

UNITED STATES DEPARTMENT OF DEFENSE

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JUDICIAL PROCEEDINGS PANEL

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SUBCOMMITTEE MEETING

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THURSDAY
AUGUST 27, 2015

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The Subcommittee met in Conference Room 150, Judicial Proceedings Panel Conference Room, 875 North Randolph Street, Arlington, Virginia, at 9:00 a.m., Dean Michelle Anderson, Chair, presiding.

PRESENT

Hon. Elizabeth Holtzman*
Dean Michelle Anderson
Lisa Friel
Laurie Rose Kepros
Dean Lisa Schenck*
Professor Stephen Schulhofer
Jill Wine-Banks
Maj Gen (R) Margaret Woodward

WITNESSES

Major Mary Ellen Payne, U.S. Air Force

Major Adam King, U.S. Marine Corps

Major Tyler Heimann, U.S. Army

Lieutenant Commander Benjamin Robertson, U.S.
Navy

Lieutenant Commander Benedict Gullo, U.S. Coast
Guard

Major Ryan Wardle, U.S. Army

Captain Charles Olson, U.S. Marine Corps

Captain Lauren Shure, U.S. Air Force

Lieutenant Paul Hochmuth, U.S. Navy

Colonel Brynn Morgan, U.S. Air Force

Colonel David Mendelson, U.S. Army

Lieutenant Colonel Brett Wilson, U.S. Marine
Corps Reserves

Lieutenant Commander Paul Casey, U.S. Coast
Guard

Mr. John Awtrey, Department of Defense

STAFF:

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

Lieutenant Colonel Glen Hines, U.S. Marine Corps

- JPP Subcommittee Staff Attorney

Bill Sprance, Designated Federal Official

Sharon H. Zahn - Senior Paralegal

*Present via teleconference

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

(9:01 a.m.)

MR. SPRANCE: Good morning, everyone.

I am Bill Sprance, the Designated Federal Official, and this meeting of the Judicial Proceedings Panel Subcommittee is now open.

At this time I will turn the meeting over to the Acting Chair, Dean Michelle Anderson. Good morning, ma'am.

DEAN ANDERSON: Good morning, and welcome, everyone. This morning we are focusing on the materials that we were sent and the key issues around abuse of power and coercive sexual offenses, particularly focused on questions of trainers and trainees.

We are delighted to have this distinguished panel in front of us to give us prosecution perspectives on this issue.

We will follow that up with defense perspectives and some more information from other experts and then we'll possibly begin deliberations later this afternoon on some of the

1 key questions posed to us on these issues.

2 So we'll begin with Major Mary Ellen
3 Payne.

4 MAJOR PAYNE: Thank you, ma'am.
5 Thanks for having me again at the JPP. I am
6 Major Mary Ellen Payne. I have been a member of
7 the United States Air Force JAG Corps for over
8 eight years now.

9 I am currently serving as an appellate
10 government counsel, but prior to that I have
11 served as a senior trial counsel, as a defense
12 counsel, and also as a base level prosecutor.

13 The following opinions that I am going
14 to express are, of course, my own. They don't
15 reflect the opinions of the U.S. Air Force JAG
16 Corps or of any other member of the JAG Corps.

17 I wanted to first address whether or
18 not the current definition of threatening or
19 placing in fear, as currently in Article 120,
20 whether or not it should be amended to ensure
21 that coercive sexual relationships or those
22 involving an abuse of authority are covered.

1 And, yes, I do believe that the
2 current definition that we have now is not
3 expansive enough and I would recommend going back
4 to the language, or the definition of threatening
5 or placing in fear from the 2007 version of
6 Article 120, with one caveat.

7 And I think the reason for this is
8 when we look at our military panel members, the
9 people that we have on our juries, they are
10 military members, they follow instructions well,
11 and when you have, or they are very intent on
12 following instructions.

13 And when you don't have things
14 explicitly spelled out in instructions that would
15 cover a certain type of conduct that you want to
16 criminalize, I think you run into problems and I
17 think you open the door for defense counsel, say,
18 to get up and argue in closing argument, oh, look
19 at the definition that the military judge just
20 gave you and that definition doesn't include
21 anything about use of rank or abuse of authority
22 and so, therefore, that's not the type of conduct

1 that we are talking about here.

2 And so I do strongly believe that that
3 is actual use of abuse of authority to coerce
4 someone to have sex with them, or commit any kind
5 of sexual act with them.

6 I do believe strongly that that is
7 something that we would want to categorize as a
8 sex offense within the military, and so I believe
9 it's important that the definition be expansive
10 enough and explicit enough to cover that
11 particular conduct.

12 The one concern that I have with the
13 2007 definition of threatening or placing in fear
14 is the fact that the definition also talks about
15 positively affecting someone's career, rather
16 than just negatively affecting somebody's career.

17 And my concern with that is that it
18 almost starts to sound like we are covering a
19 sort of quid pro quo situation and I'm not sure
20 that quid pro quo situations where someone is
21 like, hey, you know, if you have sex with me
22 I'll, you know, give you this job within the

1 flight or you'll be a distinguished graduate,
2 something like that that might be helpful.

3 I am not sure that that should
4 constitute a sex offense. Certainly, it would be
5 something that should be criminalized, or it
6 could be criminalized under Article 92, but I do
7 have concerns about it being a sex offense.

8 And that sort of rolls into another
9 point that I would like to make in front of the
10 Panel, and this regards the strict liability, or
11 the proposal for sort of any type of sexual
12 contact or relationship between a trainer and a
13 trainee being a strict liability offense and I
14 would be opposed to any amendment to Article 120
15 that would make that the case.

16 I think sexual assault cases are so
17 hard to prosecute and because usually we have a
18 situation where it's only really two witnesses,
19 the perpetrator and the victim to the offense, a
20 lot of times it is incredibly hard to get to
21 beyond a reasonable doubt.

22 And we see situations, as a prosecutor

1 I saw situations all the time where I truly
2 believed that the victim had been sexually
3 assaulted but I knew that proof beyond a
4 reasonable doubt was going to be almost
5 impossible to achieve.

6 And that is incredibly frustrating
7 because you know that the criminal justice
8 system, the American criminal justice system,
9 just is not going to provide justice to all of
10 the victims that are out there.

11 But, unfortunately, that's a tradeoff
12 that we make when we have our Constitution in
13 place that provides all these protections, but I
14 think some people see that reality, that
15 frustration, and they want to look for alternate
16 ways to get around that and to provide justice.

17 But I think that the strict liability
18 is going too far and there are several reasons
19 for that. I know I've talked for a long time and
20 I want to cede the floor to some of my
21 colleagues, but to me I just can't see
22 justification where a relationship could truly be

1 consensual, which I do believe in the training
2 environment it's absolutely possible for these
3 type of relationships to be consensual between
4 certain people.

5 I can't see labeling someone as a sex
6 offender for that. I have been a defense
7 counsel, I have had a chance to talk to my
8 clients after the fact, you know, years after
9 their conviction who have had to live with the
10 reality of being a sex offender and they have
11 said quite frankly it's almost impossible to move
12 on with your life after you've been labeled as a
13 sex offender.

14 And that may certainly be appropriate
15 for some people who have committed sex offenses,
16 but I don't believe that it's appropriate in the
17 case of a trainer and a trainee where the
18 relationship was truly, under the circumstances,
19 consensual for the perpetrator, or for the
20 trainer in that case, to have to register as a
21 sex offender.

22 And so that's the end of my prepared

1 comments that I have for you today, but I am
2 happy to answer any further questions that you
3 might have.

4 DEAN ANDERSON: We'll actually try to
5 get through whatever opening statements folks
6 have and then I'm sure -- I already have some
7 questions, Major Payne, but I'm sure we'll all
8 have questions for all of you. So, Major Adam
9 King.

10 MAJOR KING: Yes, ma'am, thank you.
11 Good morning, ladies and gentleman. I am Major
12 Adam King. I am currently the senior trial
13 counsel at Parris Island, South Carolina, which
14 is where the -- it's one of our two recruit
15 depots within the Marine Corps, and it's also the
16 recruit depot that has both men and women going
17 through recruit training.

18 Prior to that I have been a defense
19 counsel and also a Staff Judge Advocate. As far
20 as my prepared comments go, I'll try and not
21 repeat too much of what Major Payne has said,
22 because I do agree with all of her points.

1 And as a practitioner one point that
2 I would like to make as we look at Article 120,
3 and I greatly appreciate the attention that this
4 Panel is placing on Article 120, I would
5 encourage to try and default to some sort of
6 stability with the statute itself.

7 As a practitioner over the last seven
8 years we've been dealing with crimes under three
9 separate statutes and it has created some
10 challenges, significant challenges, particularly
11 in line with the instructions.

12 And so in looking at the six questions
13 that we had for this Subcommittee meeting, and
14 starting out is the current practice charging
15 inappropriate relationships or maltreatment under
16 the Articles of the UCMJ other than Article 120
17 appropriate?

18 And I think that Article 92 in my
19 practice has been adequate in dealing with the
20 instructor- and recruiter-related offenses. So
21 one of the unique things about Parris Island is
22 we also deal with the recruiting commands as

1 well.

2 So we are dealing with drill
3 instructors and also recruiters and I have found
4 that Article 92 has been an effective deterrent
5 in that regard particularly when coupled with the
6 Department of Defense Instruction 1304.33, which
7 is a new Department of Defense Instruction but
8 it's titled Protecting Against Inappropriate
9 Relations During Recruiting and Entry Level
10 Training, and it essentially requires mandatory
11 processing for certain inappropriate
12 relationships, a mandatory administrative
13 processing for certain offenses.

14 And so I think the Article 92 combined
15 with this mandatory processing under that
16 Department of Defense Instruction has been
17 helpful and effective in deterring the types of
18 consensual offenses that might possibly fall
19 underneath a strict-liability theory under
20 Article 120.

21 I do feel that the current statute as
22 drafted with regard to threatening or placing

1 that other person in fear is adequate as drafted
2 as a statute, but I do feel that there should be
3 a modification to the instructions.

4 I think the instructions are currently
5 inadequate and I think reaching back to the 2007
6 to 2012 Article 120 as a reference would be
7 helpful in drafting those instructions.

8 The prior statute in dealing with
9 constructive force discussed the negative, or the
10 positive or negative effect of the military
11 career of some person.

12 And in looking at the current statute,
13 I think it was made, deliberately made to be
14 broad and cover a wide variety of certain
15 threats, but it includes the language wrongful
16 action contemplated.

17 And so that to me seems like the area
18 in the current definition of threats or fear, the
19 constructive force definition that we have, that
20 is difficult to define, so this wrongful action
21 contemplated.

22 And I think a detailed instruction for

1 what wrongful action contemplated can be might be
2 an effective solution to solving some of that
3 ambiguity with the way that the statute is
4 currently drafted without amending the statute,
5 without amending that definition.

6 We could reach back to some of the
7 instructions from the 2007 to 2012 statute to
8 define what wrongful action contemplated may be
9 and that that wrongful action contemplated could
10 include abuse of authority-type offenses.

11 In some of the preparation materials
12 we had there was an email from Lieutenant Colonel
13 Hines that laid out an instruction for
14 retaliation offenses and I think something along
15 those lines would be appropriate and using the
16 word retaliation or maybe even substituting that
17 with the negative effect of the military career
18 of some person, to actually define what
19 retaliation could be in his email in that
20 detailed instruction.

21 I think that could be helpful and
22 could also cover some of these constructive

1 force-type scenarios.

2 Additionally, I think that the
3 constructive force scenario could also include
4 some instructions that specifically explain that
5 these threats could be both express and implied.

6 I think that that is an area where it
7 would be problematic to charge a constructive
8 force case right now under the current law
9 without having case law to reach back to that
10 discusses that express and implied threat.

11 In looking back over some of the
12 1980's and 1990's case law for constructive force
13 in rape cases the instructions relied on, the
14 instructions ended up relying on some of those
15 early cases, Hicks was one of the cases, where it
16 took the Court of Military Appeals and CAAF to
17 actually explain that those threats could be
18 express and implied.

19 So that would be along the lines of an
20 instruction where the existence or reasonableness
21 of the victim's fear of this wrongful action
22 contemplated would be based on the totality of

1 circumstances which would be questions of fact,
2 i.e. circumstances in which the victim was
3 placed: age, the training scenario, things along
4 those lines.

5 And that was Hicks, 24 MJ 3. That was
6 a Court of Military Appeals Opinion from 1987
7 where that express and implied relationship was
8 laid out. So those were the two areas in my
9 opening I wanted to address.

10 I don't want to steal all the
11 comments. I agree with Major Payne about the sex
12 offender registration and the strict liability,
13 that would just be largely repeating her argument
14 which was better than mine anyway.

15 But really that stability as
16 practitioners and realizing that we've gone
17 through three 120 offenses. We sometimes have
18 offenses where we are charging two different
19 regimes of Article 120, also with the National
20 Defense Authorization Act of 2014 and '13 we're
21 dealing with different versions of Article 60
22 with regard to clemency and post-trial action.

1 And we're dealing with either first-
2 tour or second-tour judge advocates who are
3 handling these areas well, but if we were to
4 change Article 120, the statute itself yet
5 another time, I think that could complicate
6 things.

7 So keeping statutes stable but
8 providing clearer instruction would be my
9 recommendation. And with that I'll hand it over
10 to Major Heimann.

11 DEAN ANDERSON: Thank you, Major King.

12 MAJOR KING: Thank you, ma'am.

13 DEAN ANDERSON: Major Heimann?

14 MAJOR HEIMANN: Good morning, ladies
15 and gentlemen. I am Major Tyler Heimann. I just
16 finished a tour as a Special Victims' Prosecutor
17 at Fort Leonard Wood, Missouri, one of the Army's
18 largest training organizations.

19 We train a substantial portion of the
20 Army coming in, a lot of 17- and 18-year-old
21 trainees there coming through every year.

22 In that position I handled all drill

1 sergeant misconduct and trainee misconduct that
2 arose over the last three years. Prior to that I
3 also served as a defense counsel at Fort Riley,
4 Kansas, and a couple of years as a trial counsel
5 at Fort Drum, New York.

6 When I looked at this I came close to
7 saying, thinking that this 120 strict liability
8 is the right way to go, but I don't quite get
9 there.

10 I looked back at all the cases that I
11 saw where I had 17- and 18-year-old trainees tell
12 me that they were sexually abused by their drill
13 sergeants.

14 I found that I had four cases in the
15 three years at Fort Leonard Wood. One of those I
16 prosecuted as a sex assault successfully where he
17 did actually threaten to hurt her career. He
18 threatened to send her home.

19 I used the current statute and it was
20 successful to do that. I had enough facts, able
21 to prove it, so I got what I wanted there.

22 In two of the cases, the victims told

1 me, and I believe they were sexually assaulted,
2 but I did not have the facts to prove it. But I
3 also felt that the drill sergeant was not on
4 enough notice to make him a sex offender.

5 He was on notice that he was doing
6 something wrong but his conduct based on the
7 conduct of the trainees was enough that it
8 probably should fall under 92.

9 Those were prosecuted under 92. They
10 both resulted in discharges. And then the fourth
11 one the trainee victim was a willing participant
12 in that she said I willingly wanted to do this.

13 And that's where I'm like well, now we
14 have a problem because I have to have an out for
15 this case where I have -- I could have a trainee
16 that is older than a drill sergeant even with a
17 lot of life experience that can make that choice.

18 Now I would say most of the time
19 that's not the case. Most of the time our
20 trainees, I believe 95 percent of them in the
21 first eight weeks of basic training do not have
22 the ability to consent.

1 I just don't think they do, but there
2 are some that do. And so I can't get to a 120
3 strict liability as a recommendation, but I read
4 Congresswoman Speier's testimony and I thought it
5 was pretty close to what would be helpful but I
6 have some worries about making that last five
7 percent sex offenders.

8 So what I think would be helpful is
9 creating a new 92 subsection specifically
10 prohibiting this conduct, that really just has
11 the name of a drill sergeant, AIT instructor, on
12 initial entry training and makes it a 92.

13 It doesn't really add anything beyond
14 a name, but I think in the field and briefing
15 this to drill sergeants, that's a lot to me.
16 When I can tell a drill sergeant, look, there's a
17 new statute and it says, you have sex with a
18 trainee you are violating 92(a) as opposed to a
19 violation of a wrongful general order, which they
20 don't quite understand.

21 I think that has power and I think we
22 can do that fairly easily. And so that's

1 recommendation, is to create a new 92(a) and go
2 with that.

3 So, pending any questions, that's my
4 opening statement.

5 DEAN ANDERSON: Thank you. Lieutenant
6 Commander?

7 LCDR ROBERTSON: Distinguished Panel
8 members, good morning, thank you for this
9 opportunity.

10 The three colleagues that have spoken
11 before me have done a fantastic job of
12 articulating the law.

13 What I would like to do is give you a
14 little bit of background on my personal
15 experience as a judge advocate so that you can,
16 that can form any questions you may have
17 specifically to me later on in this hearing.

18 I have 15 years of active duty, five
19 years as a Marine Corps Infantry Officer and over
20 ten years as a judge advocate. As a judge
21 advocate, I've been a defense counsel in
22 Bremerton, Washington.

1 There I had the opportunity to defend
2 an E-6 who was charged with rape on three
3 victims. In that case the Government's theory
4 was that he used his position in his authority as
5 a senior watch captain to isolate those three
6 women to put them in a position where he could
7 then rape them by force.

8 My next tour was as a prosecutor in
9 Pensacola, Florida. Now while this was not a
10 recruit-training situation like my colleagues
11 have been in, this is the next level training for
12 all aviation personnel, whether they are pilots
13 or support personnel in the Navy and the Marine
14 Corps, and we dealt with cases involving, while
15 not recruits and recruiter, excuse me, not
16 trainees and trainers, but students and
17 instructors.

18 I next taught Evidence and Trial
19 Advocacy at the Naval Justice School where I was
20 an instructor for both legalmen and entry-level
21 judge advocates so I can see and have the
22 experience from the position of an instructor and

1 the interaction with students.

2 Most recently, I was in Norfolk where
3 I was the Assistant Senior Trial Counsel. There
4 I dealt with a lot of prosecutions dealing with
5 sexual assaults, dealing with senior enlisted
6 leaders and junior enlisted onboard the aircraft
7 carriers.

8 As you may know aircraft carriers have
9 upwards of 3,000 personnel and it is in effect
10 its own city and we had E-7s, E-8s, who were
11 using their position, their authority, their
12 rank, to isolate the victims and then sexually
13 assault them by other criminal means.

14 I also had the opportunity to
15 prosecute two recruiters, one of which we
16 prosecuted under Article 92, the other we
17 prosecuted under Article 92 and Article 120.

18 Finally, currently I am the Senior
19 Trial Counsel here at the Naval District
20 Washington. My jurisdiction is the entire
21 National Capitol region and the United States
22 Naval Academy. I have been in that position for

1 the last seven weeks.

2 My position is that the law and the
3 instructions as currently written are sufficient,
4 that the definition of threat and fear under
5 Article 120(g)(7) allows the prosecutor to make a
6 fact-specific prosecution and to make an argument
7 as to why the language used by the accused was
8 sufficient to put that person in fear and give
9 them that reasonable belief that what they said
10 was going to happen, would happen.

11 I also believe that strict liability
12 is unnecessary. Most training and recruit
13 commands in the United States Navy, and I believe
14 the United States Marine Corps also, already have
15 Instructions that criminalize contact between a
16 recruit and an applicant, or a potential
17 applicant, and a trainer and a trainee.

18 I know at the Naval Justice School I
19 was allowed to have no personal relationship and
20 no contact with my students, none whatsoever, and
21 a violation of that was criminal under Article
22 92. The same is true in the recruiting

1 community.

2 And in the case that I prosecuted
3 under Article 92, the members who, seven of the
4 eight members were all recruiters and when I said
5 this is what this guy did, he touched her,
6 automatically they said we know we're not allowed
7 to touch these people and as soon as he admitted
8 to the cops that, I touched her, we knew that he
9 was going down the wrong path.

10 It was a, you know, strict liability,
11 if you will, for touching, and we were able to do
12 that. The other case we also had bodily harm.
13 We were able to prosecute under Article 120
14 there.

15 I also believe that Article 134
16 provides us other avenues that would allow us to
17 prosecute quid pro quo type cases if we did not
18 believe that Article 92 was sufficient and we
19 felt that maybe a sex offense was, or a sex
20 offender registration might be more palatable.

21 I look forward to all of your
22 questions and to what the Lieutenant Commander

1 from the Coast Guard has to say.

2 DEAN ANDERSON: Thank you, sir.

3 Lieutenant Commander?

4 LCDR GULLO: Thank you very much for
5 the invitation to come here and participate in
6 today's meeting.

7 By way of background, I am Lieutenant
8 Commander Ben Gullo. I first served in the Army
9 Reserves from 2003 to 2006. I joined the Coast
10 Guard in 2006.

11 Before my military career, for Ms.
12 Holtzman, who I believe is on the line, I was a
13 criminal prosecutor in Brooklyn, New York for
14 five years.

15 As a Coast Guard judge advocate I have
16 had the chance to previously serve as a trial
17 counsel, a senior trial counsel, and as a
18 military justice branch chief.

19 I am currently the Deputy SJA for the
20 9th District which is located in Cleveland, Ohio.
21 The 9th District oversees Coast Guard operations
22 of over 2,000 active duty Coast Guardsmen

1 stationed throughout the Great Lakes.

2 Since May of 2014 in addition to my
3 primary duty as Deputy SJA, I also serve as a
4 Collateral Duty Special Court-Martial Judge for
5 the Coast Guard.

6 So I no longer prosecute cases,
7 however, in my assignment as a Deputy SJA I
8 oversee the prosecution, courts-martial, for
9 members assigned to the 9th District, and those
10 courts-marital include violations of Article 120.

11 In my career I have served as the lead
12 prosecutor to a number of sex assault cases.

13 With regard to this specific meeting I've
14 prosecuted cases involving Cape May company
15 commanders who were alleged to have consensual or
16 non-consensual sexual encounters with recruits
17 and recent graduated recruits.

18 Like everyone else seated to my right
19 I certainly look forward to offering more
20 detailed answers to your questions. I would like
21 to state four positions up front.

22 First, I also concur that the current

1 practice of prosecuting trainer/trainee cases
2 under the UCMJ, the Articles under UCMJ, is
3 sufficient.

4 I am sensitive to the vulnerable
5 situations that new recruits and basic trainees
6 are in, but I cannot personally put
7 Servicemembers in a similar category to a ward
8 patient or an inmate.

9 I recognize that they are young, but
10 they are also adults and they are entrusted to
11 represent the U.S. military.

12 I believe Article 92 has proven
13 effective in my experience. I also agree with
14 the Major from the Army that it is not
15 necessarily novel, but a good idea perhaps to
16 pocket these types of offenses in Article 92.

17 And I'll go one stone's throw further
18 and say that perhaps if the Committee was willing
19 to entertain that, also entertain instead of two
20 years and dishonorable discharge perhaps
21 elevating the maximum punishment to higher than
22 that so that we're messaging correctly to drill

1 sergeants and company commanders that this is an
2 offense that won't be tolerated.

3 I will say within the Coast Guard
4 there has been a heavier emphasis in the last
5 couple of years on these types of cases. We had
6 an ALCOAST message traffic in 2013 that
7 prohibited these relationships beyond just the
8 trainer/trainee relationship but also within one
9 year of graduating from basic training.

10 Second, I do not believe that sexual
11 behavior committed in a consensual context
12 between trainers and trainees is a crime that
13 should trigger a sex offender registration.

