer
12 having sex with a trainee was, let's say, sexual
13 assault, and that some panel would be instructed
14 -- they would find sexual assault, they'd still
15 have to sentence, but do you think the result
16 would be any different?

17 They're still going to hear the same
18 set of facts which is he's going to say he
19 consented. She consented. And she may say she
20 consented. I think we may be talking about
21 mandatory minimums here as opposed to changing
22 the ---

1 MG COMBS: Well, I think at least,
2 ma'am, it describes the misconduct.

3 CHAIR JONES: Well, the actual sexual
4 assault it does -- that would be a training tool
5 for the Panel. Now when you say that, you
6 understand that that's a sexual assault. I just
7 don't know whether the -- I'm just curious as to
8 whether you think they would actually meting out
9 sentences when the facts would all be the same.
10 I know you can't look in your crystal ball.

11 RADM THOMAS: I think though she
12 describes an important nuance that you need to
13 contemplate, and that is we're talking
14 accessions, right? So we're talking about boot
15 camp. We're talking about officer candidate
16 school. We're talking about academies starting
17 their accession parts.

18 You know, an academy is a four-year
19 process of which you have an initial accession
20 time that probably varies. It's probably eight
21 weeks or eight to ten weeks for most of us.
22 That, in my mind, is the time that we're talking

1 about.

2 I don't think -- you know, you have
3 senior-subordinate relations that go on at the
4 academies that during four years when you have
5 kids at college that are going to make mistakes.

6 Are there assaults in that?

7 Absolutely. Should they be held accountable?

8 Absolutely. But it may not be a senior-
9 subordinate relationship in those cases.

10 So I think, considering just being
11 nuanced enough for it to be, if you contemplate
12 this change, during those accession points would
13 be important.

14 CHAIR JONES: Thank you. Other
15 questions?

16 BGen SCHWENK: I'd just like to raise
17 the issue of registered sex offender again. You
18 know, on the one hand, people have argued that
19 it's a deterrent effect. You know, it's another
20 arrow you can pull out of your quiver to say to
21 people when they're first becoming a trainer.

22 And if you do this, now that there is

1 strict liability for somebody at boot camp, and
2 you're also going to be a registered sex offender,
3 and boy, that's -- and it was all consensual and
4 all of this happened to you anyway, so stay away.

5 On the other hand, somebody, I think
6 it was General Grosso or somebody said, well, but
7 when the word gets out that you can be a
8 registered sex offender for having consensual
9 sex, that may end up being a deterrent for people
10 who want to go to the recruit training, for lack
11 of a better word.

12 Anybody got any thoughts on that or
13 concerns one way or the other?

14 BGen RENFORTH: Yes, I almost think
15 that we're looking at the wrong population in a
16 sense. Our issues that we have, at least in the
17 Marine Corps, is less than one percent of ever
18 happening in boot camp at the basic training.

19 You know, the majority of our sexual
20 assaults are in the operating forces, which about
21 76 percent happen there. That is our focus. Our
22 focus has been at that, you know, for the last

1 few years for sure.

2 You know, telling somebody that, if
3 you have sex with a recruit, you'll be a
4 registered sex offender, I don't think that will
5 be a deterrent effect because I don't think
6 anybody plans on doing that, you know, when they
7 come down there. I don't think that's ever a
8 thought process in anybody's mind.

9 Maj Gen WOODWARD: That's what we
10 thought at Lackland, too.

11 BGen RENFORTH: Well, but if it is,
12 then they should be. You know, then they should
13 be held to the highest standard and they should
14 be hammered. And in that case, I have zero
15 sympathy. But if that's a deterrent effect to
16 them, good. We don't want them there anyhow, you
17 know.

18 The thing is there should be no such
19 thing as consensual sex with a recruit because I
20 don't think they have the ability to consent at
21 that level, so that's where I do agree with this.