14 If the behavior is found to be more
15 severe than an orders violation or a cruelty
16 maltreatment toward a victim, I think it's
17 incumbent upon the prosecutor to right-size that
18 case and advise a convening authority.

19 While there are certainly risks under
20 the current 120 to prosecuting a coercive sexual
21 misconduct case I think it's incumbent upon that
22 prosecutor to right-size that case, advise the

1 convening authority to explore 120 prosecution.

2 So I don't believe that we should be
3 triggering sex-offender registration simply for a
4 consensual trainer/trainee relationship.

5 Third, I agree with everyone that has
6 testified before me that the current, and
7 actually I think perhaps Commander Robertson,
8 maybe deviated a little bit, but I believe that
9 the current definition in 120(g)(7), it falls
10 short.

11 And I think it falls short simply
12 because when we define wrongful action, that gets
13 a little gray. From the prosecutor's standpoint
14 you want to provide the military judge with
15 instructions that are definitive on the law and
16 so that those members can follow those
17 instructions.

18 Putting on my judge hat for a couple
19 of seconds here, I also want to provide members
20 with definitive guidance on the law and I think
21 when we, you know, when we read that instruction
22 of wrongful action and what wrongful action could

1 contemplate, I think it falls short.

2 I think something, as Major Payne
3 started with, going back to the 2007 Instruction,
4 you know, 2012 and 2007 definition of placing in
5 fear I think is probably the right rock for
6 coercive sexual misconduct type cases.

7 Last but not least, while I am
8 incredibly appreciative of Congress and
9 committees such as this one to provide tools to
10 military judge advocates to prosecute these
11 cases, I'd simply note that within my own legal
12 staff I continue to encourage, teach and train,
13 and increase competency and proficiency in
14 military justice.

15 Unlike the civilian sector where you
16 work toward filing felony cases, three, five,
17 seven years out. You start in misdemeanor world,
18 I know of no other institution but the military
19 where you could graduate from Charlottesville or
20 Newport or the Air Force School in Montgomery and
21 potentially be handed a violent felony case, such
22 as rape, immediately after graduating from

1 initial legal training.

2 So personally I believe that the
3 higher focus should continue and should remain
4 providing judge advocates and prosecutors better
5 training so that they are more confident.

6 And I will say that I believe that in
7 my experience it has gotten better. I do think
8 that when I started in 2006 using somebody like
9 an expert on counterintuitive behavior of a rape
10 victim and explained those concepts to members
11 was almost like speaking a different language to
12 certain members and you box yourself into the
13 trial within the trial so to speak, and so that
14 confuses members more.

15 I prosecuted a case in late 2013 where
16 we used similar testimony and it worked because
17 the members are understanding these cases better,
18 convening authorities are understanding these
19 cases better.

20 So I, you know, perhaps I am showing
21 my cards a little bit that I don't want the
22 pendulum to swing a little too right, I don't

1 think sex offender registration is the right
2 rock.

3 I don't think pocketing these cases in
4 120 is necessary. I think 120 has enough
5 offenses tucked in there already. I continue to
6 preach to my own folks, let's just become better
7 at prosecuting these cases and that aligns with
8 our current TJAG's direction that he promulgated
9 in June of this year.

10 That concludes my remarks and I
11 definitely look forward to answering the
12 Committee's questions.

13 DEAN ANDERSON: So helpful, thank you
14 all so much for your testimony. I guess I am
15 wondering based on your experience -- I'll just
16 open it up and then anyone else who wants to
17 chime in with questions.

18 Based on your experience prosecuting
19 these kinds of cases, what is the fear of
20 wrongful action and what is the communication or
21 action, other than a circumstance in which I will
22 throw you out and you'll be out of here, which

1 you mentioned, save that, what is the
2 communication or action that places someone in a
3 threat -- that threatened somebody and puts them
4 in fear that you have seen? What kinds of
5 circumstances have you seen that are more subtle
6 than the one case where there was an easier
7 conviction?

8 LCDR ROBERTSON: I'll say that I have
9 not seen that.

10 DEAN ANDERSON: You have not seen --

11 LCDR ROBERTSON: In my experience --

12 DEAN ANDERSON: Have sex with me or
13 you're out.

14 LCDR ROBERTSON: I have not seen that.

15 DEAN ANDERSON: Rare?

16 LCDR ROBERTSON: In my experience,
17 that's rare. What I have seen is the senior
18 person uses their rank or their authority to
19 isolate the victim, to get them someplace on the
20 ship or in the air traffic control tower or in a
21 barracks room.

22 DEAN ANDERSON: Yes.

1 LCDR ROBERTSON: And at that point
2 they then use force or bodily harm or something
3 else, so there is another mode of criminality,
4 you know. They come up and the woman says, or
5 the victim says no and they continue on.

6 DEAN ANDERSON: I see.

7 LCDR ROBERTSON: But there is not a
8 threat that leads to the concession.

9 DEAN ANDERSON: So you haven't done
10 much under (b)(1)(a), which is the threat or
11 placing another person in fear?

12 LCDR ROBERTSON: No, ma'am.

13 DEAN ANDERSON: I see.

14 LCDR ROBERTSON: No, ma'am. The
15 circumstances that I have seen have all had --

16 DEAN ANDERSON: Yes. You just did
17 straight up bodily harm?

18 LCDR ROBERTSON: Yes, ma'am.

19 DEAN ANDERSON: Yes. Others?

20 MAJOR HEIMANN: Ma'am, the subtle
21 ones, I have had a lot of victims tell me, I
22 just, I knew he controlled my life.

1 DEAN ANDERSON: Exactly.

2 MAJOR HEIMANN: Within that first
3 eight weeks, you know, you have the 17- and 18-
4 year-olds, they don't know what they don't know,
5 and so that's what they say.

6 DEAN ANDERSON: So then what do you do
7 with that?

8 MAJOR HEIMANN: That's tough.

9 DEAN ANDERSON: What do you do with
10 that?

11 MAJOR HEIMANN: Because -- and I --

12 DEAN ANDERSON: How is it enough under
13 the statute, under 120? Or are you saying it's
14 enough under 92?

15 MAJOR HEIMANN: It is certainly enough
16 under 92.

17 DEAN ANDERSON: Right, that's easier.
18 I think I am wondering about, a little bit,
19 because we have been directed to think about what
20 to do with 120, if anything.

21 Do you think of that as a violation of
22 120? Someone comes in to you and says, he

1 controlled my life, I didn't feel like I had an
2 ability to say no.

3 MAJOR HEIMANN: Certainly. I look at
4 it very carefully and that's where my starting
5 position is. I think I'm going to have a tough
6 time winning that case though where I don't have
7 some overt act.

8 So those are the cases that really
9 trouble me. It's the, they don't say anything,
10 but I just felt like I had no choice. That's the
11 case that is troubling.

12 DEAN ANDERSON: And so then you would
13 take that, as a prosecutor, under 92?

14 MAJOR HEIMANN: Probably. If I can't
15 find some sort of other action where I can show -
16 -

17 DEAN ANDERSON: Like the other
18 wrongful acts, right?

19 MAJOR HEIMANN: Yes, some other thing,
20 that's he's putting her on staff duty or
21 something like that, then I'm not going to get
22 there.

1 DEAN ANDERSON: Yes.

2 LCDR ROBERTSON: And if I may, as long
3 as you are finished, I like to look at the
4 definition of consent, that it's a freely given
5 agreement to the conduct at issue given all of
6 the surrounding circumstances. That may be a
7 situation, and I don't want to second-guess
8 anything the Major has done, that may be a
9 situation where you charge under a 92 for a
10 violation of the order, but you can also
11 prosecute it under 120 for bodily harm and say,
12 hey, listen, there was no consent given.

13 DEAN ANDERSON: Right.

14 LCDR ROBERTSON: The changes in the
15 laws have been positive that it's not -- since we
16 have taken the focus off what the victim has done
17 and put the focus on what the accused has done,
18 what reason did this person have to believe that
19 the victim consented?

20 And they had none in these
21 circumstances. Once again it's a 92. Is the
22 defense of reasonable mistake of fact going to

1 come in? It absolutely is, and the defense may
2 be successful on that, but with the 92 and that
3 strict liability from most of the command
4 instructions, at the very least we're going to
5 have that.

6 And if we have more and the situation
7 didn't say that there was consent, then we're
8 going to get that sex offense, and then if not we
9 still have the conviction for misusing their
10 position.

11 MAJ. GEN. WOODWARD: Mary Ellen, are
12 you aware of the Lackland ones, like Estacio and
13 LeBlanc, you know, where --

14 MAJOR PAYNE: Yes. And, ma'am, I was
15 the appellate -- I handled LeBlanc on appeal so I
16 am very familiar with that case. And that was a
17 case where they charged under the 2007 version of
18 Article 120. And actually we broke down exactly
19 how it was charged here. I think it's on my
20 other sheet of paper. Let's see.

21 Causing the victim to engage in
22 vaginal intercourse by placing her in fear of an

1 impact on her military career through use and
2 abuse of appellant's military rank, position and
3 authority.

4 Now, that was the charge under Article
5 120, and the evidence as it came out at trial was
6 essentially he hadn't made any specific threats
7 towards her, but she testified that she was
8 basically called into this PT supply room on the
9 day they were about to ship out after graduation.
10 The victim describes that she just honestly felt
11 as if she could not, she could not say no in that
12 particular situation. I mean he was her MTI,
13 he's still -- He wasn't her MTI, he was the
14 brother flight MTI, I believe.

15 But she didn't feel in that situation
16 as if she could say no. Essentially, she had no
17 choice in the matter and, so she said he still
18 had the ability to -- even though she had
19 graduated from BMT, apparently she could've still
20 been, as they call it, recycled, meaning she
21 would've had to go back and repeat things. And
22 so he was -- the accused in that case was

1 convicted under Article 92. In fact, he plead
2 guilty, but he was acquitted of the Article 120
3 offense.

4 DEAN ANDERSON: And what would you do
5 under today's 120 statute?

6 MAJOR PAYNE: I would continue to
7 attempt to charge it as an Article 120.

8 DEAN ANDERSON: Which foundation of
9 120, what's the theory?

10 MAJOR PAYNE: Well I --

11 DEAN ANDERSON: When she says I had no
12 choice, I had to go to the supply room?

13 MAJOR PAYNE: I would still say
14 threatening and placing in fear. I mean I -- but
15 I think it's -- I mean I think because you don't
16 even have as explicit a definition as you had
17 back in, that was 2011, so under the 2007 version
18 I think that that would be hard. Then again, I
19 mean there are also other things that made it a
20 difficult Article 120 case for the prosecution to
21 prove. I mean there were witnesses who said oh,
22 well, I saw this, you had been flirting prior, et

1 cetera. So, you know, it was a challenging case
2 for a lot of reasons for the Government, not just
3 because of the way the statute was written.

4 PROFESSOR SCHULHOFER: Major, can I
5 just clarify?

6 (Simultaneous speaking.)

7 PROFESSOR SCHULHOFER: Oh, okay.

8 DEAN ANDERSON: You want to clarify on
9 this?

10 PROFESSOR SCHULHOFER: But I just want
11 to clarify this one point. I wondered what your
12 thought was about Commander Robertson's theory
13 that you could charge that as absence of --
14 consent not freely given, because she felt she
15 had no choice?

16 MAJOR PAYNE: Well I think the way
17 that our statutes are written now we've almost
18 written consent out of the elements. I mean it's
19 something that the members are always going to be
20 instructed on, but that's something I actually
21 forgot to mention in my prepared statements.

22 When we look at the definition of

1 consent I think that, as it's in Article 120 now,
2 if we are going to expand the language of what
3 threatening and placing in fear means, I think we
4 also need to expand it in the definition of
5 consent as well, because right now the definition
6 just basically says you can consent -- or there
7 is no consent if, you know, someone has been
8 placed in fear or has been threatened. So
9 expanding the definition of consent I think is
10 also helpful, would also be helpful to the
11 members. But I agree --

12 PROFESSOR SCHULHOFER: Without
13 tweaking the statutory language, just thinking
14 about it as it stands, could those facts be
15 prosecuted under the theory of a sexual act
16 without consent?

17 MAJOR PAYNE: Yes, sir. I mean right
18 now you could charge it under bodily harm, and
19 bodily harm is considered any non-consensual
20 touching, however slight. And so the members
21 would get an instruction on what consent means
22 and certainly it's open for arguments, or it's

1 absolutely a fair and appropriate argument, that
2 this person could not consent.

3 PROFESSOR SCHULHOFER: Either way.

4 MAJOR PAYNE: So that is another
5 option for how to charge it under Article 120.

6 DEAN ANDERSON: Ms. Friel?

7 MS. FRIEL: Yes. So here's my
8 question: we're all talking about threatening and
9 putting in fear and reasonable fear, we're not
10 talking about fear of what, and as I understand
11 the way the statute is written it's got to be
12 fear of physical injury.

13 In one place it says grievous bodily
14 injury, and somewhere else I have seen it charged
15 as physical injury, but either way the way the
16 statute is written now, that reasonable fear has
17 to be whatever he said or did or I thought was I
18 was going to be physically injured. And you are
19 all talking about cases and we've heard about so
20 many cases that it's not I think you are going to
21 hurt me physically, you're going to hurt my
22 career. You're going to hurt me in other ways.

1 And that's where there seems to be a hole in the
2 present statute, but something you used to be
3 able to do in '07, it sounds like.

4 LCDR ROBERTSON: If I may, ma'am, I
5 believe that you are referring to the threatening
6 or placing that person in fear for rape, but the
7 definition for sexual assault in 120(g)(7) talks
8 about, and this is from the most recent MCM.

9 The term threatening or placing that
10 other person in fear means a communication or
11 action that is sufficient, that is of sufficient
12 consequence to cause a reasonable fear that the
13 non-compliance will result in the victim or
14 another person being subjected to the wrongful
15 action contemplated by the communication. So I
16 believe that's what we are talking about. I
17 think that what you are looking at is what the
18 type of threat that would cause it to be a rape
19 by a sexual assault.

20 MS. FRIEL: And I guess why I think
21 about that is that I think we've heard enough
22 about some of the victims of these kinds of

1 things where they feel they were raped. They
2 feel it's as serious as if you held a gun to
3 their head, because they didn't want to have sex
4 and you put them in a position where they had to
5 have intercourse that they didn't want to have.
6 And so I am wondering what your thoughts are on
7 that.

8 LCDR ROBERTSON: Yes, ma'am. And I
9 would like to say that I believe that any person
10 who is a victim of any Article 120, or any crime
11 for that matter-- but I have dealt with victims
12 of abusive sexual contact who, and I say this
13 only for -- the only thing that happened to them
14 was that they had their breast grabbed, or their
15 buttocks grabbed, or another part of the body
16 grabbed, has taken that and have felt what a
17 person might think would be the trauma from a
18 violent rape.

19 MS. FRIEL: Yes.

20 LCDR ROBERTSON: I have had people who
21 have been sexually assaulted who have not had the
22 same trauma, because they were unconscious or

1 whatnot. I don't think that we should look at
2 the trauma to the victim as the deciding factor
3 of how we approach this.

4 It's the mode of criminality that the
5 accused used, because the victim is going to be
6 traumatized to a tremendous extent regardless of
7 how it occurred, and there are a lot of other
8 things that come in to that. And to say well
9 this victim felt this way and so it's worse in
10 some cases could discount the way another victim
11 has felt and then been traumatized.

12 Every victim was traumatized, and it
13 is terrible for that victim and the way I
14 approach it, and I believe the way everybody
15 would approach here as Special Victims'
16 Prosecutors is, the trauma that the victim feels
17 is appropriate for that victim and should not
18 change the way we prosecute the case. So if they
19 were threatened that I am going to kill you or
20 I'm going to break your arm, just as bad as if
21 you don't do this I'm going to get you kicked out
22 of the military.

1 MS. FRIEL: But coming back to you,
2 even if we concentrate on the mode of
3 criminality, don't we think that there are
4 certain modes of criminality that are worse? And
5 I guess one them seems to be, to me, and maybe
6 it's in a level of it's certainly different than
7 holding a gun to their heads and saying doing it
8 and some of the more physically forceful cases
9 you talked about where you isolate them and then
10 use physical force.

11 But the mode of criminality is taking
12 total advantage of, certainly with your original,
13 your youngest trainees, 17 and 18-year-olds, who
14 are this far from being children, and this person
15 is taking advantage of them has their whole --

16 (Telephonic interference.)

17 MS. FRIEL: That to me is a mode of
18 criminality that may be more serious than where
19 it is now, or maybe not, I'm interested in
20 thought.

21 MAJOR HEIMANN: It's a 30-year max
22 crime, and to me that's sufficient, so I think it

1 belongs where it does for the level of
2 criminality that is used there.

3 DEAN ANDERSON: I'm sorry, Major
4 Heimann, where in the -- what is the 30-year max
5 crime, and where would you prosecute the
6 circumstance that she is describing?

7 MAJOR HEIMANN: So I'm talking using
8 that lower language from sexual --

9 DEAN ANDERSON: From sexual assault?

10 MAJOR HEIMANN: Right.

11 PROFESSOR SCHULHOFER: But Article 92
12 would be, it's now what?

13 MAJOR HEIMANN: Two years on 92
14 though.

15 DEAN ANDERSON: Yes.

16 PROFESSOR SCHULHOFER: I'm sorry?

17 MAJOR HEIMANN: Two years on 92.

18 DEAN ANDERSON: Yes, two years on 92.

19 MAJOR HEIMANN: So, yes.

20 DEAN ANDERSON: General Woodward, you
21 were next.

22 MAJ. GEN. WOODWARD: Yes. One of the

1 things I think of when you all talk about they
2 shouldn't be registered sex offenders, and I'm on
3 the same level with you, not being a lawyer, but
4 where, you know, on the edge of do we register
5 these guys as sex offenders or not.

6 But when I looked at the MTIs at
7 Lackland and some of the things that they were
8 saying and doing, you know, to each other, for
9 instance, you know, talking, I mean the whole
10 thing came to light because one guy is at the gym
11 and he tells another guy sitting next to him on
12 the weight set, you know, hey, you need to get
13 some of this 18-year-old action, you know,
14 because they'll do anything we tell them to do.

15 So that's in their minds is that they
16 can abuse these individuals, and do anything they
17 want with them, and I'm like isn't that the
18 definition of a sex offender? And so, you know,
19 when you sit there and say well they shouldn't be
20 registered sex offenders I sit there and I go
21 well, what's the difference, and I am curious
22 about what you all think.

1 DEAN ANDERSON: Sir? Oh, yes, Major
2 Payne and then Lieutenant Commander Gullo.

3 MAJOR PAYNE: Ma'am, I think when you
4 have evidence, if you had evidence in the case
5 that an individual is bragging to his friends I
6 can use my rank and power to do everything
7 possible that I can to --

8 MAJ. GEN. WOODWARD: They did in
9 Estacio and LeBlanc, right? They -- I mean --

10 MAJOR PAYNE: They did, but, again,
11 ma'am, they were ultimately, the evidence
12 ultimately played out in a court of law that they
13 were not guilty of specific -- I mean they were
14 charged, the Government did attempt to charge
15 them under Article 120 and for whatever variety
16 of reasons, at least in LeBlanc, it was a
17 military judge, she acquitted the accused of
18 that.

19 And so I feel as if we are going to
20 uphold our military justice, or even our criminal
21 justice process, in the United States, I mean if
22 someone is acquitted of a sex offense they should

1 not have to register as a sex offender, even if
2 there is evidence out there indicating --

3 MAJ. GEN. WOODWARD: I'm talking about
4 if we can convict them under Article 120 of
5 having even consensual sex, but with a trainee
6 who feels that there is implication that they
7 have to have sex with this individual. Your
8 point was that you didn't think that that should
9 get them to the point that they should register
10 as a sex offender, so you thought Article 92 was
11 more appropriate. I think I heard that a couple
12 times, right?

13 MAJOR KING: Ma'am, if I can answer
14 that in a way -- I think the key word that you
15 used in that scenario was that it was consensual.
16 So I think we all agree that if the Government
17 could prove that the sex was not consensual, that
18 it was coerced, than that individual should be
19 held accountable under Article 120 and that there
20 are means for a prosecutor to charge someone,
21 even in an implied threat scenario where nothing
22 is said at all, but based on the totality of the

1 circumstances that individual felt a reasonable
2 threat of a wrongful action contemplated.

3 So I think we feel that if the facts,
4 if the evidence shows that there was a consensual
5 sexual act, so this trainee in this context did
6 not feel that he or she were coerced, but rather
7 they had a consensual sexual encounter, then that
8 would be more appropriately charged under an
9 Article 92, and not require that offender to be a
10 sex offender.

11 DEAN ANDERSON: So, Lieutenant
12 Commander, and then this is central it seems to
13 me, this discussion we are having right now, so
14 we're probably going to continue a couple
15 iterations of it, but, sir.

16 LCDR GULLO: Thank you, ma'am. Yes,
17 just to feed off the last two folks on my right.
18 Specifically, in the consensual context for every
19 one of the Simpson cases or these outliers where
20 you have at least these drill sergeants who are
21 targeting multiple females, there is maybe 20 or
22 more cases where it's just an E-6 with an E-3.

1 And a lot of times, quite frankly, they end up
2 married, you know. So there is these onesie-type
3 cases that --

4 DEAN ANDERSON: I'm sorry, sir, in the
5 training contexts you're talking about?

6 (Simultaneous speaking.)

7 LCDR GULLO: In the training contexts
8 you see a lot of these cases that end up in
9 actually long-term marriages, and that's the same
10 thing out in a standard Coast Guard boat station.

11 PROFESSOR SCHULHOFER: I'm sorry,
12 could you just translate for the civilians that
13 an E-6 is a Captain or a --

14 LCDR GULLO: Sure. An E-6 at least is
15 a First Class Petty Officer, somebody in age
16 range of 23 through 28 years old for the Coast
17 Guard.

18 PROFESSOR SCHULHOFER: And the E-3?

19 LCDR GULLO: And an E-3 would be a
20 Seaman or a Fireman in the Coast Guard,
21 equivalent to a Private First Class in some of
22 the other branches.

1 And so, you know, specifically in the
2 consensual context I think the better play for
3 the guys that are consensually having multiple
4 relationships, that are targeting, that are on
5 the hunt, is to elevate that forum to a general
6 court-martial, because at least in my experience
7 most of these cases end up at a summary court-
8 martial with an administrative discharge or a
9 low-level special court-martial for, you know,
10 company commanders who are caught with two or
11 three recruits.

12 So as opposed to putting it in to 120
13 I think the better play, at least from a
14 prosecutor's perspective, is to advise the
15 convening authority to consider these habitual
16 offenders or repeat offenders for a general
17 court-martial, and see if we could get some
18 significant confinement for those folks.

19 PROFESSOR SCHULHOFER: Under what
20 Article, I'm sorry?

21 LCDR GULLO: Still under 92. So you
22 charge 92(1), so you have three or four women,

1 for instance, and you charge 92(1) for those
2 three or four women, and now your max exposure is
3 eight years.

4 Now will panel members give eight
5 years for that case? Probably not, but it
6 certainly sends a better message that you sent
7 somebody to a general court-martial where they
8 have the equivalent of a felony-level conviction
9 whereas, at least in my experience, again, most
10 of these cases are onesies and twosies where they
11 get caught because, you know, somebody is
12 bragging about look what's on my cell phone, and
13 they had a picture of a recruit, you know, naked
14 from the top up or something.

15 And then they get caught and then
16 there is two or three other women that are
17 involved, and those cases end up at a summary
18 level, which for anybody above the rank of E-4,
19 you don't get confinement for those folks and
20 that in a special court-martial the max you could
21 get is up to year. So rather than putting them
22 in 120, I think rightsizing the cases to a higher

1 form, like a general court-martial is better.

2 DEAN ANDERSON: But it sounds like,
3 Lieutenant Commander, that you don't think that
4 it's a sexual offense.

5 LCDR GULLO: I look at every case on
6 its facts, of course, like everybody else here
7 does, and so --

8 DEAN ANDERSON: So let's take your
9 facts, three or four victims --

10 LCDR GULLO: Sure.

11 DEAN ANDERSON: -- someone's got a
12 cell phone with a picture of a recruit --

13 LCDR GULLO: Yes, right.

14 DEAN ANDERSON: -- in basic training,
15 or whatever it's called in the Coast Guard, and
16 four other women say yes, didn't feel like I
17 could say no. So it was consensual in that
18 sense, but, you know, from his perspective he is
19 using his authority as a farm for sexual
20 opportunity. Is that a sexual offense?

21 LCDR GULLO: So the key for me is the
22 interview of those victims. I've had the case

1 where the three or four victims were like I had a
2 great time, it was a wonderful party and
3 everybody was lifting up their shirts for the
4 camera. I've had that case. And so, you know,
5 when I look at the distinction between how we are
6 treating these cases, do I feel like I pressured,
7 is there some coercive sexual misconduct here, or
8 is this a consensual case?

9 Again, my prior comments are limited
10 toward the consensual cases, but to the extent
11 that women, or any victims, feel that they are
12 pressured into scenarios that they wouldn't have
13 otherwise participated in, I will look for a 120.

14 And I think, you know, Ms. Friel had
15 mentioned earlier kind of the gap, if you will.
16 I think it's maybe not a gap, but it's just when
17 the 2012 version of, well, excuse me, Article
18 120(g)(7) under 2012 came out it limited what,
19 previously, we could do with coercive sexual
20 misconduct on its face.

21 But I personally would still take that
22 case to trial and see where the facts go, see

1 where the military judge instructs on the law,
2 and I would rely on the case law from Hicks and
3 pre-2007. We have precedent and CAAF has moved
4 cases beyond what the UCMJ says, you know, and so
5 they provided instructions like the one for
6 constructive force and I think even if we weren't
7 able to fix or revise 120(g)(7) I think the
8 courts would fashion a remedy in your particular
9 scenarios of coercive sexual misconduct.

10 DEAN ANDERSON: So we have a queue.
11 Professor Schulhofer, you are next, and then
12 we'll get to you as well.

13 PROFESSOR SCHULHOFER: Thank you.
14 I'll try to be brief, but my thinking really
15 boils down to four or five different questions I
16 think are all related, and they're really the
17 same questions already asked, but I'm going to
18 maybe try to do it in a different way.

19 One thing I wanted to say at the
20 beginning is that I know all of you have talked
21 about strict liability, and our own Panel did in
22 the meeting last month that I talked about making

1 these relationships a matter of strict liability.
2 Just as a matter of terminology I don't like
3 that, because it implies that you are rejecting
4 our commitment to prove beyond a reasonable doubt
5 or to culpability. I think what we are all
6 talking about is making these relationships
7 illegal, per se. There is no suggestion of
8 strict liability.

9 DEAN ANDERSON: Yes, right.

10 PROFESSOR SCHULHOFER: Every drill
11 instructor knows that he is a drill instructor,
12 he knows that the person under his command is a
13 trainee. For example, if a drill instructor had
14 sex with somebody on the base and didn't realize
15 that she was a trainee that would be a question
16 of strict liability, but in every one of these
17 cases we are talking about a very high level of
18 awareness of the fact, so I would prefer to frame
19 it that way.

20 I think that if we were to say that
21 these relationships are illegal per se, all of
22 these people would be culpable, they would know

1 that they were -- In fact they already know that
2 they are violating, I take it. They already know
3 that what they are doing is impermissible.

4 LCDR ROBERTSON: I would say that they
5 already know that those relationships are already
6 illegal, because there are instructions.

7 PROFESSOR SCHULHOFER: Yes.

8 LCDR ROBERTSON: And I guess the next
9 step you are saying is, well what you are saying
10 by strict liability is not only are they illegal
11 but they are sex offenses.

12 PROFESSOR SCHULHOFER: Yes.

13 LCDR ROBERTSON: And I think that what
14 Ben's been trying to get to is we don't want that
15 relationship that's already illegal to be
16 automatically an Article 120 and take away the
17 prosecutor's ability to look at the specific
18 facts because we don't want that rare occasion
19 where it's the 35-year-old recruit and the 28-
20 year-old drill instructor where the 35-year-old
21 recruit is the aggressor.

22 This is a rare circumstance that I

1 don't know of ever happening, but it could
2 happen, and we don't want to be in the position
3 where we now have to prosecute the 28-year-old
4 drill instructor for making a mistake. Now if
5 we've got the situation where we have somebody
6 with three or four victims then that's different,
7 those are different facts, but we want to be able
8 to make a fact-based prosecution.

9 PROFESSOR SCHULHOFER: Okay. So how
10 often --

11 MAJ. GEN. WOODWARD: The only thing --
12 Can I just throw in a --

13 PROFESSOR SCHULHOFER: Of course, go
14 ahead.

15 MAJ. GEN. WOODWARD: And I apologize,
16 but it just goes right to that, and I am not
17 advocating one or the other, but when I
18 interviewed one of the MTIs who had been
19 convicted and I asked him, you know, I said did,
20 you know, did you ever think you'd get caught, I
21 mean, you know, what actually deters you, you
22 know?

1 And he said oh, he goes, you know,
2 nothing is really going to happen to us. You
3 know, the worst thing that's going to happen to
4 us is, you know, we're going to be kicked back to
5 the Big Air Force, so, okay, no big deal. So
6 sometimes it gets to a level of what people, you
7 know, a deterrent, right, and do we feel that the
8 deterrent is strong enough if we --

9 DEAN ANDERSON: If it's not a sexual
10 offense, I guess that's the question.

11 MAJ. GEN. WOODWARD: If it's not a
12 sexual offense.

13 LCDR ROBERTSON: My question would be
14 is the deterrent to make them automatically sex
15 offenses, or is the deterrent to have prosecutors
16 and convening authorities and how do we do that
17 without it being UCI, so bear with me, folks, but
18 we've had a lot of emphasis on sexual assaults in
19 general.

20 Is the next step to have emphasis at
21 the training command levels on hey, guys,
22 remember you are not allowed to have any type of

1 relationship, is that the next area where we need
2 to have emphasis?

3 Is it a need to upgrade these to sex
4 offenses and, you know, sex offender registry is
5 terribly detrimental to somebody's life, and
6 rightfully so. But do we need to do a better job
7 of identifying these cases, empowering the
8 recruits to make the allegations and then acting
9 on these allegations, and doing good
10 investigations, and coming forward.

11 I think all of us have represented
12 that we take these as serious cases, and we'll be
13 looking for the facts to charge them in Article
14 120 because these guys are in the perfect
15 position to be predators, and we can handle those
16 appropriately, but do we have to be dictated by
17 the law that this is the way to handle it.

18 LT. COL. HINES: Okay. Well I think
19 -- just to interpose, I think that is the
20 question. If you are asking is the question and
21 we had, the Panel heard from several former
22 training commanders or present training

1 commanders last month, some of whom said they
2 thought that it would add some deterrent, and
3 we're not just talking about prosecution
4 investigation, we're talking about deterrence in
5 the schoolhouse.

6 So when your drill instructor comes in
7 or your recruiter comes in to DI School, and now
8 the instructor is not just talking about it's a
9 violation of Article 92 if you do this, we're not
10 even going to get to the question of consent, you
11 are going to be automatically liable as a sex
12 offender.

13 And I think that's the question, and
14 I think the Panel would, you know, welcome your
15 position on would that add any deterrent value
16 based on your experience or are these people who
17 do this just going to do it regardless. You
18 know, what I'm saying? Regardless --

19 LCDR ROBERTSON: I do, sir, and I
20 appreciate you focusing better. I'm not sure
21 it's going to, because everybody, with all the
22 training that we've had on sexual assault over

1 the last five or six years, people are still
2 committing sexual assaults. With all of the
3 training we have about alcohol facilitating
4 sexual assaults, those are still the majority of
5 the cases that we prosecute.

6 MAJ. GEN. WOODWARD: Right, but
7 they're very hard to try. I guess, what the
8 point we're trying to make is we're trying, you
9 know, the Estacio LeBlanc thing. They were
10 unable to get a conviction in Article 120. And
11 so our point is, is if you just take away the
12 consent piece, and just say, okay, you as an
13 instructor are not allowed to have sex with one
14 of your trainees and if you do, it's sexual
15 assault.

16 Then you don't have to, as
17 prosecutors, make that consent versus non-
18 consent. And doesn't it, just taking away the
19 ambiguity of how easy the conviction or how hard
20 the conviction is, all you have to do is prove
21 that sex actually occurred, right?

22 LCDR ROBERTSON: Yes, ma'am. But I am

1 very concerned about using the law to fix
2 problems with proof. Especially when it may
3 vacuum up people. As you were saying that, and
4 there are -- I just, to say we're having
5 difficulties prosecuting these cases, and so
6 therefore we want to change the law to make it
7 easier to prove them.

8 DEAN ANDERSON: I'm not sure that
9 that's what we're saying.

10 LCDR ROBERTSON: Okay.

11 DEAN ANDERSON: I think, so actually
12 Professor Schulhofer has the floor with about
13 seven, eight possible more questions that will
14 divert us as well.

15 MAJ. GEN. WOODWARD: Sorry.

16 DEAN ANDERSON: But we're going to
17 come back to this. Because I think, and I'll put
18 you on the queue.

19 PROFESSOR SCHULHOFER: I started with
20 just three questions but now I have seven.
21 Actually I'm going to try to make this short.
22 And also I wanted to say, you should feel free to

1 give a very brief answer. I won't be
2 disrespected, feel disrespected if you just say
3 that's a very simple question and the answer no,
4 or something like that.

5 But I wanted to try to unpack some of
6 this. And I'm trying to understand Article 92.
7 If a drill instructor says to one of the
8 trainees, let's say it's a guy. Say they're both
9 guys. And I guess there must be cases where the
10 drill instructor lives off base, as a home, and
11 he says to one of the guys, I want you to come
12 over to my house Sunday afternoon and help me
13 clean out the garage. And the guy goes and does
14 that.

15 And then afterwards complains. It
16 somehow comes to light. Maybe he's been doing,
17 he's a serial abuser of this sort and he's doing
18 this a lot and it comes to light, would that be
19 an Article 92?

20 MAJOR PAYNE: I believe that would
21 captured, sir, under the Air Force Instruction.

22 PROFESSOR SCHULHOFER: So you're

1 telling us that the cases we're talking about are
2 like the one I just gave you?

3 MAJOR PAYNE: I wouldn't say they're
4 necessarily like them. Article -- I'm sorry, the
5 Air Force Instruction specifically criminalizes a
6 wide range of different behaviors. All falling
7 under the professional and unprofessional
8 relationship.

9 PROFESSOR SCHULHOFER: Right. But I
10 think some of us are having trouble, or I am,
11 I'll just speak for myself, I'm having trouble
12 thinking about Lackland or any of these other
13 situations, regardless of whether there was a
14 threat or not. I'm having trouble thinking of
15 that misconduct in the same category as the guy
16 who's exploiting his trainees to help paint the
17 side of the garage, and things like that. I'm
18 having trouble seeing that those are either
19 behaviorally, or in terms --

20 DEAN ANDERSON: Analogous?

21 PROFESSOR SCHULHOFER: -- of their
22 intrinsic seriousness that they belong in the

1 same bucket.

2 MAJOR PAYNE: Well, you go ahead.

3 LCDR GULLO: Okay. Yes, that would be
4 a decision, at least from my perspective, a
5 charge under Article 93 for cruelty and
6 maltreatment. So if you have a pattern of a guy
7 --

8 PROFESSOR SCHULHOFER: 93?

9 LCDR GULLO: 93. For somebody saying,
10 hey, come over and clean my garage, come over and
11 do menial tasks for me. To a certain point I
12 charge that under 93, as opposed 92.

13 PROFESSOR SCHULHOFER: What is 93?

14 LCDR GULLO: 93 is cruelty and
15 maltreatment. So anybody subject to the orders
16 of somebody's superior who's doing things, like
17 you're discussing, menial tasks, belittling him
18 to the point of embarrassment or humiliation --

19 PROFESSOR SCHULHOFER: No, no I mean,
20 to be sure. But I wasn't thinking of it that
21 way.

22 DEAN ANDERSON: He's being really --

1 (Simultaneously speaking.)

2 LCDR GULLO: But that is how I would

3 --

4 MAJ. GEN. WOODWARD: The sentence
5 between 92 and 93. Just out of curiosity.

6 LCDR GULLO: Yes, so 93 is just
7 elevated now to two years as well, under the 2015
8 version of things. It was one year up until last
9 year.

10 MAJ. GEN. WOODWARD: So they have an
11 analogous sentence --

12 LCDR GULLO: It is analogous. Yes,
13 ma'am.

14 PROFESSOR SCHULHOFER: But I'm
15 thinking more of, you know, thanks a lot. You
16 know, we share a beer and pizza while we're doing
17 it. But it's still wrong, right? I mean would I
18 be right to say that in cleaning out the garage,
19 help paint. And let's say the DI himself is
20 working side by side with the recruit.

21 But he's misusing his position to get,
22 you know, some personal benefit that he should be

1 hiring a contractor. Would it be right to say
2 that that's just an obvious violation of Article
3 92? No humiliation, but just -- ma'am?

4 MAJOR PAYNE: I think it is, sir. But
5 I highly doubt that one, or even a few instances
6 of that would be taken to a court-martial. It
7 would probably be first handled through a letter
8 of reprimand, as we would call them in the Air
9 Force. And then non-judicial punishment.
10 Perhaps if they continued. I think that's --

11 DEAN ANDERSON: So what's the
12 heartland of 92? What's the heartland of 92?

13 LCDR ROBERTSON: It's all over the
14 place.

15 DEAN ANDERSON: So 92 is just a
16 general vacuum for a lot of different kinds of
17 things?

18 LCDR ROBERTSON: It's violation of a
19 lawful general order.

20 DEAN ANDERSON: Right.

21 LCDR ROBERTSON: Or violation of a
22 direct lawful order.

1 DEAN ANDERSON: I guess -- you got a
2 couple law professors up here.

3 LCDR ROBERTSON: Yes.

4 DEAN ANDERSON: And so think about,
5 what's the heartland of the crime.

6 LCDR GULLO: There's three subsets of
7 92. So violation of a lawful general order is
8 typically coming from a flag or a general
9 officer. And that's been published, right? So
10 everybody should know about a constructive
11 notice, if you will.

12 Sub 2 is a violation of a lawful
13 order, which could be given by Lieutenant Colonel
14 Hines to me right now to stop talking and I
15 continue to talk, okay. And it was found lawful.
16 And so there's less punishment under Sub 2 then
17 there is under Sub 1.

18 Finally, Sub 3 is a catchall called
19 dereliction of duty. And that amounts to showing
20 up late to work, or mopping the bathroom floor in
21 a really bad way repeatedly. And that is
22 punishable with even a lesser punishment. I

1 believe it's six months maximum.

2 PROFESSOR SCHULHOFER: If I could just
3 wrap up my question so that --

4 LCDR GULLO: Sure.

5 PROFESSOR SCHULHOFER: -- I just --
6 there's just so much on the tip of my tongue, and
7 I just want to get them off my table so that I
8 can think. And then I really would like to turn
9 the floor to other people.

10 One point that you made, Commander
11 Robertson, was that you could have the situation
12 of the very sophisticated 34 year old recruit.
13 And you said it's rare, but that could happen.
14 How often do you have the other kind of situation
15 where you have a 18 year old, 17 year old recruit
16 who feels she can't say no, but either there's no
17 explicit threat, or it's he said, she said.

18 And she says, there was -- and
19 something in the way he put it, you know, it was
20 pretty clear that he was going to send me back to
21 square one. And he said, I never -- first of
22 all, I didn't put it that way. And, you know, I

1 put it somewhat different. I didn't say anything
2 of the kind. So how often is it the case that
3 you have either a recruit who just feels she
4 can't say no, even though nothing was in the air,
5 or that it's a he said, she said. How often do
6 those situations arise?

7 LCDR ROBERTSON: I would have to defer
8 to Adam or Major Payne, given their experience at
9 where they are.

10 MAJOR KING: Yes, sir. So in the
11 drill instructor, recruit environment, I don't
12 see that very often. That it's a very rigid
13 environment. Where there's not a lot of free
14 time period, for anyone to do anything. Any type
15 of misconduct. In the recruiting world, that's
16 where, in the Marine Corps. Again, this is all
17 Marine Corps Parris Island specific. In the
18 recruiting world I do see those types of
19 allegations.

20 PROFESSOR SCHULHOFER: Can you, and I
21 apologize, can you explain that? This is a
22 civilian question. I think a recruiter as

1 somebody who's at one of those Armed Forces
2 storefronts in a mall.

3 MAJOR KING: That's an accurate --
4 it's true.

5 PROFESSOR SCHULHOFER: So what is --

6 MAJOR KING: That is our recruiter.
7 So we have --

8 PROFESSOR SCHULHOFER: I don't see
9 where the abuse --

10 MAJOR KING: Sure.

11 PROFESSOR SCHULHOFER: -- setting.
12 Parris Island, I have the pictures of.

13 MAJOR KING: Yes, sir. And this is
14 the area where I think I run into this type of
15 allegation. This constructive force, the implied
16 threat. Or even the expressed threat in the
17 recruiting dynamic. You have a high school
18 student whose hopes and dreams are on becoming a
19 United States Marine or a Soldier, Airman,
20 Coastie.

21 And that's all they want to do is go
22 into that Service. And the recruiter is the one

1 that's going to facilitate that. And so you have
2 a young man or woman who is usually in their mid-
3 20's that is going to facilitate that
4 application. There may be --

5 PROFESSOR SCHULHOFER: The recruiter
6 could decide that the person doesn't measure up
7 and not forward their application?

8 MAJOR KING: I think there are checks
9 and balances there. Please don't get me wrong.
10 But there are threats that can be made. And
11 there could be implied threats that are made to
12 these perspective applicants regarding medical
13 waivers. Sometimes legal waivers, academic
14 waivers. Where there could be a threat there.

15 So that's where I see it more often.
16 Where there's an allegation that a recruiter
17 threatened to not process my medical waiver. Or
18 that recruiter threatened to expose some other
19 type of legal problem.

20 PROFESSOR SCHULHOFER: Well, I will
21 rest my questions and just sum up with this and
22 turn it over. But my concern is that -- and I'm

1 guessing -- and you folks know -- but I'm
2 guessing that there are just lots and lots of
3 cases where a person who is targeted for sexual
4 attention feels that she can't say no.

5 Even though nothing is made explicit,
6 or there is some kind of a swearing contest about
7 exactly what was said to the point that the
8 members feel, the court-martial members feel, we
9 haven't been convinced beyond a reasonable doubt
10 that a threat was articulated. And under our
11 system, that means that no crime was committed.

12 But from another point of view, it's
13 not to change -- it's not to start prosecuting
14 people who aren't culpable. The point is, why do
15 we care whether it was articulated or not, when
16 the conduct is impermissible and everybody knows
17 it? And the element of inability to say no is
18 inherent in the situation, other than the outlier
19 perhaps. So that's, I think, what we're
20 struggling with is a situation where the
21 inability to freely consent is built in to the
22 dynamic, whether it's articulated or not.

1 And you get into a situation where the
2 message gets muddy because the message is, unless
3 you can prove beyond a reasonable doubt that
4 something was articulated, then you haven't
5 committed this very serious crime. You're only
6 in this area of violating a general order and
7 exploiting your position to get your garage
8 cleaned out. That's what I'm struggling with.

9 DEAN ANDERSON: Okay, so rather than
10 give you an opportunity to respond to that, we've
11 got two other folks on the Panel. I want to make
12 sure everybody on the Panel gets an opportunity
13 to ask questions. Ms. Kepros, you were next.

14 MS. KEPROS: Thank you. I guess my
15 first question isn't even for you; it's for
16 Colonel Hines. This is from the Benchbook?

17 LTCOL HINES: Yes. And I didn't want
18 to take up a lot of time, Ms. Kepros, but this
19 might be something just very briefly. And maybe
20 it's a question for this panel or the other
21 panelists.

22 So this is from the Benchbook. And I

1 know, for the Panel, this is Page 474. And it's
2 part of those initial instructions for the
3 present version.

4 And so I think the issue is, and you
5 can correct me, but there are two different parts
6 of the threat instruction. The second part, on
7 Page 477, I think it basically regurgitates what
8 some of you have been saying was in the 2007
9 Statute.

10 But this isn't part of the Benchbook
11 instruction that the judge gives the members.
12 All the judge gives the members is this first
13 part.

14 And so I think that's something for --

15 DEAN ANDERSON: That's one question
16 for us later in our deliberations.

17 LTCOL HINES: -- you to keep in mind
18 later. But --

19 MS. KEPROS: Okay, that's very
20 helpful. Because as you were saying, it doesn't
21 talk about a person abusing their rank. I'm
22 going, well, this Benchbook instruction talks

1 about a person abusing their rank and how that
2 can constitute a -- threatening or placing that
3 other person in fear.

4 That's an example that's given in this
5 instruction. Or benchbook or whatever this is.

6 LTCOL HINES: Right. This is what's
7 weird, Ms. Kepros, is this is for the judge.

8 MS. KEPROS: Right.

9 LTCOL HINES: But the judge doesn't
10 read this part to the panel for some reason.

11 MS. KEPROS: Oh, okay.

12 LTCOL HINES: So maybe that's part of
13 something you can recommend that he can do.

14 MS. KEPROS: Well, and that's actually
15 my question to this panel now. As you're saying,
16 you know, I think part of the problem is there's
17 not enough example, maybe, given to what this
18 terminology means. What's a wrongful action or
19 what some of these scenarios -- and something
20 we've heard through the course of various rounds
21 of testimony is people saying, yes, maybe you
22 don't want to try change the Statute or recommend

1 a change to the Statute, but you can address some
2 of the problems with definitions, changing the
3 Benchbook, changing, you know, some of that
4 procedural guidance that exist.

5 And just the fact that many of the
6 examples you gave were, I felt addressed by this
7 thing, but you're not using it or seeing it in
8 your practices. Is this an adequate place to
9 make changes or does it need to really be in the
10 Statute or somewhere else?

11 MAJOR KING: What page are --

12 MS. KEPROS: This is Page 477.

13 MAJOR KING: Okay. So I think that
14 one of the problems is that this is an old --

15 DEAN ANDERSON: It's an old version.

16 MAJOR KING: It's an old Statute.

17 DEAN ANDERSON: So that's 2007.

18 MAJOR KING: So what you're looking at
19 there, on 477, is going to be the instructions
20 that were from 1 October 2007 --

21 MS. KEPROS: Okay.

22 MAJOR KING: -- to 27 June 2012. So

1 these were the instructions that Major Payne was
2 reviewing, was referring to as at least
3 encompassing, having some specific language that
4 a military judge could provide to members that
5 would encompass abuse of rank.

6 That's no longer there in this new
7 definition which kind of encompasses all of those
8 illustrations, from '07 to '12, under one term.
9 Which is this wrongful action contemplated. With
10 no explanation of what wrongful action
11 contemplated is.

12 So that's -- so you're right. It's
13 probably very confusing to look at that and say,
14 it says it right there. Well the current Statute
15 does not.