22 BGen SCHWENK: When you guys get

1 gender integrated training then at boot camp,
2 we'll see how the numbers go at that point.

3 BGen RENFORTH: We don't have gender
4 integrated.

5 BGen SCHWENK: No, when you do, then
6 the numbers might get different.

7 BGen RENFORTH: Well, we have issues
8 too with the same gender, so it's wide open.

9 BGen SCHWENK: Anybody else, comment?
10 No?

11 CHAIR JONES: Any other questions?

12 HON. HOLTZMAN: Can I just raise a
13 question?

14 CHAIR JONES: Yes.

15 HON. HOLTZMAN: It's one I wanted to
16 raise earlier and General Woodward said you were
17 the expert on. One of the issues that I've been
18 concerned about and was raised by one of the
19 previous witnesses is that a substantial number
20 of the percentage of the victims in the training
21 mode, and it may be altogether, were previously
22 victimized -- victims of sexual assault, whether

1 it's as children or at a later stage in their
2 lives. That, I don't know.

3 Do you have any programs to address
4 this? How do we deal with this subject? Because
5 I'm concerned that if we -- if this is a true
6 statistic, and I do believe it is, then what
7 tools are we giving these young recruits to be
8 able to help them withstand the predators?

9 MajGen GROSSO: Yes, ma'am, so in the
10 2012 Workplace and Gender Relations Active
11 Component Survey, so that's the Defense Manpower
12 Data Center survey that's done every two years
13 for the active component, they asked the
14 question, did you experience unwanted sexual
15 contact before coming in, and in our case, of
16 course, the Air Force. All the Services got the
17 data.

18 So in the Air Force in 2012, 27
19 percent of women currently in the Air Force had
20 experienced some form of unwanted sexual contact
21 before coming in, and four percent of men. So
22 not quite as high as the numbers as the general,

1 but -- so you're exactly right.

2 So we're working on interventions to
3 get to that point. So we know that if you've
4 been victimized already, you're dramatically more
5 likely to be revictimized. So we're working
6 interventions with Research Triangle Institute at
7 the accession source to mitigate the risk.

8 So there's three populations we're
9 targeting. There's risk factors for
10 perpetration. So we are trying to create an
11 intervention to reduce risk factors for someone
12 committing the crime.

13 And then there's two groups of people
14 that are at risk for victimization. So one is
15 someone that's already been victimized, but
16 there's another set of risk factors that you get
17 on these well understood psychological
18 instruments, so those two groups that -- have
19 more risk for being victimized.

20 So we're trying to build three
21 separate interventions, and we're starting to do
22 the primary research this year. And we think --

1 we don't know what that intervention will exactly
2 look like, but probably maybe two hours, two to
3 three hours probably at basic training, and then
4 some web-based training. But they don't exist
5 today, so we are actively building those
6 interventions today.

7 DEAN ANDERSON: This is just hugely
8 helpful. I can't tell you. Thank you so much.

9 Maj Gen WOODWARD: Can I ask the other
10 Services, or if you know? I'm just -- I'm really
11 interested in the cadet one because that's
12 something I had never thought of before. But --
13 well, Gina, I guess, I think I know where you
14 stand because you're not comfortable with the BMT
15 making -- not giving them the ability to consent.
16 But the two of you, your thoughts on the cadet
17 piece of it?

18 RADM THOMAS: You mean between --

19 Maj Gen WOODWARD: Whether we take
20 away their ability to consent in essence, that it
21 becomes a crime to have sex between a cadre
22 member and a cadet whether or not the cadet

1 consents.

2 RADM THOMAS: During their initial
3 accession -- for the Coast Guard, it's swab
4 summer. At Navy, it's plebe summer -- during
5 that time, I do. Once they have graduated from
6 that and they start the academic year, then I
7 think it becomes a different kind of environment.

8 It becomes an academic environment or
9 it becomes an athletic environment. It becomes
10 military environment. And so then it's more
11 college-like even though you have military
12 structure over the top of it, and you know, I
13 think then it moves to be a different thing, but
14 during the accession.