16 DEAN ANDERSON: So mindful of time,
17 does that clarify, Ms. Kepros? Do you have other
18 questions?

19 MS. KEPROS: Well, I mean, I'm trying
20 to understand. If a sufficient solution to the
21 problem that you have articulated is to make a
22 change to the Benchbook, or does it require a

1 statutory change?

2 MAJOR PAYNE: Ma'am, I would say that
3 it needs to be a statutory change. I know from
4 seeing this issue come up in appellate courts.
5 When military judges or someone who's not -- I
6 mean, the Military Judge's Benchbook is not the
7 law.

8 MS. KEPROS: Right.

9 MAJOR PAYNE: It's an interpretation
10 of the law.

11 Our courts, at least the Air Force
12 Court, has been critical of people trying to put
13 instructions or putting instructions in the
14 Benchbook or giving instructions to the court
15 members that do not specific come from the
16 Statute. So I would be concerned about that,
17 ma'am.

18 LCDR GULLO: And that inherent risk
19 with that, is that unlike the civilians factor
20 where certain appeals are, you know, maybe one
21 out of 1,000 appeals are heard by an appellate
22 court and a state court.

1 In the military system, anybody that
2 gets a punitive discharge, there's a certain
3 amount of confinement and is entitled to an
4 automatic appeal.

5 And so whenever we go outside the
6 instructions or the definitions that have been
7 statutorily provided to us, and the judge
8 provides special instructions that might tweak
9 things, we're swimming in the deep end and it's
10 very, very dangerous waters at the appellate
11 level. Which is automatic.

12 DEAN ANDERSON: Thank you.

13 MAJOR KING: And I would disagree with
14 that view point and feel that wrongful action
15 contemplated is broad enough to include some
16 specific instructions that would include abuse of
17 authority and rank. Based on the statutory
18 intent, which would include abuse of authority
19 and rank.

20 I think what they tried to do in 2012
21 was broaden it to not be too specific in the
22 statute itself, to include other scenarios that

1 might not be contemplated.

2 DEAN ANDERSON: All right, so there's
3 a split on the panel. That's helpful to clarify.
4 Ms. Wine-Banks, sorry about that.

5 MS. WINE-BANKS: Thank you. Actually
6 a number of my questions just got covered by
7 Laurie and Professor Schulhofer.

8 But I'm still struggling with having
9 heard that it is a rare case where there is true
10 consent. The older recruit, whatever.

11 Where there is really a genuine
12 relationship that may end in marriage. That most
13 of these cases, it seems to me, are clear abuse
14 of authority.

15 It's not an expressed threat because
16 it doesn't need to be. The trainee knows that
17 his or her career depends on being put forward
18 and that there can be a very negative consequence
19 to this.

20 And it seems to me also that there is
21 a limited time. Let's just look at basic
22 training.

1 We're talking about a short duration.
2 And even under current law, which may say for 30
3 days or 90 days after, if it's going to be a
4 genuine relationship, why can't it wait for the
5 training plus 30 days.

6 I'm not sure why there is so much
7 resistance to including this in 120 for that
8 limited duration of time where it is obvious that
9 there's a disparate relationship that will affect
10 the capacity to consent.

11 That the person consenting will not be
12 freely giving it. That it has been so
13 misunderstood that people -- I mean General
14 Woodward was saying, there were acquittals there.
15 In what seems to me would have been a clear cut
16 case of abuse of authority.

17 So what is the real objection to our
18 clarifying this and making 120 clearly encompass
19 a strict liability?

20 MS. FRIEL: And to put it in a context
21 for -- and so you see where our civilians are
22 coming from, there are all kind of civilian

1 statutes where they do this.

2 MS. WINE-BANKS: Right.

3 MS. FRIEL: Parole officers and
4 parolees. Correctional, you know, people who
5 work in jails and people who are the inmates.
6 There are all kinds of places.

7 Doctors and patients. Some
8 psychiatrists and patients, depending on what
9 state you're in.

10 So we've got all kinds of places in
11 our world where we say you cannot do this during
12 the relationship.

13 And if you do, it's a crime, and I
14 don't want to hear what you said or what she said
15 or whether factually it was consensual, so we're
16 trying to see why doesn't that work here.

17 DEAN SCHENCK: This is Dean Schenck,
18 can I say something real quick?

19 DEAN ANDERSON: Sure. Please do.

20 DEAN SCHENCK: Okay. So my just
21 having worked in the JAG Corps and worked in the
22 Criminal Law Division where Chuck Pede was the

1 head, and he briefed you.

2 Just from my experience in the JAG
3 Corps and working with the changes to the manual
4 and the UCMJ, I think one general consensus
5 throughout the Service is the fear.

6 Once we send recommended changes,
7 statutory changes, it opens the big book. And
8 once we do that, we end up with all sorts of
9 things we never planned on.

10 So it's the control of, you know, if
11 we could agree that you could add that one
12 provision, that I believe Title 18 has, when
13 someone in your care, the provision is in Title
14 18, it's just that is if we go that route, we on
15 the subcommittee would think, oh, that would be
16 easy. But in reality it turns out really, in
17 some circumstances, really bad.

18 DEAN ANDERSON: So, Dean Schenck,
19 that's the argument against major overhaul
20 versus, am I understanding? Is that the argument
21 between major overhaul of 120, which is resisted
22 all around for legitimate reasons, given multiple

1 versions floating around and the difficulties
2 there, and for other reasons as well.

3 Versus more minor tinkering, if you
4 will, through the use of jury instructions and
5 Benchbook revisions and what not? Is that -- are
6 you talking about that tension?

7 DEAN SCHENCK: What I'm saying is we,
8 on the Joint Service Committee and having been on
9 the working group of that committee, propose very
10 limited changes, statutory changes.

11 And the reason we do that is because
12 the history of sending changes up to the NDAA, we
13 never know what's coming back. And so that fear
14 of asking Congress, hey, open up the big book of
15 Article 120, even to the -- I mean almost to the
16 very minute that the NDAA is going to pass, we
17 never know what's coming out. Because of the
18 negotiations on the Hill.

19 And frankly I think that the original
20 Article 120 is a prime example.

21 DEAN ANDERSON: So this is a core
22 challenge of this Committee's work, generally.

1 And I appreciate you circling back to that.

2 I'm mindful of time and the presence
3 of other experts from the defense side.

4 (Simultaneously speaking.)

5 HON. HOLTZMAN: You know, I've been
6 pretty patient and I'm going to have to leave
7 early so I just have a few questions to ask.

8 DEAN ANDERSON: So, Ms. Holtzman, can
9 we wait one sec? And we'll now have a queue of
10 two, we'll finish up your question and then, Ms.
11 Holtzman, you're up.

12 MS. WINE-BANKS: And let me just ask

13 --

14 HON. HOLTZMAN: Thank you.

15 MS. WINE-BANKS: -- if I can, one
16 additional question. Which is I want to make
17 sure I understood whether using the instructions
18 could solve the problems as opposed to a
19 statutory.

20 And, Major Payne, I thought you said
21 no, that it couldn't. I'm wondering if it would
22 be upheld even, if it was done through a

1 recommended executive order or statutory -- or
2 instruction?

3 MAJOR PAYNE: Well, ma'am, I think
4 it's different from amending the Benchbook.
5 Which is an Army publication interpreting the
6 law.

7 I mean I think that's very different
8 from changing the -- from actually making a
9 statutory change.

10 I have concerns that no matter --
11 whatever the Army does or puts into its
12 Benchbook, the appellate courts are going to be
13 able to say that's not the law, and that's not an
14 appropriate interpretation, so therefore it's
15 incorrect to instruct the jury of its prejudicial
16 error or overstrain the case.

17 That was my main concern. My
18 colleague doesn't have the same concerns, so
19 it's, you know, it's a difference -- it's sort of
20 up in the air I guess. But that's my personal
21 opinion.

22 MS. WINE-BANKS: Let me go back to my

1 original question.

2 MAJOR PAYNE: Sure. And, ma'am, I
3 feel like I would like to provide written
4 comments to the Panel. Because I don't think I
5 can possibly summarize all that I have to say on
6 this, on this particular topic.

7 DEAN ANDERSON: We will take your
8 written comments very seriously.

9 MAJOR PAYNE: Okay.

10 DEAN ANDERSON: Anybody who takes time
11 to write out their comments, we love you and we
12 appreciate your wisdom. So, Maj Payne --

13 MAJOR PAYNE: I think that there is
14 just -- there is a concern when we, as military
15 members look at it, is that it's very overly
16 paternalistic to tell individuals who make a
17 commitment to come into the military and to serve
18 their country to tell them straight up, you are
19 going to be in this position where you absolutely
20 have no agency, you cannot consent, under any
21 circumstances, to sex in that particular
22 situation.

1 Yes, I agree with what everyone on the
2 panel seems to be indicating. In most of the
3 situations we deal with, there is going to be
4 that abuse of power. But in not all of them.

5 And I think just being attorneys, we
6 have a lot of concerns, who have been prosecutors
7 and defenders, we just have a lot of concerns
8 about the justice.

9 Even if we're talking about a minority
10 of people who might be adversely affected and who
11 might be put on sex offender registry, when we're
12 doing the balancing in our particular minds about
13 what is just and what is not just we can't get,
14 or at least I want to only speak for myself, I
15 can't get over the hump to believe that for the
16 wrong or the injustice that we're going to cause
17 to those people who have to register as sex
18 offenders, that that would -- that would be
19 justified or it would outweigh the potential of
20 being able to get more sexual assault
21 convictions. I guess that's a thought.

22 Also, I worry about military members.

1 I feel as if they get a lot of training on sexual
2 assault, and I feel like so much is coming at
3 them that almost we're in danger of losing hearts
4 and minds. Where they start tuning everything
5 out and thinking, oh, well this is just
6 somebody's political cause.

7 And I think there's definitely danger
8 of that. I saw that as a prosecutor, where I
9 felt like some of the members that I had, we had
10 already lost their hearts and minds because they
11 got some much sexual assault training, and
12 there's so much emphasis on it that they started
13 just tuning it out.

14 And I feel like it's important that we
15 strike a balance with how we deal with
16 everything. And it's certainly possible that
17 military members are going to see this as an
18 overly drastic move to make, we won't say strict
19 liability, sir, but to make it a per se crime.

20 And I just worry about backlash. I
21 worry about it harder for prosecutors to get up
22 there and make arguments.

1 DEAN ANDERSON: So it's always
2 fascinating to have military prosecutors in front
3 of you because all of you have experience, almost
4 all of you have experience as defense attorneys.
5 And you always get very subtle.

6 And it's much more one sided I think
7 in the civilian world. That someone is a
8 committed prosecutor and a committed defense
9 attorney.

10 But you all are all over the map. You
11 never know what you're going to get. It's
12 wonderful.

13 MS. FRIEL: It's balanced.

14 DEAN ANDERSON: And it's really
15 helpful to us. Your expertise on all sides is
16 very helpful to us.

17 I'm mindful just of time that we are
18 over, this panel. And Elizabeth Holtzman would
19 like to speak. Ms. Holtzman?

20 HON. HOLTZMAN: Thank you very much,
21 Dean Anderson. I just have a couple questions
22 here.

1 One is, General Woodward mentioned the
2 Lackland case where a prosecution, the charges
3 under 120 were dismissed despite the fact you had
4 a drill sergeant, maybe it was more than one,
5 involved in serial misconduct and abuse of power
6 with regard to trainees.

7 Do we understand why that charge was
8 dismissed? By the judge.

9 MAJOR PAYNE: He was found not guilty.

10 MAJ. GEN. WOODWARD: And your point
11 was that --

12 HON. HOLTZMAN: I'm sorry, he was
13 found -- oh, excuse me, he was found not guilty.

14 MAJOR PAYNE: Right.

15 HON. HOLTZMAN: I mean, did the judge
16 ever explain?

17 MAJOR PAYNE: No. No, ma'am. We're
18 not allowed to get into -- the judge can't reveal
19 his deliberative processes of --

20 HON. HOLTZMAN: Okay. Has there been
21 any analysis trying to explain or understand what
22 the judge was -- why the Judge arrived at that

1 conclusion?

2 MAJOR PAYNE: Well, I --

3 HON. HOLTZMAN: Was there a weakness
4 in the evidence in other words?

5 MAJOR PAYNE: Ma'am --

6 HON. HOLTZMAN: Under 120.

7 MAJOR PAYNE: Ma'am, having read the
8 record of trial, when I served as an appellate
9 counsel, there was evidence presented that the
10 victim may have, at certain points, acted
11 flirtatious before the sexual act occurred. That
12 she may have acted flirtatiously towards this
13 particular individual.

14 There was no evidence that came out in
15 the testimony that he had ever specifically
16 threatened her in any way. Essentially, you
17 know, she had never articulated no.

18 It shouldn't necessarily be a -- it
19 shouldn't be a concern. But that was the fact of
20 the case there.

21 And there just wasn't a lot of
22 evidence, otherwise, of this coercive type of

1 atmosphere or that there was explicit, I guess,
2 coercion used. And so I think all of that played
3 into why there was an acquittal in that
4 particular case.

5 HON. HOLTZMAN: Do you think today, I
6 mean somebody had mentioned, I don't remember who
7 it was, that members are much more receptive
8 today to certain issues than they would have been
9 in the past. Do you think the judge would have
10 come to the same conclusion today?

11 MAJOR PAYNE: I do, yes. I do, ma'am.
12 I don't think that the law has changed such that
13 --

14 HON. HOLTZMAN: I'm not talking about
15 the law; I'm talking about people's understanding
16 of what acceptable behavior is.

17 MAJOR PAYNE: I think that the result
18 still would have been the same. And as I was
19 saying, ma'am, I in fact, I worry bit, and I
20 worried as a prosecutor, that, you know, there's
21 almost somewhat of a backlash among court members
22 where they think perhaps that things are becoming

1 too political and that there's too much emphasis
2 on sexual assault. And so they're less likely to
3 take it seriously.

4 That was my opinion as a prosecutor.
5 And I thought that was very unfortunate.

6 HON. HOLTZMAN: Okay, so you think
7 there would still be an acquittal today under 120
8 in the Lackland case?

9 MAJOR PAYNE: Yes, I do.

10 HON. HOLTZMAN: Okay. Anyone disagree
11 on the panel?

12 LCDR ROBERTSON: I disagree with the
13 backlash from the members. That's not been my
14 experience. My experience is the members have
15 taken it on board, and members are very
16 deliberate in looking at all of the evidence, and
17 are more receptive to testimony about what can be
18 referred to as counterintuitive behavior or
19 understanding that the person didn't fight back
20 because that's not what they do.

21 HON. HOLTZMAN: Okay. Do you think the
22 judge would have come to the same conclusion

1 today?

2 LCDR ROBERTSON: I have no idea, ma'am,
3 because I don't know enough about the facts.

4 HON. HOLTZMAN: The record. Okay, fine.
5 My second question has to go to Article 92, which
6 has been held out as a solution to this problem.
7 Do we have any information about the frequency of
8 prosecution, the effectiveness of prosecutions,
9 the sentences meted out and so forth under 92? In
10 other words, I really want to understand why this
11 is --- and whether, in fact, is an acceptable
12 alternative? Does anybody have any comment on
13 that?

14 LCDR GULLO: Ma'am, this is Lieutenant
15 Commander Gullo. In April of this year, I went
16 out to Seattle to serve as a judge on a case
17 where the recruiter was engaged in the kind of
18 behavior that one of the professors was talking
19 about with a recruit. And, ultimately, kissed her
20 on a driveway, and I think the implicit threat
21 was that her recruiting package would be slowed.
22 She wouldn't get to Cape May as quickly. She was

1 in Alaska. And that case was prosecuted at a
2 special court-martial under Article 92, Sub 1.

3 Of course, like every good crime,
4 everybody lies about it afterwards to federal
5 agents so there was also a false official
6 statement charge in there, as well as a
7 dereliction of duty charge. But the individual
8 had 16-1/2 years of service, and so he was 3-1/2
9 years away from military pension. He was an E-6,
10 which is a First Class Petty Officer, and I
11 awarded him a punitive discharge and five months
12 of confinement, and reduction to E-1.

13 So, I can personally speak to the
14 success of a prosecution under Article 92. The
15 Government, I thought, right sized the case and
16 prosecuted accordingly. And based upon the pleas
17 and the sentencing case, that was the adjudged
18 sentence that I arrived at.

19 LCDR ROBERTSON: And in the early part
20 of this year, I had two cases. One was a
21 recruiter, an E-8 with 20 some odd years of
22 experience. He pled guilty to a 92 for having an

1 impermissible relationship. There was an
2 allegation there was consensual sex. We didn't
3 have any allegation that he had used his position
4 or made any threats, or had even implied that it
5 would affect her ability to come in the Navy. And
6 she was able to come in the Navy, but he pled
7 guilty at a summary court-martial. He was reduced
8 one pay grade, and so that will affect the amount
9 of retirement that he has.

10 I also had a recruiter who was
11 prosecuted under 92 and 120 for abuse of sexual
12 contact, impermissible relationship. He was found
13 guilty of both. He was --- he had 18-1/2 years of
14 service. He was given, I don't know the
15 confinement, but less than a year of confinement
16 for kissing this woman and grabbing her buttocks,
17 and he is being processed for administrative
18 separation.

19 MAJ GEN WOODWARD: Do you know what
20 Estacio and LeBlanc got, because they did get ---

21 MAJ PAYNE: LeBlanc I know got 30
22 months of confinement, and punitive discharge. I

1 can't remember off the top of my head if it was
2 dishonorable or --- it was probably dishonorable,
3 but --- or bad conduct, but it was a punitive
4 discharge, as well.

5 LT COL HINES: Ms. Holtzman, this is
6 Lieutenant Colonel Hines. I'll put this out as a
7 premise, and I'll ask the Panel whether they
8 agree or disagree with me, but I would think just
9 anecdotally in 100 percent of these cases where
10 you have this fact scenario, as a prosecutor
11 you're charging both --- if you can charge the
12 sexual assault, you charge that, but you're
13 always charging Article 92, as well, for
14 Contingencies of Proof. Would the prosecutors
15 agree with that? So it's almost always a part of
16 these prosecutions.

17 DEAN ANDERSON: So, it's like a
18 failsafe that you have.

19 LT COL HINES: Yes, it's like a lesser
20 included almost. Yes, ma'am, absolutely.

21 DEAN ANDERSON: Ms. Holtzman, are you
22 good, or do you have other questions?

1 HON. HOLTZMAN: Yes, those are my
2 questions, and I want to thank also the panelist
3 who said that he served in the Brooklyn DA's
4 office.

5 LCDR GULLO: Right on, ma'am.

6 DEAN ANDERSON: Do we have any last
7 comments from anyone on the panel?

8 MAJ KING: Ms. Wine-Banks.

9 MS. WINE-BANKS: Yes?

10 MAJ KING: To briefly answer the
11 questions you had, it's a very important
12 question. I think it's probably the most
13 important question that this Panel, at least, has
14 to address.

15 My view on it is, if the Government
16 can't prove beyond a reasonable doubt that there
17 was a threat, either implied or expressed, then
18 my view is that that accused should not be
19 convicted of a sex assault. That is my viewpoint,
20 so if it's --- in a lot of the scenarios we
21 discuss, there is an implied threat that is
22 there. And I think that we could charge it, and

1 with better instructions, even prove an implied
2 threat under the existing statute. But if it
3 doesn't fall into that, I don't think it is fair
4 to convict a Servicemember of a sexual assault
5 offense when the entire interaction did not
6 include any type of threat, either express or
7 implied.

8 MS. WINE-BANKS: Thank you. That's
9 actually a very helpful answer. What --- how easy
10 is it to charge an implied threat just based on
11 the overall totality of the circumstances; I'm
12 the trainee, you're the drill instructor. My life
13 is in your hands. My assumptions as the trainee
14 are that my career is going to end if I don't
15 give in to your request, nice as it may be.

16 MAJ KING: Yes, ma'am. I think it would
17 ----I could charge it, but it would be difficult
18 to prove due to the lack of instructions to the
19 military judge. Now, we could craft a novel
20 instruction and try and reach back to Hicks and
21 some of the language about this totality of
22 circumstances. But I think it would be

1 challenging, but I think we could still prove it,
2 this wrongful act contemplated and in this
3 implied threat dynamic.

4 MS. WINE-BANKS: So, what's the biggest
5 hurdle to successfully charging that way? Is it
6 the Statute, or could it be through the Manual,
7 the instructions?

8 MAJ KING: Yes, ma'am. My view is that
9 having instructions that are tailored, and I am
10 concerned about having the right instruction in
11 an appellate review based on these non-binding
12 instructions. The Military Judge's Benchbook is
13 non-binding instructions, but I think that's the
14 biggest hurdle. How does the judge instruct the
15 members about this wrongful act contemplated, or
16 wrongful action contemplated? How does the judge
17 even start to do that, and how does the
18 government craft a model instruction for them?

19 LCDR ROBERTSON: And I would say that
20 another large hurdle is the mistake of fact as to
21 consent defense that the accused raises in almost
22 every bodily harm case. The same instruction is

1 going to be given, and that instruction, in my
2 experience, carries a lot of weight, and is a big
3 hurdle for members to get over.

4 DEAN ANDERSON: So ---

5 MS. FRIEL: One kind of an argument,
6 though, for maybe making it a per se crime. Then
7 you don't get into the mistake of fact ---

8 LCDR ROBERTSON: Yes, ma'am. And,
9 unfortunately, both of you have made some very
10 compelling arguments that made me rethink my
11 position. I'm not willing to say that I
12 completely agree. But yes, ma'am, it could be.

13 DEAN ANDERSON: So, we're going to let
14 Stephen get the shortest question ever.

15 PROF. SCHULHOFER: And there can be the
16 shortest answer, also.

17 DEAN ANDERSON: No, no, the question,
18 also.

19 PROF. SCHULHOFER: Yes, the question,
20 primarily for Major King. Is your position
21 against using Article 120 in the absence of an
22 implicit threat? Is that position shaped

1 primarily by the fact that it's a registerable
2 offense? Would you take the same position if it
3 were not?

4 MAJ KING: I think ---

5 PROF. SCHULHOFER: Short answer.

6 MAJ KING: Yes, it is shaped. It's not
7 just --- but not just the registerable offense,
8 but I think for those of us that have had defense
9 counsel experience, having a client convicted of
10 any 120 offense, you are now going to deal with
11 how does that brig, the confinement facility,
12 treat that Article 120 offense? Because there are
13 some 120 offenses that under our instructions are
14 not registerable, but for every client that I've
15 had that's dealt with that, they run the risk,
16 and we have to advise them that your state may
17 interpret that as a registerable offense. That's
18 the challenge with it being tucked up under 120.

19 PROF. SCHULHOFER: Okay, thank you.

20 Very helpful.

21 DEAN ANDERSON: This has just been so
22 helpful. What a terrific panel this has been.

1 Thank you all so much. We have more experts
2 coming to help us in our deliberations. I just
3 want to thank you all and reiterate an invitation
4 to even a short one-page analysis that you think
5 of after this panel presentation. Any other
6 comments you wish to submit to us, we take them
7 very seriously. We read them, and we'll take them
8 into account. Thank you all.

9 Let's do a quick five-minute break and
10 then we'll come back.

11 (Whereupon, the above-entitled matter
12 went off the record at 10:43 a.m. and resumed at
13 10:54 a.m.)

14 DEAN ANDERSON: Welcome. We very much
15 appreciate the insight and wisdom of this panel
16 on these core challenging questions that we are
17 tackling here today on abuse of power and
18 coercive sexual offenses, particularly looking at
19 the trainer/trainee context.

20 We are delighted to have you here with
21 us, and we'll start with Major Wardle.

22 MAJ WARDLE: Thank you, ma'am. Good

1 morning, Madam Chairperson, Members of the
2 Subcommittee. First off, I appreciate the
3 opportunity to come here and speak to this.

4 Like you said, my name is Major Ryan
5 Wardle. I'm currently the Senior Defense Counsel
6 at the Fort Riley Field Office of the United
7 States Army Trial Defense Service. I think both
8 formatively for the issues today, from 2011 to
9 2013, I was the Chief Military Justice at the
10 United States Army Training Center at Fort
11 Jackson in South Carolina. So, ma'am, I had the
12 opportunity to brief you when you came and
13 visited. And there I supervised the investigation
14 and prosecution of a number of trainer/trainee
15 misconduct cases ranging from inappropriate
16 language from the trainer to the trainee, to the
17 actual sexual assault of the trainee.

18 Based upon my personal interactions
19 with trainees, drill sergeants, AIT platoon
20 sergeants. When I say AIT, it's Advanced
21 Individual Training for those who are sort of
22 next stage in the Army training model, and

1 commanders within this community. Now, my
2 experience as a defense counsel I believe any one
3 size fits all solution such as a status based or
4 strict liability type sexual assault offense for
5 trainer/trainee sex would be a mistake.

6 We saw the full range of fact patterns
7 at Fort Jackson, to be sure, from forcible sexual
8 offenses to consensual sex where the trainer and
9 trainee were intending to remain in a
10 relationship even after graduation. We charged as
11 prosecutors what the facts bore out. That's what
12 we did, and did not shy away from charging sexual
13 assaults where they were present. And we actively
14 engaged trainees to make sure that what was going
15 on either was or was not consensual based upon
16 what they told us. This is before the days of
17 Special Victims' Counsel, where we as trial
18 counsel could directly engage the trainee early
19 and often without --- if they didn't have an
20 attorney at that time.

21 My concern is that defense counsel
22 would be casting a wide net under the generalized

1 belief that no trainee can consent, and catching
2 up trainers who had engaged in consensual sex and
3 subsequently having them subject to registration
4 as a sex offender.

5 These are still individuals who have
6 committed criminal offenses under our statutory
7 framework, as it stands, and these were not taken
8 lightly while we were at Fort Jackson. Their
9 misconduct, at least in my experience, was taken
10 extraordinarily seriously. Any allegation while I
11 was there at Fort Jackson carried a suspension
12 from duties, investigations by professional
13 Military Police officers, which often took a long
14 time. It removed them from their drill sergeant
15 duties and harmed their unit and their
16 reputation.

17 These are difficult jobs that drill
18 sergeants do and MTI trainers. They spend a lot
19 of time in them, and they know when they're taken
20 out of the fight, the training fight, that it
21 affects all of their comrades. And this is a
22 definite impact on them.

1 If the allegation was founded in sex
2 or sexual contact that occurred, at least during
3 my tenure there, they were prosecuted almost 100
4 percent of the time. We took them to trial if
5 they had sex with a trainee. Their punishment was
6 public. We made it public, and we utilized the
7 results in training at the Drill Sergeant School,
8 where I personally instructed drill sergeants
9 during their Drill Sergeant Training.

10 These cases were all different,
11 though. I did not supervise one case that was the
12 same as the other, just as I did not meet one
13 trainee whose experience with the drill sergeants
14 was the same as all others. Some of the trainees
15 were quite clear that the sex they participated
16 in was very consensual.

17 By way of example, just even as a
18 defense counsel now at a FORSCOM installation, I
19 have had a client who began a relationship with
20 that client's AIT platoon sergeant, so that would
21 be prohibited. They are married now, so I
22 wouldn't characterize how their relationship

1 started, although criminal under our rules, as in
2 any way non-consensual or assaultive.

3 Under a one size fits all statutory
4 framework, fact patterns such as those and others
5 that we experienced while I was at Fort Jackson
6 would be dealt with the same way as cases we had
7 at Fort Jackson that were, in fact, sexual
8 assaults and rapes, where the trainee was not a
9 consenting party in any way.

10 If I learned anything during my time
11 in military justice, is that as soon as I think
12 I've heard all the possible scenarios or strange
13 fact patterns, I will undoubtedly hear something
14 new. So, my concern, again, particularly as a
15 defense counsel is that criminal sanctions and
16 lifetime collateral consequences will be
17 disproportionate to the actual factual criminal
18 activity in some of these cases, namely those
19 where the trainees are, in fact, and have said to
20 me to my face, I was consenting. I wanted to do
21 this. I liked him. This is what I was trying to
22 do.

1 So, thank you very much for the time
2 and the opportunity. I look forward to your
3 questions, and that's what I have to say.

4 DEAN ANDERSON: Major Wardle, I am
5 confident that this Panel will have many
6 questions of you based on your opening statement.
7 It's just a guess. Actually, it's based on our
8 prior conversation, so this is lovely.

9 MAJ WARDLE: Yes, ma'am.

10 DEAN ANDERSON: It's just an extension
11 of the dialogue that we've been having, so we'll
12 go through the panel. Everybody can make opening
13 remarks, and then we'll start to question you.
14 Captain Olson.

15 CAPT OLSON: Good morning, ladies and
16 gentlemen. Thank you for inviting me here to
17 speak with you.

18 I did sit in earlier during the
19 earlier testimony, so I'm going to couch what I
20 say with I agreed with a lot of what the
21 prosecutors were saying earlier.

22 My background, I've served as a trial

1 counsel in Yuma prior to the reorganization, a
2 Victim Witness Liaison Officer down there, pretty
3 much a sole hat trial counsel operating alone for
4 the --- by and large.

5 Following regionalization, I moved to
6 the Recruit Depot where something that
7 distinguishes me from the other people who have
8 spoken is that I've served as a series commander,
9 an executive officer for Recruit Training Line
10 Company. I've trained recruits, I've supervised
11 drill instructors. I've handled these issues day
12 in and day out. I've also served as a Uniformed
13 Victim Advocate while stationed there on the
14 Depot. So, my experience, and now currently, I'm
15 serving as a defense counsel. My experiences are
16 definitely biased by my experience there, I will
17 say.

18 Recruit training has changed a lot,
19 and I know a lot of the previous materials I
20 reviewed dealt with testimony from back in 2013,
21 and a lot of these cases are older. The situation
22 on the ground has changed as far as recruit

1 training. Recruits are notified immediately, and
2 are immediately sat down and given information
3 about how to report any type of sexual offense.
4 And it occurs on pickup with their drill
5 instructors. So, they can be sitting there,
6 brought in, they're shaken up, but immediately,
7 immediately after being shaken up and introduced
8 to their drill instructors, they're sat down and
9 ---

10 DEAN ANDERSON: When you mean ---
11 sorry. When you say shaken up?

12 CAPT OLSON: Shaken up, I mean by shock
13 and awe of pickup that occurs during recruit
14 training and ---

15 DEAN ANDERSON: Like in your face
16 stuff?

17 LT COL HINES: I have a similar bio.
18 Just briefly explain to them what that --- what
19 pickup means. It's the first time the recruits
20 are introduced to the drill instructors who are
21 going to train them for 12 weeks. It's a very
22 intimidating situation.

1 CAPT OLSON: It is. So, the recruits
2 are sat down in a tiny little square in their
3 squad bay. The drill instructors --- I would come
4 out as the series commander and introduce the
5 drill instructors. The senior drill instructor
6 gives a speech to the recruits, and it's very
7 intense, to say the least.

8 After receiving this intense speech
9 while he's standing amongst them, they get up,
10 stand up, get on line, and that's when the chaos
11 begins of recruit training. Shouting, yelling,
12 instant obedience to orders is being enforced
13 almost immediately. So, I understand when the
14 Panel was discussing earlier fear and how that
15 gets instilled.

16 Now, the recruits immediately
17 following this shock and awe of the initial
18 meeting of their drill instructors are sat down,
19 and they're told about sexual assault. And
20 they're explained how to report. Your Uniformed
21 Victim Advocate is Captain Olson. If you ever
22 have an issue, please let your senior drill

1 instructor know, and it'll be reported. They're
2 not asked to explain anything, and they're
3 directed to the Uniformed Victim Advocate
4 directly. And I could go on at length, but I want
5 to let the other Members here introduce
6 themselves.

7 But just to get to the base of my
8 opinions based on my experience, I am opposed to
9 changing the Statute as it is. I think 92 is
10 sufficient. I think 120 is sufficient as it is.
11 And, again, I agree with what was discussed
12 earlier. Thank you.

13 DEAN ANDERSON: Thank you, Captain
14 Olson. Captain Shure.

15 CAPTAIN SHURE: Thank you, ma'am. Good
16 morning, honorable members of the Panel. As you
17 know, my name is Captain Lauren Shure. I'm
18 currently assigned to the Air Force Appellate
19 Defense Division here in the NCR where I
20 represent Airmen on their appeals before both the
21 Air Force Court Criminal Appeals and the Court of
22 Appeals for the Armed Forces.

1 Prior to my assignment here, I was
2 stationed at Joint Base San Antonio Lackland
3 through the height of what we'll call the
4 scandal, for lack of a better word, with the
5 MTIs.

6 During my time there, I represented
7 over 18 MTIs in offenses related to the sexual
8 misconduct with trainees, that's of the 36 that
9 were court-martialed. My experience defending
10 MTIs ranges also from minor administrative
11 disciplinary actions to courts-martial.

12 I'm extremely familiar with the
13 training environment and worked in the legal
14 office there at Lackland at the beginning of the
15 Walker investigation, along with Estacio,
16 LeBlanc, and Vega-Maldonado. You may be familiar
17 with those names. If not, I can help you with
18 that.

19 I was involved in nearly every single
20 MTI prosecution and defense that came through
21 Lackland from 2011 to 2013, as all of them were
22 handled out of my Defense Office.

1 I believe the current structures of
2 the UCMJ, specifically Article 120, are fully
3 capable of handling the sexual misconduct within
4 the training environment.

5 Through the scandal, we were able to
6 deal with and prosecute appropriately where we
7 found coercive sexual behavior, and where we
8 found simply consensual sexual behavior between
9 two adults.

10 Article 120 and the definition of
11 threatening wrongful action, I point you
12 specifically to United States v. Walker. I think
13 the definition under the 2007 version was capable
14 of handling all the cases where we saw coercive
15 sexual behavior.

16 I understand that the Article 120 is
17 different, the definition is now different. I
18 think that a --- I know you all were speaking
19 last time about expanding the definition. I think
20 that rather than a statutory change, a Benchbook
21 instruction would likely be the fix that you're
22 looking for.

1 A couple of other things I want to
2 talk --- touch on just in my opening. Following
3 all that went on in Lackland during my tenure,
4 General Woodward came down, and she did a lot of
5 work down there, of which I'm intimately
6 familiar, and there have been changes. There have
7 been a lot of changes. There is now a critique
8 system that is frequently used by trainees. It
9 can be anonymously done, discussed with the
10 trainees by leadership outside the presence of
11 MTIs. There is just a number of things that have
12 been changed based on General Woodward's
13 recommendations and other things that we found
14 that were wrong with the training environment
15 that we've now worked towards, and I believe the
16 changes are working.

17 I want to briefly touch on some of the
18 fears and concerns from a defense perspective I
19 have, with changing Article 123, Strict Liability
20 Offense. First and foremost, and I know my
21 colleague is going to touch on this a little bit
22 more, but the fear of sex offender status for

1 behavior that is, frankly, 90 percent of the time
2 consenting between two adults. That is what we
3 saw the most.

4 Additionally, the trainees are simply
5 not in the same position as a ward of the state
6 or a prisoner. They don't need those same
7 protections. They absolutely need protections,
8 but not in the same vein as we give those to
9 prisoners and wards of the states.

10 We require trainees to sign a
11 contract. We shouldn't then at the time of their
12 signing the contract take away their ability to
13 do the very thing they just did. It's as if we
14 say the moment you sign a contract, you no longer
15 can make decisions for yourselves.

16 Trainees can and do leave basic
17 training quite frequently. They leave with an
18 entry-level separation 90 percent of the time,
19 and that entry-level separation is its own
20 category. It's not negative; it's not bad.
21 There's nothing wrong with it. They have the
22 opportunity to freely move around BMT and do

1 things for themselves, and speak up, especially
2 with the critique system that we have.

3 Moreover, and I think this is unique
4 to the Air Force, we want our Airmen to be
5 innovators. And although in BMT we do instill
6 adherence to orders, we ask them repeatedly to
7 innovate, to do things for the Air Force. And if
8 they hear an order that is not lawful, it is
9 repeated throughout our careers that they do not
10 need to follow that order. I think that if we
11 were to take that away in BMT we are undermining
12 the very thing that we are trying to teach them.

13 I will close with this. Of the roughly
14 36 MTIs that were court-martialed, only six to
15 seven were involved in sexual misconduct that
16 occurred during BMT. Of those six to seven, only
17 two were found to be the result of some coercion
18 or abuse of power. The vast majority of the MTIs
19 that were court-martialed at Lackland had
20 consensual sexual relationships with trainees who
21 were either in technical training, or
22 transitioning to technical training. I think the

1 current construct is capable of handling it, but
2 I'm open to questions about how we change it and
3 make it better.

4 I thank you for your time and welcome
5 any questions that the Panel will have.

6 DEAN ANDERSON: Thank you, Captain.
7 Lieutenant.

8 LT HOCHMUTH: Thank you, ma'am. Madam
9 Chair, Distinguished Panel Members, I'm
10 Lieutenant Paul Hochmuth. I'm currently the
11 officer in charge of Defense Service Office
12 Southeast in Pensacola. Down in Pensacola is the
13 Naval Aviation Training Center. All of the Navy
14 pilots, all of the enlisted members who are going
15 to be working on our aircraft are going to be
16 going through Pensacola. In addition to that, we
17 also have the Coast Guard down there, and the
18 United States Marine Corps is down there, as
19 well.

20 I have conducted three tours as a
21 defense counsel, and I have conducted one tour as
22 a prosecutor during my time in the Navy. In my

1 current command, I have represented several
2 instructors in both the Navy and in the Coast
3 Guard.

4 The current practice of charging
5 inappropriate conduct by instructors is both
6 effective and appropriate. The current Articles
7 allow prosecutors the flexibilities they need in
8 charging. In addition, both the Coast Guard and
9 the Navy, and the subsequent training commands,
10 have their own policies to address instructors'
11 behaviors. No change to the language of
12 threatening or placing another person in fear is
13 needed, as the 2015 edition of the Military
14 Judge's Benchbook will actually address that, and
15 it changes the definition back to the previous
16 2007 edition.

17 The prospect of strict liability
18 offenses for instructors, and the potential for
19 additional Articles requiring sex offender
20 registration are of great concern to myself, and
21 to the Navy Defense Bar. The best example of
22 strict liability in our society today is one

1 dealing with child pornography.

2 A law that is necessary but at times
3 has terrible consequences for some of the young
4 Sailors and Marines who come in my office.

5 Eighteen and nineteen year old kids who have a
6 girlfriend back at home with a 16 or 17-year old
7 girl sending them nude pictures. I then have to
8 go and tell them that you're now going to be a
9 sex offender, and you're now going to have a
10 criminal conviction for child pornography because
11 your girlfriend or you boyfriend who is a year or
12 two years younger than you has sent you a nude
13 picture.

14 In my experience, the majority of
15 offenses committed by instructors is that of a
16 mutual relationship. A typical offense is one
17 that involves a Navy or a Coast Guard trainee who
18 is older than his or her peers, and is of similar
19 age to the instructor. A relationship between the
20 two develops. The chain of command finds out
21 about it, usually through Facebook or social
22 media, and it is handled and dealt with.

1 Most of the time, the trainee is
2 punished, but not all the time. The instructor is
3 always going to be punished, and most of the time
4 separated from the Navy.

5 My last point is in regards to the
6 addition of offenses that would trigger sex
7 offender registration. We have veered away from
8 the intent of the law to protect our children or
9 society from predators. As set forth in the
10 federal mandates of 1994, Megan Law in 1996, a
11 recent client of mine was convicted for abusive
12 sexual contact. The abusive sexual contact that
13 he was convicted of was for kissing a girl on the
14 cheek.

15 As we sit here today, my client is
16 going to NCIS this morning, and he is going to
17 have to register as a sex offender for a kiss on
18 the cheek. And the reason he's going to have to
19 register is because the DoD requires that
20 pursuant to our instruction for any abuse of
21 sexual contact.

22 In addition to that, many states have

1 laws on sex offender registration that says if
2 you are found guilty in a jurisdiction that
3 requires registration, you must register in that
4 state. The Commonwealth of Virginia is one of
5 those states. He will never set foot in Virginia
6 again.

7 There is a difference between a
8 predator we want to protect our society from, and
9 an individual making a foolish decision.

10 The current list of offenses covered
11 by the DoD Sex Offender Registration Instruction
12 is too broad, and too inclusive. We should not
13 add to this list. If anything, we need to take
14 away from this list, so I do not believe by
15 adding coercive sexual behavior that is charged
16 under Article 93 or Article 92 should be added to
17 the Sex Offender Registration List that the DoD
18 has.

19 Thank you for your time this morning,
20 and I'm willing to answer any questions.

21 DEAN ANDERSON: Extremely helpful. I
22 appreciate the presentations of each of you.

1 I want to start with you, Lieutenant.
2 You said that the majority of these cases involve
3 --- you used an interesting word, mutual,
4 relationships, which seems even more robust a
5 conceptualization than consensual. And I'm
6 wondering if they're prohibited under Article 92,
7 and if it's clear that they're prohibited to both
8 the trainers and the trainees, it sounds like
9 there's no deterrent effect of 92 and 93 given
10 that they continue. Would you --- what are we
11 missing?

12 LT HOCHMUTH: Well, I think there is a
13 deterrent effect, ma'am.

14 DEAN ANDERSON: You think that
15 otherwise without 92 and 93 they would --- there
16 would be more of it.

17 LT HOCHMUTH: I think there would be
18 absolutely more of it. And what happens in the
19 Navy is, when an instructor shows up, we are
20 bombarded with the Navy sexual harassment and
21 fraternization policy. Both are General Orders,
22 so both --- as a General Order, it's basically

1 strict liability. It doesn't matter if you know
2 about the law or not. If you violate it, you will
3 be held accountable.

4 Further, I talked to our largest chain
5 of command in Pensacola before I came up here,
6 and I said talk to me about what you do with the
7 instructors when they show up. They sit the
8 instructors down, they go over the command
9 policy, which is even more restrictive than the
10 Navy policy as a whole, and the Coast Guard has
11 very similar policy, as well.

12 In addition to that, they make the
13 instructor sign what we refer to as a Page 13, a
14 document saying I have read this, I understand
15 this, and I will not commit this misconduct. If
16 we did not have that, I think we would have even
17 more of these relationships being developed, so I
18 think we do have the deterrent effect.

19 With any law that you pass, you're
20 never going to stop every single action,
21 especially when you're dealing with hormones of
22 young individuals. And the reason I say mutual

1 relationship is because we had the evidence of
2 the emails between the two of them, the text
3 messages between the two of them, of the phone
4 calls between the two of them, and most of the
5 time --- I have represented, and I looked it up
6 before I came up here, over 20 instructors. Not a
7 single one of them was for coercive relationship.
8 It seemed to either be fraternization issue where
9 they're both engaging in that, or it's a sex
10 assault situation where the instructor is doing
11 it against the will of the trainee.

12 DEAN ANDERSON: So, it's fascinating in
13 part because the percentages of the way that the
14 prosecutors conceptualize these cases are
15 completely different. It's the rarer
16 circumstance, I think, that they perceive of, and
17 so I guess I'm wondering does positionality
18 affect how you're describing these cases?

19 LT HOCHMUTH: No, ma'am. I think the
20 difference is we see more of it because it's
21 handled at different levels. The prosecutor is
22 only going to see the most severe cases. As a

1 defense counsel, we are going to see someone who
2 is taken to Article 15 or NJP Captain's Mast, not
3 the usual punishment. We're going to see the
4 individuals who are just being separated, who are
5 just being kicked out. If you're a prosecutor,
6 you're only going to see those cases who are
7 going to a court-martial. And most of the time,
8 it's not to that extreme level.

9 I would say all of my cases, this is
10 just an estimate on my part, I would say probably
11 only 10 percent that actually make it to that
12 high-level court-martial.

13 DEAN ANDERSON: Got it. Thank you for
14 that clarification.

15 Captain Shure, you talked about the
16 critique process.

17 CAPTAIN SHURE: Yes, ma'am.

18 DEAN ANDERSON: What does that mean?

19 CAPTAIN SHURE: So, the critique
20 process is fairly new. And for everyone's
21 education, I did leave Lackland end of 2013, so I
22 called back just to make sure that I was fully up

1 on kind of what they are doing there now.

2 The acronym that they use is IMR. And,
3 essentially, what you have is, you have they call
4 it dropping a critique because there are boxes
5 throughout BMT. In every squadron you have
6 individual boxes with papers where the trainees
7 can simply anonymously write something down,
8 whether that be I didn't like the way my trainer
9 talked to me. I don't like that I don't get to
10 eat more than for 10 minutes, or it can be an
11 instructor made some sexual advance towards me,
12 any of those. Like I said, they can be done
13 anonymously. They can be done giving your name.

14 The MTIs are absolutely forbidden from
15 speaking of their critique system. In fact, I
16 know that MTIs have been punished ---

17 DEAN ANDERSON: Who reads the critique?
18 Who read it? Where does it go?

19 CAPTAIN SHURE: The command, ma'am. So,
20 the leadership within each of the BMT squadrons.
21 From everything they told me, because the
22 critique system was in its infancy when I was

1 defending people, but lately what they've seen
2 is, the moment any critique is dropped, as they
3 say, if it is to the extent of okay, we need some
4 sort of more official investigation of a sexual
5 nature, the MTI is immediately removed from
6 training, hat taken away, relieved of their
7 duties, placed somewhere else.

8 All critiques are fully investigated,
9 whether that be through the leadership or outside
10 individuals coming in. Within two days of their
11 arrival at Basic Military Training, the trainees
12 meet with the commander, the commander of their
13 squadron, or the Training Support Squadron
14 Commander. No MTIs are present during that
15 meeting. They're not allowed to be present. And
16 during that time, the commander informs the
17 trainees of their opportunities to give these
18 critiques, of the ways that they can report, of
19 the different things that they can do during
20 training to report any misconduct. That's just at
21 BMT.

22 At technical training, we've now added

1 a different --- well, let me back up. They also
2 finish BMT with something called Airmen's Week.
3 Airmen's Week is they've graduated and they spend
4 another week at BMT where all of their time is
5 briefed on responsibility, resiliency, and
6 finances. So, they spend this week talking to
7 non-instructors, so not military training
8 instructors. They have the opportunity to meet
9 with the commander of the entire training
10 squadron, I'm sorry, the entire training wing, in
11 addition to the training group that is in charge
12 of Basic Military Training. Throughout that,
13 they're briefed repeatedly on sexual assault.
14 They have the opportunity to speak to
15 individuals, Victim Advocates are there.

16 Yes ma'am?

17 DEAN ANDERSON: Just wondering, are the
18 recruits, the trainees told that consensual
19 relationships are against military orders?

20 CAPTAIN SHURE: Yes, ma'am. Yes, ma'am,
21 they are.

22 DEAN ANDERSON: They are told that as

1 explicitly as the trainers?