15 MG COMBS: But I think that's where
16 they prey. That's the problem that I see is it's
17 not the initial. It is because of the college
18 environment.

19 And maybe not necessarily the
20 academies because they're a little more
21 structured, but on college campuses, the college
22 environment is very much a permissive environment

1 for those kinds of activities, and that's where
2 we have found our sexual predators preying on our
3 cadets, and they are doing it because they are
4 their military instructor and they're doing it.

5 Now, I mean, some would say, you know,
6 21-year-old women know a little bit better than
7 that. Some may. Some may not. And -- but there
8 is a power differential when they're in training.

9 And so, I truly believe that, you
10 know, cadets, particularly those -- maybe not
11 even at the academies. Maybe it's different
12 there. I've never been at the academy
13 environment.

14 But on the college campuses, I just
15 believe that, you know, they prey, and, you know,
16 we've had some cases and it's ugly.

17 Maj Gen WOODWARD: And you think that
18 that relationship between the cadet and the cadre
19 is as powerful as the trainee and drill
20 instructor one --

21 MG COMBS: Absolutely.

22 Maj Gen WOODWARD: -- when they don't

1 have the ability --

2 MG COMBS: They don't see them 24/7,
3 but absolutely. It's as powerful.

4 Maj Gen WOODWARD: Okay.

5 MG COMBS: It's as influential -

6 CHAIR JONES: What does cadre mean?

7 MG COMBS: -- I would say.

8 Maj Gen WOODWARD: I'm sorry, that's
9 the instructors.

10 CHAIR JONES: Oh, okay.

11 Maj Gen WOODWARD: The ROTC
12 instructors.

13 CHAIR JONES: Okay, so when you say
14 cadre you're talking about instructors?

15 MG COMBS: Right, they're, you know,
16 either Army NCOs or officers.

17 RADM THOMAS: Yes, we don't have such
18 a program in the Coast Guard, so that's why I
19 really had no frame of reference.

20 MG COMBS: Okay.

21 BGen RENFORTH: Yes, ma'am, I went
22 through the Naval Academy, and prior to that I

1 was enlisted in the Navy, so I've seen both sides
2 here of some of this. And I went through the
3 Navy's nuclear power, so I was in school for a
4 pretty long time.

5 You know, I get a real -- I can only
6 defer to the General on that, but I tell you, at
7 the Academy, I was more concerned about the
8 upperclassmen than I was about the instructors.
9 The instructors, they -- I mean, I just saw very
10 few even interacting with that in that capacity,
11 but it could happen, you know, so I would be
12 careful about wanting to do strict Article 120
13 under strict liability with them.

14 But really, their threat is the
15 upperclassmen if any. And it's the freshmen who
16 come in, just like any college that you go to.
17 It's the new freshmen girls coming in or what
18 have you, and then that's the prey, you know.
19 That's where it's at.

20 So again, where we have a problem in
21 the Marine Corps, if I can, you know, shift it to
22 that a little bit, is the first 90 days in the

1 operating forces, you know. That's when we have
2 the majority of our sexual assaults.

3 So when these women graduate our
4 schools and then go to the operating forces,
5 that's when we're really trying to protect them
6 and put good systems in place to ensure that
7 they're taken care of because that's where we get
8 the most amount of our sexual assault allegations
9 is the first 90 days.

10 DEAN ANDERSON: And who is offending
11 in the first 90 days?

12 BGen RENFORTH: It's usually E4s and
13 E5s against E1s to E3s coming in is our number.

14 Maj Gen WOODWARD: And there's a
15 fairly good percentage of males as well, right?

16 BGen RENFORTH: Yes, ma'am, it's not
17 all females. I say that because they are our
18 majority, but it's both.

19 RADM THOMAS: Right, because if you
20 think about it, they're away from home.

21 BGen RENFORTH: Right.

22 RADM THOMAS: They're trying to

1 transition. They're trying to fit in.