2 CAPTAIN SHURE: Yes, ma'am. I think the
3 trainers are probably told it more explicitly
4 than the trainees, but the trainees are informed
5 that it is --- it's not --- it's against military
6 law.

7 I will say, in my experience there I
8 don't recall, to the best of my knowledge, any
9 trainee that was punished for her relationship
10 whether it was consensual or not.

11 DEAN ANDERSON: I'm sorry. I thought
12 you said, Lieutenant, maybe it was your remarks
13 that most of the time the trainee is punished,
14 and always the trainer is punished.

15 LT HOCHMUTH: Typically, in the Navy,
16 the trainee is going to be punished. It depends
17 on what level. I've never seen a trainee go to a
18 court-martial for behavior. I recently did a case
19 where the instructor and a trainee were both
20 separated for a mutual relationship. Typically,
21 the trainee is just going to be separated.
22 There's going to be no additional punishment to

1 her or him. And then most --- I'd say many of the
2 times, they're not punished at all. They're
3 brought into the office. They're told hey, this
4 is inappropriate. Do not do this. This is your
5 second chance. Do not make this mistake again.

6 DEAN ANDERSON: Go ahead.

7 CAPTAIN SHURE: That is not the case in
8 the Air Force, ma'am.

9 DEAN ANDERSON: Okay. Other ---

10 MAJ WARDLE: Yes, in the Army, ma'am --
11 - I'm sorry to speak over you. No, the trainee is
12 very rarely, if ever, punished.

13 DEAN ANDERSON: And is the trainee told
14 that consensual relationships with your drill
15 sergeant are inappropriate?

16 MAJ WARDLE: Yes, ma'am.

17 DEAN ANDERSON: Against military
18 orders?

19 MAJ WARDLE: Yes, ma'am. And the issue
20 is --

21 DEAN ANDERSON: I guess my concern is
22 discussions about sexual assault. They get a lot

1 of education about sexual assault, but if that
2 doesn't include an analysis of consensual
3 relationships between the drill sergeant, or the
4 trainer and the trainee, the trainee may think
5 that that's within the realm of what's
6 appropriate, or at least not explicitly --- maybe
7 not what's in the realm of appropriate, but at
8 least not explicitly prohibited by the sexual
9 assault policies of the military.

10 MAJ WARDLE: Yes, ma'am. My
11 experience was the trainees were very much up
12 front, sensitized to both what sexual assault
13 reporting, what can and can't happen, and also
14 consensually. They knew what the rules were up
15 front. Now, granted these are new --- they're
16 learning ---

17 DEAN ANDERSON: Yes, and a lots thrown
18 at them. I understand ---

19 MAJ GEN WOODWARD: Can I just in really
20 quick, because I --- just because we did a really
21 involved survey, and we actually had a
22 psychologist who went in. And the first day of

1 training, they're briefed on what the rules are,
2 then they're briefed again, and they actually
3 have a class. So, we went through and we actually
4 evaluated their understanding of the policies as
5 they went through the eight weeks. And it was
6 absolutely fascinating that as --- even though
7 they were taught, they didn't grasp it. So, our
8 point was they are just in such a place ---

9 DEAN ANDERSON: They're a little bit
10 shock and awe.

11 MAJ GEN WOODWARD: As well as they're
12 educated, they're not grasping a lot of the
13 concepts that well. And I guess that would be ---
14 the question is okay, so if the trainees are
15 violating this rule, why aren't they held
16 accountable?

17 CAPTAIN SHURE: Well, ma'am, you know
18 that during our investigation, I don't want to
19 use --- during the investigation from 2011 to
20 2013, the trainees were approached with the idea
21 you will not be held accountable for this. You
22 were a victim. That was the terminology used by

1 the Air Force Office of Special Investigations
2 whenever they approached an individual whom they
3 suspected to have an inappropriate relationship
4 with a trainer.

5 I will say with that caveat, the vast
6 majority of my clients were telling the trainees
7 it's okay once you're out of BMT, which is not
8 okay. That was not what the regulation said. And
9 that culture permeated BMT. It was to them, and I
10 will say many of them were found guilty of either
11 false official statement or obstruction of
12 justice because they craftily took the idea that
13 once they became an Airman, they were fair game,
14 because if you're an Airman, you're not a
15 trainee.

16 Well, we define trainee as including
17 all the way up through technical trainee, so the
18 MTIs were using the system to their advantage,
19 but they were also telling the trainees hey,
20 look, once you're out of BMT you're fine, or they
21 would say hey, we have to wait until, you know,
22 we have to wait until your active duty station.

1 But then the trainee would seek them out prior to
2 arriving at their active duty station. So, the
3 trainees understood, but I don't think the MTIs
4 were helping the situation, to be fair.

5 MAJ WARDLE: Just to add. This is
6 interesting about the discussion about, you know,
7 the trainee committing misconduct, too, and the
8 trainer --- I don't know how --- hopefully this
9 is relevant to the analysis. But, you know, I
10 would regularly go through --- our drill
11 sergeants, there's this very busy schedule they
12 go through, but they have cycle breaks, they call
13 it, where they get sort of a break from their
14 job, and they have a couple of weeks to, you
15 know, take care of personal issues, financial
16 issues, and they also go through sort of a
17 rehabilitative kind of training. And part of that
18 would be, I would come in and tell them listen,
19 as professionals, these are professional non-
20 commissioned officers, sort of the best of our
21 best, right? Listen, here's the current --- I am
22 the Chief Prosecutor here on this installation.

1 I'm going to tell you what the story is right now
2 with your --- what you guys are looking like.

3 Here is what's happening, here is what the
4 misconduct looks like. And a lot of times the
5 complaint would be well, the trainees don't get
6 punished, anyway. And I would very aggressively
7 challenge those non-commissioned officers that
8 you cannot put yourself on the same plane of
9 understanding and culpability as that trainee in
10 the midst of a consensual relationship. You're
11 the professional. You're the one who's supposed
12 to be training them as to what it's supposed to
13 be like, and why it's so divisive within the
14 chain of command, within a unit for this
15 relationship to exist.

16 So, they're not being punished, the
17 trainee, because the commander has the discretion
18 not to and with advice of their counsel because
19 they're learning. They don't, as you just
20 mentioned, psychologically we're trying to
21 sensitize them to this, we're trying to train
22 them to be professional Soldiers, to understand

1 the chain of command, understand the chain of
2 supervision. So, it didn't make sense to punish
3 them at that time.

4 The drill sergeant, on the other hand,
5 is known. They've been there at least likely six
6 years in the Army or more, and that is why they
7 were held to account. That's how I would explain
8 it to drill sergeants, because they would
9 regularly feel it was unfair.

10 MAJ GEN WOODWARD: Well, I just bring
11 that up to sort of counter the concept that you
12 guys bring up, is that well, you know, these are
13 adults. They're fully accountable. You know, we
14 can't take away their ability to freely consent,
15 and it's a little bit ---

16 MAJ WARDLE: Yes, ma'am. The one thing
17 I'll add to that is, when I'm saying the trainees
18 are not being punished, there's two different
19 categories. In the mutual relationships, they are
20 being punished; however, if any one of those
21 trainees every said the instructor took advantage
22 of me, the instructor sexually assaulted me, he

1 raped me, you're never going to see that trainee
2 punished, even if after-the-fact we find out that
3 one, she lied about it; or two, every single
4 piece of evidence we have out there says she's
5 lying about it. If she doesn't utter those words,
6 I'm lying about it, she will never be touched.

7 We had a case in Pensacola. It's a
8 perfect example. NCIS, we had it on videotape
9 where she said she lied. The commands are too
10 afraid to do anything to her, so nothing is
11 happened. So, I think there's a distinction
12 between when the trainees are being punished and
13 when they're not, and it depends on what that
14 relationship is with the instructor.

15 DEAN ANDERSON: So, if anybody wants to
16 jump in, just cue me. Yes, Ms. Kepros?

17 MS. KEPROS: Lieutenant, is it, I'm
18 sorry, Hochmuth?

19 LT HOCHMUTH: Hochmuth.

20 MS. KEPROS: Okay, thank you. You talk
21 about the 2015 Benchbook. What is the change in
22 the 2015 Benchbook?

1 LT HOCHMUTH: I actually printed it out
2 last night. They changed the definition of ---
3 give me one moment. Threatening or placing
4 another person in fear. The definition for the
5 Navy --- I did not look at the Air Force or the
6 Army, but the Coast Guard, Navy, and Marines all
7 have the same definition that's going to be in
8 there. And it goes through the standard
9 definition that has been in there, and then it
10 gives basically three different examples.

11 In the last one, it directly talks
12 about the use or abuse of military position,
13 rank, or authority to effect or threaten to
14 effect either positively or negatively the
15 military career of some person. So, I don't think
16 a Statute is needed to be changed, and the
17 definition in the Statute needs to be changed. I
18 think if we allow the appellate courts to look at
19 it and through case law, I think the courts will
20 adjust. And I think this is a perfect of example
21 of what has happened. I think the appellate
22 courts have had the chance to look at this, and

1 they have gone and they have changed that.

2 And a similar situation is the
3 definition of incapable consent. The Navy and
4 Marine Court of Appeals have just released a
5 definition of that just last month. The issue
6 that we're seeing is the Statute book is changing
7 so often right now that we're not allowing the
8 appellate courts the time to adjust. And no
9 matter what Statute we put in place, there's
10 going to be hiccups in there, there's going to be
11 mistakes in there. And the best way for our
12 system to adjust, now whether or not that's in
13 the military or the civilian sector, is to allow
14 the courts to adjust that for us.

15 MS. KEPROS: And do you feel like a
16 change in the Benchbook gets effectuated on the
17 ground? I mean, are you going to get different
18 instructions as a consequence of what's in the
19 Benchbook, or are the judges or trial counsel
20 going to be so nervous about doing something that
21 doesn't lock step with the Statute that they're
22 not going to follow that guidance in the

1 Benchbook?

2 LT HOCHMUTH: Well, I think if defense
3 counsel is worried about that, you know, they
4 have other issues. This is going to be the
5 definition given to our panel members.

6 MS. KEPROS: Okay.

7 LT HOCHMUTH: So, this is going to be
8 the definition that both the trial counsel and
9 defense counsel will be arguing in courts.

10 MS. KEPROS: I would ---

11 MAJ GEN WOODWARD: It's read to the
12 members --- I'm sorry.

13 MS. KEPROS: Yes, ma'am.

14 MAJ GEN WOODWARD: I just want to ---
15 because that kind of --- Glen, weren't you
16 saying that ---

17 LT COL HINES: Was this published
18 recently, or is it just in the Navy, Marine
19 Corps, and the Coast Guard?

20 LT HOCHMUTH: It's published already.
21 It's on the Army website.

22 LT COL HINES: I'm going to, over the

1 lunch break, I'll go pull that down and get
2 copies for everyone.

3 MAJ GEN WOODWARD: Thank you. But it is
4 read to the members rather than ---

5 LT COL HINES: Yes, ma'am.

6 MAJ GEN WOODWARD: Okay.

7 LT COL HINES: So, what he's talking
8 about is, as we touched on earlier, before this
9 new modification it was just the one sentence at
10 the bottom of page 474.

11 LT HOCHMUTH: And, ma'am, I have a copy
12 I can hand to you now.

13 MAJ GEN WOODWARD: No, no, thank you,
14 though. He'll get that to us.

15 LT COL HINES: And this is --- what
16 we're hearing is this is a beefed up, and it
17 basically goes back to what it was in 2007, which
18 gave that specific example of through the abuse
19 of military position, rank, or authority. So,
20 that would --- what would happen, ma'am, is if
21 that was the theory of culpability the government
22 is putting out, the government is going to be

1 asking the judge, we want that instruction, and
2 the judge is going to give that instruction.

3 MAJ GEN WOODWARD: Absolutely.

4 LT HOCHMUTH: And that Benchbook is
5 going to take effect as of October 1st, so all
6 the judges in the Navy are required to get
7 training on the new Benchbook, including the new
8 definitions. I know in Jacksonville, they are
9 conducting that training next week, and then in
10 Pensacola we will be doing it --- we haven't set
11 a date, but it's going to be in the next week or
12 two.

13 DEAN ANDERSON: General Woodward, did
14 you have another question?

15 MAJ GEN WOODWARD: I did, and I just
16 ask for your guys --- so, I think I'm getting
17 from the recommendation that each of you gave us
18 that you all believe that trainees have the
19 ability to freely consent while they're in the
20 training environment.

21 CAPT OLSON: Yes, ma'am. And there are
22 safeguards built in, especially in our

1 environment in the Marine Corps, so not only are
2 there multiple classes that they receive, not
3 only do they have the ability to request UVA,
4 they're checked in on by series commanders at
5 least one time, if not more, interviewed about
6 what's going on during recruit training,
7 questioned in private about what's going on
8 outside of the presence of their drill
9 instructors, so there's another safety valve for
10 them to report any misconduct.

11 DEAN ANDERSON: Just to understand,
12 does that have to do with the question of
13 consent? I think the checks would be
14 circumstances in which there's coercive behavior.

15 CAPT OLSON: Right.

16 DEAN ANDERSON: That's not --- I mean,
17 the --- as I take your question, it's sort of
18 like ---

19 MAJ GEN WOODWARD: Well, he's saying
20 that by having the checks and balances in place,
21 they are more comfortable with their ability to
22 say no, because somebody will protect them.

1 CAPT OLSON: Right. And teaching the
2 classes, I mean, I tell the recruits that they
3 have the ability to report, that they should
4 report, they have a duty to report the offense.
5 And I know that was brought up, too; reporting
6 offense, you know, there's the pressure that the
7 recruit or the trainee may get in trouble.
8 There's also the possibility of getting in
9 trouble if you don't report an offense under
10 Naval, you know, regulation. If you don't report
11 an offense, you can held for a 92 violation. So,
12 they're encouraged to report.

13 They're also instructed about
14 fraternization policy, and how it's a --- the
15 Marine Corps or our institution looks at it. The
16 higher rank you are, the more culpable you are
17 for the offense, so all of that is part of their
18 training and awareness.

19 As to consent, they --- I did a lot of
20 digging and, obviously, on the San Diego Recruit
21 Depot, it's an all-male depot, and I could not
22 find any recent cases of recruit and drill

1 instructor, you know, anything as far as that.
2 There was hazing, and there's violations there
3 that weren't chargeable under 120. They were
4 looked at in a 120 context.

5 DEAN ANDERSON: Were there sexual
6 activities as part of the hazing?

7 CAPT OLSON: So, the bulk of my cases
8 were recruit on recruit, or as a UVA, or prior
9 instances prior to entry. The only two cases that
10 I found were where drill instructors
11 inappropriately, you know, managed the recruits,
12 like having them line up close together in, you
13 know, various states of undress. This is clearly
14 a hazing issue. There's no sexual intent behind
15 what he's doing. It's degrading in a way and,
16 obviously, that drill instructor was prosecuted
17 and received his discharge.

18 But, yes, the --- at least from my
19 perspective, and my view, and my understanding of
20 what's been going on in the Depot this entire
21 time that I've been around the Western Region,
22 there hasn't been any instances brought up.

1 MAJ WARDLE: Ma'am, my experience with
2 consent is yes, absolutely, and it's because I'd
3 asked them. I have sat in front of trainees with
4 the particular concern, because my concern going
5 in as a prosecutor, to be a Chief Justice and to
6 oversee and supervise the prosecutions was that
7 they couldn't, maybe, that this was impossible
8 without a very, maybe, a good understanding of
9 the actual training environment, and of the
10 trainees themselves.

11 So, we were very sensitive to the fact
12 that maybe we're missing something. Maybe we're
13 missing what their actual --- what was going on
14 their minds, what was going on, what they were
15 expressing to the drill sergeant when this
16 activity was going on. So, we would very
17 sensitively, you know, go about --- outright
18 asking them all the time right up front, but
19 going through the process of interviewing them
20 and making sure to see what this was. And then
21 sometimes just asking them at the end of the day,
22 and some of them were quite clear what their

1 intentions were. And this is not always the case
2 of a 17-year old young trainee. And we keep
3 saying she here, but we had both, males and
4 females having sex with female drill sergeants
5 and vice versa in all varieties; a 17-year old
6 trainee and a 35-year old drill sergeant. The age
7 range was a lot closer.

8 I think the last time we did
9 statistics before I left, we were looking at and
10 trying to advise our commander who are we looking
11 at as the drill sergeants who are committing this
12 conduct? The median age range was, I think, 26.
13 These are fairly young men and women who were
14 closer in age range often to the trainee than I
15 think we would imagine. But just outright --- we
16 would talk to them, and some of them were very
17 much consenting adults. They may be in a coercive
18 environment for sure. Basic Training is a
19 coercive environment on purpose, but that doesn't
20 mean any sex that occurs in it is coerced.

21 CAPTAIN SHURE: I would absolutely
22 agree with that, and I think that --- I think

1 they can consent, but they are definitely
2 susceptible to the coercive nature of that
3 environment, and more so just because of the
4 positions that they're in.

5 I would point you to two cases, or a
6 couple of cases to kind of show --- highlight the
7 differences from what you see. United States v.
8 Walker was, he had 10 complaining witnesses in
9 that case, 10 women he was found guilty, some
10 consensual behavior, some of constructive force,
11 coercive sexual behavior. And those women
12 testified that they did not feel that they could
13 say no in that situation, and that is absolutely
14 a sexual assault and should be prosecuted under
15 Article 120, and was successfully done. But then
16 you look at cases ---

17 MAJ GEN WOODWARD: And none of which,
18 I just want to clarify.

19 CAPTAIN SHURE: Yes, ma'am.

20 MAJ GEN WOODWARD: None of which came
21 forward of their own free will to tell anybody
22 about that.

1 CAPTAIN SHURE: Absolutely.

2 MAJ GEN WOODWARD: It was only through
3 secondhand.

4 CAPTAIN SHURE: Yes, it was. And, in
5 fact, the way we investigated United States v.
6 Walker, I was in the legal office when it was
7 done. One report came out, and rather than just
8 proceed on that one report, they pulled all of
9 his training classes, and they went back and
10 talked to every single one of those women, and
11 found all of them.

12 From there, though, you look at
13 Estacio, LeBlanc, and Vega-Maldonado. Those were
14 three that were named initially shortly after
15 Walker's investigation started. Estacio and
16 LeBlanc were both charged with coercive sexual
17 behavior, but acquitted of that and found guilty
18 of the lesser included. Their interactions with
19 the trainees occurred post-graduation where the
20 trainee sought out the behavior as much as the
21 MTI, to an extent.

22 Now, I would say that there is still

1 the opportunity for that coercive sexual behavior
2 to be present during those times. I'm not saying
3 it's removed. I'm simply saying that in those
4 particular cases.

5 I will highlight one other case that
6 I had experience with that is not on --- there's
7 no appellate record of this case. It's United
8 States v. Thornberry. In that particular case,
9 the trainee was in a holdover status in Basic
10 Training. Once you graduate if you have a medical
11 issue, really any other issue that prevents you
12 at a certain time from proceeding to technical
13 training, you're in the training support
14 squadron. You do behaviors, and you do duties as
15 you were --- as an Airman. You're not still in
16 that strict training environment. You are an
17 Airman at that point.

18 That particular case, the facts as
19 they laid out, the complaining witness, she did
20 not come forward on her own, but when she did her
21 statement repeatedly throughout that statement
22 said, "I sought this relationship out. This was

1 my idea. It was consensual. I wanted to do this.
2 I sought this out." It doesn't relieve the MTI
3 whatsoever of his culpability in that situation,
4 but I believe that the trainee has the ability,
5 although they are more susceptible to coercive
6 sexual behavior, and I think that we have to have
7 a way, as we did in Walker, of dealing with it.
8 But I think that the definition that we used in
9 Walker is appropriate.

10 DEAN ANDERSON: So, help us understand.
11 I think the thing that we're circling around and
12 trying to make sense of is this --- what you have
13 called the coercive nature of the environment,
14 and what Captain Olson talked about in terms of
15 the initial shock and awe that comes in, in terms
16 of a relationship between a trainer and a
17 trainee.

18 And I think I'm a little less
19 interested in the question of whether or not a
20 person can conceive of what they have done as
21 consensual, and testify to that, or declare
22 autonomy in that way. I'm somewhat less

1 interested in that, than I am in questions about
2 how to control the manipulation of the coercive
3 sexual environment by people who are in positions
4 of authority at that time.

5 And if someone is in a position of
6 authority and using the relationship with new
7 recruits, trainees as a farm for sexual
8 experiences by telling them that they are unique,
9 that they are one and only, even though as you
10 find out in your investigation when you look at
11 all the trainees over time that there were
12 multiple. And each victim indicates that this was
13 a consensual circumstance.

14 I think one of the things that I'm
15 concerned about is individuals who use the
16 coercive environment to their advantage to access
17 sex in ways that they would not otherwise have
18 the ability to access sex, and using that
19 coercive environment as the mechanism by which
20 they obtain that sex. So, I don't see that,
21 necessarily, falling within the use of --- it is
22 the abuse of a military position, rank, or

1 authority for sure, but it doesn't involve a
2 specific threat on your career one way or the
3 other.

4 So, what do you do in that
5 circumstance? How do you think of --- how do you
6 conceptualize -- do you conceptualize that as a
7 problem, because it sounds like the Venn diagram
8 that you see as defense attorneys are
9 circumstances in which there's coercion, and
10 circumstances in which there's consent, and nary
11 the twain shall meet. And it seems to me that
12 the environment is coercive, and consent is a
13 complicated question under conditions of coercion
14 that are explicit, and in which autonomy is
15 greatly circumscribed on the part of the
16 trainees. All kinds of autonomy is circumscribed.
17 Maybe that was too theoretical.

18 MAJ WARDLE: So, I guess just to help
19 me with the concept, so how do you envision that
20 trainee --- I guess, how do we envision that
21 trainee becoming involved in the sex? So, it's a
22 coercive environment, yes, and they don't have

1 full autonomy over all decisions in their life at
2 that point.

3 DEAN ANDERSON: Very few at that point
4 in their life.

5 MAJ WARDLE: The drill sergeant may be
6 using his or her position to increase their
7 abilities to engage in sexual behavior. Their
8 position is one that may increase their --- I'm
9 going to say this wrong, so I apologize in
10 advance, their attractiveness, their ability to
11 access sex.

12 DEAN ANDERSON: Oh, yes, it happens
13 with professors all the time.

14 MAJ WARDLE: Yes, ma'am.

15 DEAN ANDERSON: I mean, positions of
16 authority. Right?

17 MAJ WARDLE: All kinds of different
18 positions.

19 DEAN ANDERSON: But different
20 constraints.

21 MAJ GEN WOODWARD: They're looked at as
22 gods.

1 DEAN ANDERSON: Right. I think that's
2 what we've heard, is that way of ---

3 MAJ GEN WOODWARD: Yes, absolutely.

4 MAJ WARDLE: It could be absolutely
5 looked at that, and then the trainee has sex with
6 the drill sergeant. And I guess where do we see
7 the actual loss --- or where does the accused see
8 the loss of consent? The accused in the --- I
9 mean, the accused is going to be criminally
10 prosecuted, sees the other party and they engage
11 in sexual activity, what appears to be
12 consensually. I guess I don't know how we do
13 prosecute that. Maybe I'm misunderstanding. I
14 don't ---

15 MAJ GEN WOODWARD: So, are they
16 equating----

17 DEAN ANDERSON: I think that's one of
18 the challenge that we're facing. I mean, it
19 sounds like it's clear that it's a violation
20 already, that people already know that it
21 violates 92. Right? So, there's no question that
22 what's happening, although it may not be

1 interpreted on all sides and absorbed as a
2 violation.

3 MAJ GEN WOODWARD: Equating their use
4 of power to maybe the use of a date rape drug. I
5 mean, I don't know, to manipulate these
6 individuals, but I don't know if you can make
7 that ---

8 DEAN ANDERSON: I think the question
9 that a lot of the materials posed for us, and one
10 of the challenges that we're facing is do --- is
11 there an analogy between the constraints imposed
12 in other circumstances, and the constraints
13 imposed in military training?

14 CAPTAIN SHURE: I think --- sorry,
15 ma'am.

16 DEAN ANDERSON: Yes.

17 CAPTAIN SHURE: I think General
18 Woodward will agree with me more in this
19 particular circumstance. In LeBlanc's situation
20 there was a trainee who it appeared initially
21 that the --- I mean, that there was a question of
22 whether the coercion eventually affected her mind

1 set of whether she consented. So, I think that
2 that's probably what you're getting at, is these
3 trainees look at them like God. And all of my
4 clients would come in and tell me stories of
5 trainees hosting competitions to see who could
6 sleep with an MTI first; trainees bragging about
7 hey, I dated this --- none of that is
8 appropriate, and it doesn't, again, relieve the
9 MTI of their responsibility, but is the coercive
10 nature of the environment affecting what these
11 trainees think about their behavior? Is that the
12 question that we're really --- I mean, that must
13 be the question we have to answer is, if these
14 trainees' belief on whether or not they're
15 consenting is incorrect. And I would say that I
16 don't think that the constraints that are put in
17 place in prison situation equate to what we have.
18 They are similar, but I don't think that they are
19 the same.

20 DEAN ANDERSON: And the part that's
21 different for you is?

22 CAPTAIN SHURE: In what I read leading

1 up to this, I did a lot of research on the
2 prisoner situation and things like that. And what
3 the literature seems to suggest is that prisoners
4 use their sex as a tool, use the sexual behavior
5 with guards as a tool to gain access to certain
6 necessities, or things they want.

7 MAJ GEN WOODWARD: So do trainees.

8 CAPTAIN SHURE: Agreed, ma'am. Agreed.

9 However, I don't think that the trainees are able
10 to get what you see in the prison environment. In
11 the prison environment they're using it to get
12 more food, cigarettes, visits with their
13 children, hygienic products, things along those
14 lines. In a training environment, these --- the
15 extra things that they want, it would be very
16 difficult for an individual to be rewarded
17 without anyone noticing.

18 MAJ GEN WOODWARD: So, that's --- I
19 mean, you know the situation at Lackland. They
20 were rewarded with access to their cell phone.
21 They were rewarded with all kind --- I mean ---

22 CAPTAIN SHURE: Yes.

1 MAJ GEN WOODWARD: --- to me, it
2 matched exactly what you just talked about.

3 CAPTAIN SHURE: Well, it does, ma'am.
4 And I would only counter it with, it will get
5 noticed. And so --- and I would agree that prior
6 to 2011-2013, we were in a different scenario
7 than we are right now. And so I just don't --- I
8 don't know that the extremes that you see in the
9 prison environment, and the training environment
10 are the same. But the fear that I have is that if
11 you are --- if you tell them you can't consent,
12 you are only making the problem worse because
13 they will continue to use that.

14 If we have a problem where trainees
15 are using their sexual behavior, or using sexual
16 conduct with instructors, are we then rewarding
17 that by saying you'll never get in trouble for
18 this, so don't worry about it. Doesn't that just
19 undermine what we're trying to teach them in
20 training? That's the fear we have.

21 DEAN ANDERSON: So, you're saying that
22 the fraternization --- the criminality of

1 fraternization is a more effective tool to
2 protect recruits from a coercive sexual
3 environment.

4 CAPTAIN SHURE: I believe if it is a
5 coercive sexual ---

6 DEAN ANDERSON: Doesn't the
7 fraternization set the recruits up for
8 prosecution, though?

9 LT HOCHMUTH: It does in some capacity,
10 but I've never seen it. I've never seen a recruit
11 or a trainee being sent to a court-martial for
12 it. And the last case we had down in Pensacola
13 where we did have a recruit and the instructor
14 sleeping with one another, both were separated.
15 And in that situation, it's what we refer to as a
16 fleet-returnee. So, this is someone who has
17 already been in the Navy, they got out, and then
18 they're coming back in. And she down in Pensacola
19 for aviation training at that point in time. And
20 once again we saw she's older, she's not the 18,
21 19-year old young recruit. She was about 24-25,
22 he was 26.

1 So, we are setting them up in the
2 guidelines out there, but as soon as you join the
3 Navy, as soon as you enter into the Service,
4 you're being bombarded with the fact of these are
5 the rules. Do not break them. If you do, you will
6 go home; especially in the Navy down in
7 Pensacola. It's very much a zero tolerance policy
8 where they're weeding people out left and right.
9 So, are we setting them up for failure?

10 DEAN ANDERSON: And when you say
11 weeding people out left and right, what do you
12 mean by that?

13 LT HOCHMUTH: What I mean by that is,
14 down in Pensacola, and this depends on the CO of
15 the command, if a person is caught underage
16 drinking, some of the COs will give that person a
17 second chance. Many times right now they are not
18 getting that second chance, and there's a lot of
19 theories for, you know, why that's happening, but
20 the fact is it is happening. Where I represent
21 someone who's been in the Navy for 25, 26 years,
22 they may have a court-martial conviction on their

1 record from 1991 or 1992. Now, if you have a
2 Captain's Mast conviction, there's a very good
3 chance that you're not even going to promote, and
4 you're not going to stay in the Navy.

5 MS. KEPROS: I actually wanted to
6 return to the analogy, because I have turned this
7 over a lot in my mind in anticipation of today's
8 meeting. And I guess I see the prison situation
9 as different, because it's not a situation you
10 voluntarily elected to enter. But, you know, I'm
11 trying to think, is there a civilian, comparable
12 civilian experience?

13 And I have no military Service
14 experience, so I'm turning to the panelists,
15 because the analogy that you just mentioned of a
16 professor at a university having a sexual
17 relationship with a student. That seems more
18 resonant to me, where you have selected to be at
19 the university. It has clear implications for
20 you. You may be paying lots of money to even be
21 there. There's certainly a position of trust,
22 there's certainly a position of authority. But,

1 you know, there's also sort of this notion of
2 autonomy. And in my hypothetical, I'm thinking of
3 somebody who is over 18, so you're not dealing
4 with the statutory rape type scenario. You know,
5 it's improper. It's something I'm sure every
6 university would have policies against, and
7 genuine consequence for at least the professor.

8 (Simultaneous speaking.)

9 MAJ GEN WOODWARD: The difference, if
10 I can, and you guys can jump in, is that MTI has
11 so much control over that trainee that a
12 professor doesn't at all. That MTI controls when
13 they go to bed, when they wake up, you know,
14 their access to anything. I mean, so it is much
15 more like the prison environment, even if you
16 don't choose to be in the prison, and you to
17 choose to be in the --- it's still the same
18 control environment, and the same power level.
19 That's what we're getting at rather, so that's
20 the difference.

21 LT COL HINES: I think in all the
22 Services, Ms. Kepros, and the non-Marines can

1 correct me, but I know in Marine Corps entry-
2 level training, you get no freedom whatsoever.
3 Okay? So, recruit and entry-level training at one
4 of the depots is never going off the base, you
5 know, for what we would call liberty, where you
6 have your own free time on the weekends, and
7 maybe some of the other Services have that, but a
8 Marine, even an officer candidate, you might get
9 a Saturday, but for the most part your
10 instructors are controlling your freedom, your
11 physical freedom, and can tell you well, because
12 you did this today, you're staying in the
13 barracks, you're going to eat dinner in the
14 barracks. It's a very restrictive environment on
15 your personal freedom, so that may be an analogy,
16 because you're not going to have that in a law
17 school scenario, you're not going to have that --
18 --- I would think maybe a ward situation where
19 someone is committed to a hospital, you know, and
20 the doctor can tell them whether they can leave
21 or not. It's pretty similar to what we have in
22 entry-level training. I'll let the counsel ---

1 MS. KEPROS: Yes, I'm interested
2 because --- I mean, the comment you just made,
3 someone who's been identified as not having maybe
4 the cognitive and mental ability to consent to
5 things, that's a very distinct situation in my
6 mind.

7 LT HOCHMUTH: I think the difference
8 between a law school example, or a college
9 example ---

10 MS. KEPROS: While the law professor is
11 sitting next to me.

12 LT HOCHMUTH: I think the difference
13 is you get to go home at night, and if you don't
14 want to go to class, well, you don't have to go
15 to class. When you go and you join the military,
16 for those first ten weeks, five weeks, whatever
17 it may be for the Basic Training, and then
18 continued on to the A-School, the secondary
19 school, you are very much controlled from the
20 time you wake up, and actually when you wake up
21 to when you go to bed. You know, you may have two
22 or three hours at most during the day for

1 flexibility, but even during those time periods
2 you're not leaving the base, you're not going to
3 be using your cell phone, you're definitely not
4 drinking. So, the limits --- I don't see the
5 education comparison. I also don't see the prison
6 comparison either. I think the military is a
7 unique institution in our country. I don't think
8 we can cram it into another example. I think we
9 have to look at it.

10 DEAN ANDERSON: Fair enough. I'm
11 mindful of time, and I know that there are
12 multiple comments that we want to make, so we're
13 going to keep this to only burning questions, and
14 very short questions and short answers so that we
15 can make sure that we get out of here on time and
16 hear the full expertise of the next panel that
17 we're going to have. So, did you have a quick
18 question?

19 PROF. SCHULHOFER: Yes.

20 DEAN ANDERSON: Okay.

21 PROF. SCHULHOFER: And I'd be very
22 happy to accept a short answer. I won't be

1 offended if you just tell me yes or no. But one
2 of the concerns that we had with the last panel
3 was we've discussed that the situation of
4 trainees not like prisoners or people in college,
5 or anything like that. It's different that way.

6 From the other angle, what some of us
7 are concerned about is the situations with these
8 trainees and some of these very predatory DIs.
9 It's not like other Article 92 violations. It's
10 very different, at least we're struggling with
11 this idea that you see these pattern of predatory
12 sexual misconduct. It's very different from other
13 kinds of fraternization, or misuse of authority.

14 One of the suggestions that was made
15 in the last panel was to have a specific
16 subsection of Article 92 that would cover this.
17 And what I'm wondering is whether that would
18 solve the problem, or would it trigger the same
19 concerns about registration?

20 MAJ WARDLE: Sir, it is a great
21 question. I think --- I can certainly conceive of
22 a separate offense. I don't know about Article

1 92; 93 seems to make more sense to me where we
2 have sexual harassment housed. You can make an
3 Article 93 Alpha specific to this type of
4 situation, and it's sexual harassment. I think --
5 -

6 PROF. SCHULHOFER: But would that then
7 raise registration issues?

8 MAJ WARDLE: Well, I think that's the
9 secondary concern, and I think that's the concern
10 of everyone here, is that the consequence of it
11 being an Article 120 is so extreme so as to not
12 match the varied experiences we've all had with
13 trainees. The one thing is trying to put a one
14 size fits all solution on all trainees, and
15 they're not all the same. And not all training is
16 the same. Training changes, so it's not all just
17 Marine initial entry when they first get there
18 and they're --- it changes throughout. In Army
19 AIT they get to go off post, they're in civilian
20 clothes. You wouldn't know you're having --- you
21 met a trainee at a bar and had sex with them. You
22 wouldn't know, but would you be a predator sex

1 offender if you did and it was found out. That's
2 sort of the concern is the end state. So, I would
3 --- in my mind, in Article 93, it's sexual
4 harassment. It's an inappropriate sexual
5 relationship in the workplace that's just not
6 appropriate and will criminalize, and that's
7 fine. Are they sex offenders? No.

8 CAPTAIN SHURE: Sorry, ma'am, short
9 answer to that. I agree, it has since changed
10 with the Force Protection level. In BMT they are
11 allowed, Air Force BMT, they do have town pass
12 after graduation, and they're now there a week
13 after graduation. They are not permitted --- they
14 used to have to wear their blues off base. They
15 are not permitted to do that anymore given the
16 Force Protection changes. So, even if a BMT
17 trainee is off base, they would have to, to
18 caveat that, be home by a reasonable hour. They
19 have to be back on base by a certain time, but
20 you would not know a basic trainee any more on
21 the streets of San Antonio than anybody else.

22 DEAN ANDERSON: Ms. Wine-Banks?

1 MS. WINE-BANKS: Two questions, one
2 quick one. I just want to follow-up ---

3 DEAN SCHENCK: Can I interrupt? This is
4 Dean Schenck. I've got to run to class, so if
5 Colonel Hines could call me back at 1:40, I'll be
6 here.

7 LT COL HINES: Yes, ma'am.

8 DEAN SCHENCK: Okay, thanks. All right.
9 I'll talk to you guys in a little bit. Okay, bye.

10 MS. WINE-BANKS: You mentioned
11 workplace crime, not a sex crime, and that has
12 some superficial feel to me, except that it is a
13 sex crime if the use of the authority and of the
14 rank is what caused the woman to consent. And so
15 taking it out of a sex crime bothers me a little.
16 Can you address that? That's my first question.

17 CAPTAIN SHURE: I think, ma'am, that if
18 it is of that nature, it should be under 120. And
19 I simply think that 120 is adequate as is to
20 address those situations.

21 MS. WINE-BANKS: But that limits it to
22 where there is an explicit verbalized threat, I

1 will affect your career if you don't do X.

2 CAPTAIN SHURE: Well, in United States
3 v. Walker there wasn't explicit threats. There
4 was this coercive environment where he simply
5 walked one down, and she testified she just
6 didn't --- he didn't say anything, and she said I
7 just didn't feel like I could say no. And he was
8 found guilty of that.

9 MS. WINE-BANKS: That's in the totality
10 of circumstances.

11 CAPTAIN SHURE: Yes, ma'am.

12 DEAN ANDERSON: Under the threat it was
13 wrapped up in --- it was a sexual assault under
14 120?

15 MAJ GEN WOODWARD: I'm not sure he
16 would have got a conviction if that was isolated,
17 but he also had one that was forcible rape in the
18 same, so I just throw that in there because that
19 helped.

20 CAPTAIN SHURE: Yes, ma'am, that helped
21 in Walker's situation, and I think that --- and I
22 understand Estacio and LeBlanc were acquitted,

1 and I think that that's probably the fear that
2 General Woodward is expressing, is that when you
3 have isolated incidents it's a little bit harder
4 to get to that fear.

5 MS. WINE-BANKS: Right, and I've been
6 a prosecutor and a defense lawyer, and it's very
7 interesting to see the very big difference in
8 what hearing from this morning's prosecution
9 panel and from this panel. And I get both sides,
10 but --- and one of the examples was given was
11 where the trainees actually have a contest to who
12 can sleep with the drill instructor first, or the
13 most, or whatever. And we've heard there's also a
14 contest on the other side where it's the drill
15 instructor saying how many can you sleep with?
16 And let's take advantage of these 18-year old
17 bodies.

18 So, if we don't --- if we exclude the
19 truly consensual where somebody says I want to
20 marry you, and I have a relationship with you,
21 and if we exclude the situations where the
22 trainees are having a contest and initiating

1 this; again, what is the harm of making it clear
2 that 120 should include the use of rank, the use
3 of the pull that an instructor has over the
4 trainee, to say that that is a sex crime?

5 LT HOCHMUTH: I think the Statute is
6 evolving to do that, and I think the Benchbook --
7 the changing of the definition as the appellate
8 courts review that, ma'am, we are getting to that
9 point where they are treating it underneath 120.
10 It doesn't just have to be a rape, a sexual
11 assault, aggravated sexual contact, abusive
12 sexual contact, so I think it is going to be
13 covered in that situation based on the way the
14 law is evolving.

15 MS. WINE-BANKS: So how can we on this
16 Panel help that evolution? What actions would you
17 say we could take that would not disrupt
18 prosecutions, wouldn't be harmful, that wouldn't
19 hurt your defenses, but would allow a legitimate
20 prosecution?

21 LT HOCHMUTH: And this may not be a
22 popular answer, the best thing to do is nothing,

1 is to give it time to allow the law to change
2 through the appellate courts. In today's society,
3 we always want an answer right now, but so many
4 times we just have to be patient. And I think
5 this is one of the times where we need to have a
6 little patience. And I think that patience is ---
7 it's already being rewarded with the changes
8 that are coming through the appellate courts now.

9 MAJ WARDLE: Ma'am, I would say, you
10 know, the definition of threatening or place
11 another person in fear can encompass this. An
12 able prosecutor can tell that story if the facts
13 are there. That's --- if they're there, they can
14 tell that story. Where you be able to help is
15 what is the definition of action? Right? To
16 separate out just the mere presence of being in
17 Basic Training is not enough. There has to be
18 something that that drill sergeant, in
19 particular, is doing to that trainee. And it
20 could be just that drill sergeant is sort of ---

21 DEAN ANDERSON: Isolating.

22 MAJ WARDLE: --- out of control. We've

1 had --- I've prosecuted drill sergeants who were
2 out of control in their power. And if a trainee
3 just in watching them and the way they behave is
4 so overcome by that, I can see that prosecution,
5 absolutely. I can see it under our current
6 Statute. Maybe it's more helpful and more ---
7 there's more notice given if what those actions
8 are can be better defined, the action that is of
9 sufficient consequence. But a prosecutor, an able
10 prosecutor can prosecute this if the facts are
11 there. But I just don't think --- I think the
12 separation is --- just the presence of being in
13 Basic Training isn't what gets you there.

14 DEAN ANDERSON: Extremely helpful and
15 insightful. Do we have a burning question?

16 MS. FRIEL: Very simple question. In
17 the Lackland case, was what I'm thinking of as
18 the more expanded definition of threat, the one
19 that we're looking at that's going to be under
20 215. Was that given to the Panel?

21 CAPTAIN SHURE: Yes, ma'am, it was.

22 LT COL HINES: Those were all under the

1 -----

2 (Simultaneous speaking,)

3 CAPTAIN SHURE: Yes, ma'am, and yes,
4 sir. It was under the 2007 version. I think the
5 current version is broad enough to allow an
6 instruction giving the definition from 2007.

7 MS. FRIEL: So that was given and it
8 resulted in acquittals ---

9 CAPTAIN SHURE: It was, ma'am. Yes,
10 ma'am. Acquittals and convictions, ma'am.

11 MS. FRIEL: Got it. Thanks.

12 DEAN ANDERSON: I want to thank you all
13 very much for your time and insight, appreciate
14 it.

15 (Whereupon, the above-entitled matter
16 went off the record at 12:05 p.m. and resumed at
17 12:50 p.m.)

18 DEAN ANDERSON: Welcome, everyone.
19 Thank you so much to the panel for being here. We
20 are deeply engaged in very challenging issues and
21 look forward to having your insight and wisdom
22 influence our deliberations on these issues of

1 coercive sexual relationships, in particular in
2 the trainer/trainee context. So, we'll provide
3 you with an opportunity to give any prepared
4 statements or off-the-cuff statements you have
5 initially, and then we'll do a question and
6 answer session. Colonel Morgan, you want to
7 begin?

8 COL MORGAN: Okay, thank you. Good
9 afternoon, Panel Members. Thank you for the
10 opportunity to appear before you today.

11 I'm Colonel Brynn Morgan. I'm a Staff
12 Judge Advocate for 2nd Air Force at Keesler Air
13 Force Base Mississippi, where we oversee
14 technical and Basic Military Training for over
15 150 trainees annually. I've been a member of the
16 JAG Corps for 25 years, and this is my second
17 tour at 2nd Air Force, as I was a Deputy SJA from
18 2008 to 2010.

19 During my career, I've been an SJA
20 four times, and I've been assigned to various
21 AETC installations five times, twice as an SJA. I
22 served on the Staff of the General Court-Martial

1 Convening Authority four times as the Chief of
2 Military Justice, Deputy SJA, or SJA for eight
3 separate GCMs. As a Wing SJA, I have advised five
4 separate Special Court-Martial Convening
5 Authorities.

6 There's been much discussion about the
7 efficacy of charging military trainers under
8 Article 92 as a violation of a Lawful General
9 Order versus a violation of an Article 120
10 offense. This Panel took up the discussion over a
11 year ago with the JPP that convened 19 September
12 14, and before which Colonel Polly Kenny, my
13 boss, and the AETC SJA appeared along with other
14 Senior Service SJAs.

15 In your report dated 14 February, your
16 recommendation was to continue to examine whether
17 a strict liability standard would better serve to
18 prosecute trainers who have had sexual relations
19 with trainees. Like Colonel Kenny, I do not
20 believe it will. The unintended consequences of
21 the changes to Article 120 of 2007, and again in
22 2008, limited our ability to employ constructive

1 force theories to prosecute sexual encounters
2 between trainers and trainees.

3 Under Article 92, however, the Air
4 Force can effectively address trainer misconduct
5 by punishing unprofessional relationships between
6 trainers and trainees that are sexual or not as a
7 violation of AETC Instruction 36-2909.

8 The use of Service-specific
9 regulations allows each Service the precision to
10 address unique cultural issues of its training
11 programs. AETCI 36-2909 comes very close to
12 resolving the shortcomings of the 2012 Article
13 120 with the improvement that 36-2909 provides
14 clear definitions and explanations to place
15 trainers on notice of prohibited conduct.

16 Further, the Articles of the UCMJ,
17 such as Article 120, 93 which is maltreatment and
18 cruelty, 128, assault, simple assault and
19 battery, or 134, violation of the lawful General
20 Regulation provide the flexibility to charge
21 appropriately depending on the unique facts of
22 each individual case.

1 Finally, Question 6 of the JPP Initial
2 Assessment is a definition of threatening
3 wrongful action ambiguous or too narrow? The
4 answer is yes, it is too narrow, and should also
5 include providing favorable action as an element.

6 Those are the comments that I have.
7 Thank you for your attention.

8 DEAN ANDERSON: Thank you so much. I'm
9 sure that we will have plenty of questions for
10 you once we hear from your colleagues.

11 COL MENDELSON: Good afternoon, ma'am,
12 Members of the Panel. My name is Colonel David
13 Mendelson. I am the Staff Judge Advocate for the
14 Fire Center of Excellence in Lawton, Oklahoma.
15 I've been there for 14 months. Just prior to
16 that, I was a student at the Army War College,
17 and then for the two years prior to that I had
18 the honor of being the Staff Judge Advocate for
19 the Joint Multinational Training Center in
20 Grafenwoehr, Germany.

21 Over the past 14 months at Fort Sill,
22 I've been able to see how we train our Field

1 Artillery and our Air Defenders. That is the home
2 of both of those branches, and not only do we
3 train Air Defenders and Field Artillery, but we
4 also have a Basic Training mission there, as
5 well.

6 We have 85 cycles of Basic Trainees
7 that come through numbering between 18 to 20
8 thousand. Overall we train at the ADA School and
9 the FA School annually approximately 34,000
10 trainees, averaging about 6,000 a day. We train
11 the enlisted in their advanced individual
12 training, and we train the officers in their
13 Basic Officer Leadership Course.

14 I've been a Judge Advocate for 21
15 years. I am honored to be here. Bottom line up
16 front, I believe there are a lot of concerns and
17 I will feel free to express those in terms of
18 having a strict liability standard in the drill
19 sergeant/trainee scenario. Thank you for having
20 me. Those are my comments.