2 BGen RENFORTH: Exactly.

3 RADM THOMAS: They're told to be a
4 part of a unit. And, you know, they're -- you
5 know, for women, they want -- most want to be
6 feminine. And so, how do you express that? And,
7 you know, it's just this whole transition.

8 My own transition from starting to
9 wear the uniform, until I had confidence in
10 telling someone to stop behaving in a certain
11 way, it took me 10 years, you know, because I'm
12 trying to fit in. I'm not going to be a
13 troublemaker. I'm not going to make waves.

14 And so, part of our strategy in this
15 whole arena has been about bystander intervention
16 and teaching somebody else to step in because
17 this person might not have the confidence. And
18 in those first, you know, months and early years,
19 it takes people a long, long time.

20 Each person's transition is much
21 different, but learning how to say no and
22 learning to put up, you know, to put up a

1 defense, learning how to, you know, do those
2 interventions is hard. It's hard.

3 MS. WINE-BANKS: How many of the
4 victims was alcohol involved, particularly in the
5 operating --

6 BGen RENFORTH: I actually have that
7 stat. Most.

8 MS. WINE-BANKS: Most?

9 BGen RENFORTH: It's usually they're
10 not with their buddy. They're with alcohol.
11 They're with people that they don't normally hang
12 out with, you know, so they got out of their
13 friend zone and away from their buddy. We
14 usually have a buddy program.

15 What we do, they have to go out with
16 a like-minded person, you know, and usually they
17 break away from that because alcohol is involved,
18 but I'd say most, yes, ma'am.

19 MajGen GROSSO: At the Air Force, it's
20 basically one in two.

21 MS. WINE-BANKS: Really?

22 MG COMBS: For us, it's over 70

1 percent.

2 BGen RENFORTH: We're right there with
3 you. It's not funny, but it's just --

4 MS. WINE-BANKS: And both people are
5 drinking, right, in those cases?

6 BGen RENFORTH: Yes, ma'am.

7 MS. WINE-BANKS: That's what it is on
8 the college campuses.

9 RADM THOMAS: Our number's not quite
10 that high. We'll have to get back to you, but I
11 think our number is about 50 percent.

12 MS. WINE-BANKS: That's still a lot.

13 Maj Gen WOODWARD: And not necessarily
14 though. I noticed everybody nodded their head
15 about both people are drinking. I don't know. I
16 know we found a lot of predators out there who
17 used alcohol as a date drug, a rape drug.

18 MG COMBS: And the predator didn't
19 drink.

20 Maj Gen WOODWARD: Yes, or very
21 lightly.

22 MajGen GROSSO: Yes, I think alcohol

1 is a complex problem. I think people want to
2 believe if you eliminate it, you won't have
3 sexual assaults, and I would just say that's not
4 correct.

5 BGen RENFORTH: I think that's a great
6 point.

7 CHAIR JONES: Anything further? Well,
8 this has been extremely helpful to get your ideas
9 on this. I don't think it's an easy question.

10 And I think one of the things that
11 you've pointed out for me is that we have to
12 figure out should we go this route and make the
13 decision to -- for whatever -- however you want
14 to call it -- make a strict liability crime here?
15 Figure out how you define the people subject to
16 it among the various surfaces, so that may
17 require your return. But again, I want to thank
18 you all very, very much. It's been a pleasure to
19 have you here, and we really needed you to tell
20 us about this and we appreciate it very much.
21 Does anybody want to discuss this a little bit or
22 -- everybody is half out of their seats. Yes,

1 why don't we close the meeting?

2 MS. FRIED: Meeting is adjourned.

3 (Whereupon, the above-entitled matter
4 went off the record at 4:38 p.m.)

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Before: US DOD JPP

Date: 07-22-2015

Place: Arlington, Virginia

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