21 DEAN ANDERSON: Thank you, Colonel
22 Mendelson. Lieutenant Colonel Wilson.

1 LT COL WILSON: Good morning, ladies
2 and gentlemen. Appreciate the opportunity to
3 speak here today.

4 I've served in the Marine Corps for
5 approximately 17 years, both as an active duty
6 and Reserve Component Officer. About a quarter of
7 that time has been spent at one of --- excuse me,
8 at both of the Marine Corps Recruit Depots that
9 we have in the Marine Corps, one in San Diego
10 where I'm currently serving in active duty
11 status, and as well as at Parris Island.

12 At Parris Island, I served as a
13 prosecutor and defense counsel during my tour
14 there. And at the Marine Corps Recruit Depot San
15 Diego, I served as the Staff Judge Advocate.

16 Just as a refresher to the Panel, you
17 know, the Marine Corps initial training, normally
18 referred to as Boot Camp. It's a 12-week period.
19 At San Diego, we only train male recruits, and
20 then at the Recruit Depot Parris Island we have
21 one female of battalion recruits, and then three
22 male training battalions.

1 The staff is also segregated by
2 gender, that is at Fourth Training Battalion. The
3 female recruits are trained by only female drill
4 instructors. In San Diego, we only have trained
5 male recruits. All the drill instructors are
6 males. We do have, this may be a first, we're not
7 certain, but the Executive Officer of one of our
8 training battalions is a female Major.

9 You know, as a result, or perhaps one
10 may presume that we perhaps have lesser instance,
11 of course, of sexual acts in our training
12 environment. Certainly, male on male, or female
13 on female sexual assaults could occur. I'm not
14 aware of any, so I have not experienced advising
15 a commander on this particular issue in the
16 recruit training environment. I spoke to my peer
17 at the Recruit Depot at Parris Island, and she
18 related the similar thing. She's been there a few
19 years, they just haven't had any allegations or
20 cases thus far.

21 Now that being said, it's certainly --
22 as part of this discussion that's relevant

1 because we may have the occasion come up in the
2 future. But, again, I'll be speaking I guess more
3 in the hypothetical than actual experience of
4 advising commanders on this particular issue
5 before the Panel today.

6 As far as the --- in preparation for
7 today, my understanding working with Lieutenant
8 Colonel Hines and reviewing some of the prior
9 meetings of the JPP, a few of my thoughts on the
10 major questions before us. One of which, you
11 know, do commanding officers have the necessary
12 tools to hold offenders accountable in this
13 coercive sexual offense world? And I would say
14 yes. Under Article 92, I do believe it's
15 sufficient for us to hold Marines accountable
16 when we're talking about the recruit training
17 environment.

18 The only caveat or thing I think could
19 be an improvement along those lines would be
20 returning to the 2007 MCM definition in which it
21 specifically talks about the use or abuse of
22 military position, rank, or authority. I think

1 that language if included in an updated
2 definition in MCM would assist in holding people
3 accountable in sort of the situations we're
4 talking about in which a drill instructor would
5 use perhaps a promise of benefits, or the removal
6 of potential negative consequences in exchange
7 for sexual acts.

8 And, finally, with respect to the
9 strict liability, I'm not in favor of a strict
10 liability in the trainer/trainee environment. The
11 --- with the enhanced definition or the broader
12 definition which we're turning to 2007, I think
13 that would be sufficient to capture misconduct
14 related to the drill instructor/recruit sexual
15 offenses. And that completes my opening comments.
16 Thank you.

17 DEAN ANDERSON: Thank you very much.

18 Lieutenant Commander Casey?

19 LCDR CASEY: Good afternoon ladies and
20 gentlemen. Thank you, again, for having me and
21 giving me this opportunity to testify before you
22 this afternoon.

1 My name is Lieutenant Commander Paul
2 Casey. I currently serve as the Staff Judge
3 Advocate to the Coast Guard's Training Center in
4 Yorktown, Virginia.

5 The Training Center Yorktown is the
6 Coast Guard's largest training center. But, in
7 comparison, we're very, very small. We have
8 about 800 active duty personnel stationed at
9 Training Center Yorktown and we train roughly
10 about 6,000 students annually.

11 I think I heard a couple officers
12 before me say that they had 6,000 students a day
13 or something like that.

14 We are --

15 COL MENDELSON: Take 10 or 15.

16 LCDR CASEY: So, 6,000 students
17 annually, and the overwhelming majority of the
18 students that come to my training center are what
19 we call A-School students, equivalent of AIT
20 students to where they are coming in as E-3s,
21 having already served in the Coast Guard fleet
22 between one and three years.

1 Typically, in periods of when we're
2 drawing down our force numbers, that can even be
3 as much as five years in the fleet before they
4 arrive at our training center.

5 And after about a 12 to 19 week course
6 of study, they get their rating training and they
7 are returned to the Coast Guard fleet.

8 The instructors at our training center
9 are typically high performing E-5 to E-8s in the
10 Coast Guard who are assigned to Training Center
11 Yorktown because they have requested to be at the
12 training center. It's not a random assignment
13 process. They have been vetted as instructors.

14 And the last thing about kind of the
15 background I would add is, for many years now,
16 the Coast Guard continues to get highly
17 qualified, I may even say overqualified folks in
18 our enlisted ranks to where it's quite common for
19 folks who are E-3s in the Coast Guard to have
20 Master's level, and some even Doctorate level,
21 degrees coming through our training center. And
22 that's becoming more and more commonplace.

1 So, in my two years, it's been no
2 surprise -- two years as a Staff Judge Advocate,
3 it's been no surprise to me that there has been
4 no issues of sexual misconduct at Training Center
5 Yorktown. I'm not going to say here today that
6 that hasn't happened at other training centers in
7 the Coast Guard, certainly it has, but I haven't
8 seen it in my personal experience.

9 To summarize my opinions on the issues
10 that are facing the subcommittee, in almost all
11 cases involving instructor and training sexual
12 conduct in the Coast Guard, I believe the current
13 practice of charging other Articles under the
14 UCMJ, primarily Article 92, is sufficient in
15 capturing, first the criminality of what is, in
16 fact, going on.

17 And secondly, exposing them to the
18 appropriate level of criminal liability. I think
19 those Statutes that we have in place are
20 effective and are working.

21 And, I think the most important part
22 of the Article 92 piece is that it is allowing --

1 it is giving the Services, it is giving the Coast
2 Guard the ability to correct this problem by a
3 policy instead of over legislating the issue
4 potentially. It's allowing the Services to fix
5 the problems if they exist.

6 But, in the event of an egregious
7 case, that was submitted in the US v. Simpson
8 case that Army case from Aberdeen, that's an
9 example of probably the most egregious case that
10 you will see.

11 I do believe that the current version
12 of Article 120 gives us the ability to prosecute
13 those cases. First, under a theory of bodily
14 harm, but secondly, like the Colonel states, in
15 the alternative, I think the 2000 version of the
16 instruction of the constructive force or maybe
17 above the use of rank would be another
18 alternative that this committee could look at.

19 So, therefore, I do not believe there
20 needs to be an amendment to Article 120 and I am
21 strongly opposed to any strict liability Statute
22 that that would be considered.

1 Therefore, I am standing by to answer
2 any questions that you have.

3 Thank you very much.

4 DEAN ANDERSON: Thank you, sir.

5 I'm fascinated by the fact that it
6 sounds like Lieutenant Colonel Wilson and
7 Lieutenant Commander Casey have not had any
8 experiences of sexual misconduct over the
9 duration of time that they've served as leaders
10 of the training. Am I interpreting your remarks
11 correctly?

12 LT COL WILSON: Ma'am, yes, in that --
13 and I'm only referring to initial boot camp
14 training.

15 DEAN ANDERSON: Right.

16 LT COL WILSON: And --

17 DEAN ANDERSON: No hazing? Same sex
18 hazing that was sexualized?

19 LT COL WILSON: Not sexualized that
20 I'm aware of, ma'am.

21 There has been recruit on recruit
22 allegations have occurred over the -- in my

1 experience.

2 DEAN ANDERSON: So, peer?

3 LT COL WILSON: Peer to peer and
4 typically, that's along more of the hazing, being
5 slapped on the rear or, you know, other hazing
6 related activities involving nudity have
7 occurred. But, I'm not aware of any cases in
8 which an active duty drill instructor staff have
9 engaged in any type of sexual acts with the
10 recruits.

11 DEAN ANDERSON: And, how long have you
12 been in this position, Lieutenant Colonel?

13 LT COL WILSON: I'm been at MCR San
14 Diego for three months, Parris Island for four
15 years and prior to coming to the meeting here, I
16 spoke to my predecessor who spent three years at
17 Marine Corps Recruit Depot San Diego and I spoke
18 to my colleague at Marine Corps Recruit Depot
19 Paris Island, Lieutenant Colonel Maven, she's
20 been there at least two years.

21 So, I tried to do a bit of homework
22 prior to attending today.

1 DEAN ANDERSON: I appreciate that.

2 LT COL WILSON: And, I think, you
3 know, in the Armed Services, there's actually --

4 DEAN ANDERSON: Did you colleagues --
5 I'm sorry to interrupt -- did your colleagues
6 report the same thing, no instance of sexual
7 misconduct that they were aware of?

8 LT COL WILSON: They did, they did.

9 And, part of that is Marine Corps boot
10 camp, there's no liberty opportunities
11 whatsoever. And, that highly controlled
12 environment with multiple layers of supervision
13 may be something that assists us relative to
14 other Services that may have liberty
15 opportunities, things to meet outside of the
16 recruit training. Every minute of every day is
17 scripted. They're either sleeping or doing
18 something on the training schedule.

19 DEAN ANDERSON: Right. And,
20 Lieutenant Commander Casey, you said in two years
21 you've not had any instances of sexual misconduct
22 that you're aware of?

1 LCDR CASEY: That's correct, ma'am.
2 And, like the Colonel, I did do my homework as
3 well. So, our sister training center, there's
4 one on each coast, Training Center Petaluma has
5 not had one either.

6 The only cases that have come from the
7 instructor to trainee that you would be concerned
8 with comes from our boot camp which is Training
9 Center Cape May in New Jersey.

10 Prior to this job, I was the Senior
11 Appellate Defense Counsel for the Coast Guard and
12 I did have the opportunity to represent more than
13 a few cases that came out of Training Center Cape
14 May.

15 DEAN ANDERSON: And what about the
16 other Services, in your experience, do you have a
17 similar experience?

18 COL MENDELSON: Would you like to go
19 first and then I'll remark?

20 COL MORGAN: With just student on
21 student or trainee on trainee type of offenses?

22 DEAN ANDERSON: Trainer on trainee?

1 COL MORGAN: We haven't had a report
2 of -- I'm sorry, a substantiated case of a
3 trainer on trainee sexual assault since 2012.

4 DEAN ANDERSON: Okay. And, let me
5 just back up, Colonel Morgan. That's -- I forget
6 the scope of your duration of time. Were you
7 responsible for that training since 2012?

8 COL MORGAN: No, I arrived at 2nd Air
9 Force this time in 2013.

10 DEAN ANDERSON: Okay, okay.

11 COL MENDELSON: Ma'am, in my 14
12 months, we have had instances of drill
13 sergeant/trainee misconduct. I would say that,
14 in terms of nonconsensual penetrative acts, zero.
15 In terms of consensual drill sergeant
16 relationships with trainees, we had one out of
17 our basic training mission. I'll refer to that
18 as BCT, and we had one out of our AIT mission,
19 our Advanced Individual Training mission.

20 In addition -- that's just in those
21 two environments, ma'am. I can go to other
22 environments if you'd like as well.

1 DEAN ANDERSON: So, you're saying that
2 over the course of 14 months, maybe training
3 upwards of 30,000 students, you've had one
4 consensual instance of trainer/trainee
5 misconduct?

6 COL MENDELSON: Drill sergeant/trainee
7 specific, ma'am.

8 DEAN ANDERSON: Yes.

9 COL MENDELSON: Penetrative consensual
10 in the --

11 DEAN ANDERSON: None nonconsensual?
12 None deemed nonconsensual?

13 COL MENDELSON: None deemed
14 nonconsensual, yes, ma'am.

15 DEAN ANDERSON: No reports or not
16 substantiated reports? I was interested in that.

17 COL MENDELSON: Ma'am, I can tell you
18 that these are the ones that have been deemed
19 founded and these are the ones that have been
20 deemed sufficient evidence to act upon. Whether
21 or not there have been other, I am not tracking
22 any, ma'am, in my 14 months.

1 DEAN ANDERSON: And, so, do you think
2 that the lack of -- I'm sorry, Colonel Morgan,
3 but you already answered. Do you think that each
4 of you -- do you think that the direction toward
5 the null set for each of you is a result of
6 enhanced training, education and excellence on
7 the part of the respective branches or do you
8 think that it's that this just doesn't occur that
9 often? Or both?

10 COL MENDELSON: Ma'am, I'll start
11 first.

12 Number one, our drill sergeants are
13 the best of the best. They're in positions of
14 trust and they are Tier 1 screened.

15 You've been informed on Tier 1
16 screening, ma'am? They received thorough
17 background checks and a Tier 1 screening, as far
18 as I understand, ma'am, has at least been around
19 since 2013 in full effect.

20 I know probably Major General Woodward
21 has -- I know you were at Fort Jackson, ma'am,
22 and have experience in this as well.

1 But so, our drill sergeants are the
2 best of the best.

3 Two, I do believe there is significant
4 training and education that is done not only for
5 the drill sergeants but the trainees. I believe
6 our trainees coming in have a clear understanding
7 when they come in, they are from all walks of our
8 country.

9 I do believe they understand what
10 right and wrong is and I do believe when they
11 come in, they are given a wealth of information
12 about what inappropriate conduct is, whether it's
13 from another trainee or another drill sergeant
14 and I believe that they fully understand that
15 there are many mechanisms for them to report
16 inappropriate conduct.

17 DEAN ANDERSON: So, you think the
18 education is -- that both the trainers are
19 excellent and the education is strong enough
20 right now so that there really are no instances
21 over the past 14 months or do you believe that
22 it's under reported? I guess that's part of what

1 I'm wondering.

2 COL MENDELSON: Do I believe that
3 there are instances that are unreported? Yes,
4 ma'am.

5 Do I believe they are in a great
6 number? In my experience, the answer would be
7 no, ma'am.

8 DEAN ANDERSON: Other thoughts?

9 COL MORGAN: Immediately after 2012
10 and the Woodward Report, we've put into place
11 many enhanced measures to try and prevent further
12 misconduct. I believe those are working.

13 For example, drop boxes for reporting,
14 surveillance cameras in all of our dormitories.
15 We have something called the Consolidated
16 Misconduct Report and a 2nd Air Force Abuse
17 Hotline. So, all of those were part of it.

18 Also, we have gone to a measure where
19 we no longer have volunteer military training
20 instructors. We've gone to something called DSD,
21 Designated Special Duty, where every NCO in the
22 Air Force is selected for some type of special

1 duty based on their record.

2 So, whereas before, an enlisted person
3 could say, I want to be an MTI, they no longer
4 can.

5 So, all of those things have helped
6 and we do train our trainees extensively on how
7 to report, when to report and they also --
8 another measure that's been very effective is the
9 wingman concept where they are never left alone.
10 They always have another trainee with them.

11 LT COL WILSON: Ma'am, the recruits at
12 the initial phase of training have a Sexual
13 Assault Prevention Response Training. I think
14 that their knowledge and understanding of sexual
15 assault and how to report it is understood and I
16 think that's evidenced by the fact that we have
17 recruits making allegations against other
18 recruits.

19 And, sometimes for things that are
20 minimal types of sexual contact. But, clearly, I
21 think that message is getting through.

22 Also, throughout the recruit training

1 process, there's mandatory interviews of each
2 recruit by different levels of command that have
3 to be documented.

4 So, recruits have an opportunity to
5 sit down, not just with that -- specifically, not
6 their direct drill instructors, but the series
7 commander who is typically a First Lieutenant or
8 a Captain will have one on one interviews and
9 they'll ask them a series of questions to include
10 are they being abused in any way by their drill
11 instructors or by other recruits and so forth.

12 So, I imagine those two factors, to
13 me, make it seem that if it were going on, it
14 would be likely to be reported. But the,
15 perhaps, most importantly, subjectively, my
16 opinion, is simply the fact we have a gender
17 separation.

18 I'm not trying to diminish the fact
19 there could be male on male sexual assaults or
20 female on female, but I think the mere fact there
21 isn't the temptation or opportunity to engage in
22 our most frequent types of coercive sexual

1 conduct that would occur if we, you know, were in
2 a different scenario than what we deal with.

3 DEAN ANDERSON: And, in terms of the
4 training, I asked this of the defense counsel and
5 I think maybe the prosecutors as well earlier, in
6 terms of the training, is the training of the
7 recruits and the trainees, does it involve
8 clarity on the question of consensual
9 relationships are verboten?

10 COL MENDELSON: Absolutely,
11 absolutely, ma'am. No question.

12 COL MORGAN: Ours does, too. And, we
13 actually have both the trainees and the trainers
14 sign a form saying that they acknowledge it is
15 forbidden.

16 And, with the new DoDI 13-04.33, they
17 have to sign a separate DoD form for all the
18 Services it says that.

19 DEAN ANDERSON: And, is that form
20 specific to sexual assault, or actually, I'm
21 sorry, to consensual sexual relationships?

22 COL MORGAN: It's any relationship.

1 It tells them they can't drive in cars, go visit
2 their house, use alcohol, anything like that.

3 LCDR CASEY: And, the one thing I
4 would add from the Coast Guard perspective,
5 pretty much immediately after some cases came out
6 of our boot camp, the Force Readiness Commander,
7 who is the General, the Admiral in charge of the
8 training commands, issued a lawful general order
9 basically freezing any sexual consensual sexual
10 conduct with instructors and trainees.

11 And, it also has a 365 day chilling
12 period after these folks graduate from whatever
13 training center, whether it be boot camp or a
14 training center like ours.

15 So, you know, it's a combination of
16 good people and, you know, getting the word out
17 like these measures have been stated. But, it's
18 also action policy from our commanders and from
19 the Coast Guard that's actively working these
20 issues.

21 DEAN ANDERSON: Do you think that
22 you'd have reported to you circumstances in which

1 a drill sergeant or other type of trainer
2 isolates victims and doesn't threaten them with,
3 you know, discharge or other kind of wrongful
4 behavior or detrimental behavior, but basically
5 just isolates and tries to obtain sexual contact
6 using the coercive nature of the relationship
7 between the two? Do you think those would come
8 to your attention?

9 COL MORGAN: Well, I would have to say
10 the measures we put in place seek to avoid that -
11 -

12 DEAN ANDERSON: For sure.

13 COL MORGAN: -- for people, the
14 wingman concept where the trainees are never by
15 themselves. But also, the trainers are
16 prohibited from being alone with a trainee. And,
17 again, the DoDI and our regulation go so far as
18 to prohibit lesser forms of contact like Facebook
19 or anything like that.

20 So, it's trying to get it before it
21 can blossom into something else.

22 COL MENDELSON: Ma'am, we have

1 regulations in place that prohibit any type of
2 personal interaction between trainer and trainee
3 from personal texting.

4 To answer your question, can those set
5 of circumstances happen? Yes, ma'am. Will a
6 drill sergeant with a set mind try to do this?
7 Unquestionably. Do I think it would be reported?
8 I believe the answer is yes.

9 We did have a set of circumstances
10 where a trainee did have a consensual sexual
11 relationship with their AIT instructor and, after
12 this had gone on for a period time, she felt so
13 guilty and understanding what she did was wrong,
14 she reported it to the chain of command. He was
15 punished, separated, nothing happened to her.

16 DEAN ANDERSON: Questions by the
17 Panel?

18 MS. WINE-BANKS: I'm just trying to
19 figure out the difference between what we heard
20 from prosecutors about the occurrence of these
21 events and the fact that the Staff Judge
22 Advocates are not hearing about it.

1 COL MORGAN: I would say we hear about
2 it because we have something called a
3 Consolidated Misconduct Report. So, every
4 trainee base in our command has report any
5 instance of trainer misconduct against a trainee
6 on a monthly basis, even if it's just texting
7 them inappropriately.

8 MAJ GEN WOODWARD: I think they were
9 talking about older cases maybe?

10 MS. WINE-BANKS: But, has it really
11 changed that much do you think? I know for
12 Lackland it has.

13 COL MORGAN: Certainly for Lackland it
14 has. I feel that it does for the other technical
15 training bases as well.

16 And, you know, there's mandatory
17 reporting just like the Army. If one trainer
18 knows another trainer is doing something wrong,
19 they can get into as much trouble under Article
20 92 for not reporting that. Because it says part
21 of the lawful general regulation.

22 PROFESSOR SCHULHOFER: I think our

1 panel this morning wasn't very specific about the
2 time frame. But I had the same concern. I
3 think, as my other Committee Members, when we
4 talked about changing Article 120, what we heard
5 a lot of was no, don't do that. In that respect,
6 they agree with you.

7 The reason was because so many of
8 these relationships are genuinely consensual.
9 They didn't tell us they weren't happening, they
10 were stressing that they were happening a lot and
11 that they were genuinely consensual which is a
12 very different kind of problem.

13 So, I think some of us are feeling a
14 little bit --

15 MS. WINE-BANKS: That's then because
16 the trial courts were changing things and would
17 make it all right, so we didn't need to do
18 anything but just sit and wait until the courts
19 did what they were going to do.

20 PROFESSOR SCHULHOFER: But, I'm a
21 little confused now about whether they were
22 specifically addressing pre-2012 or, you know,

1 would you say that you've seen -- is your
2 perception about pre-2012 different from theirs?

3 COL MORGAN: I do know now that for
4 basic military training in the Air Force that it
5 would be very hard for a trainer to have any kind
6 of relationship with a trainee of a sexual
7 nature.

8 PROFESSOR SCHULHOFER: Now.

9 COL MORGAN: Because we've made it
10 very difficult to do that.

11 COL MENDELSON: Sir, I went down and
12 I engaged the brigade commander and I said, pull
13 in any drill sergeant. They pulled in about six
14 and I told them what I was going to be conversing
15 with you on.

16 And when I would tell them about these
17 set of circumstances, they clearly understood
18 that those situations were out there, but what
19 they thought was is that the training that they
20 had, the rigorous screening which they had had to
21 go through to get in those positions, that it was
22 significantly reduced that these set of

1 circumstances would take place.

2 PROFESSOR SCHULHOFER: When did that
3 training start?

4 COL MENDELSON: Sir, my --

5 PROFESSOR SCHULHOFER: This training,
6 I'm sorry, when did this training --

7 COL MENDELSON: It's their position of
8 trust screening. It's for the sharp drill
9 sergeant. Those who are in the position of
10 trust, they call it Tier 1 screening in terms of
11 making sure nobody had negative things in their
12 file.

13 Sir, I believe it took full effect in
14 and around 2013, but I could be convinced
15 otherwise.

16 MS. WINE-BANKS: Glen, could you maybe
17 check with the dates of what we were hearing
18 about and what the current flow of cases is?

19 LT COL HINES: Yes, ma'am. I mean I
20 will do that. I'll go back to the trial counsel.

21 One of the thoughts that I had was
22 too, is that often times, and I can only speak

1 for the Marine Corps, but a prosecution office
2 will be dealing with cases from several different
3 commands.

4 And so, the prosecutors that you heard
5 from are dealing with cases, not just in the
6 entry level training environment but what we
7 would call the schoolhouse. So, they're
8 following school for their MOS training.

9 Where I think some of the presenters
10 have said this kind of thing happens more because
11 now you're outside the entry level training and
12 their Marines now or Soldiers or Airmen or Coast
13 Guard.

14 And so, I'll go back, ma'am and answer
15 that question because everyone might be speaking
16 the truth, there's just a different perspective.

17 MS. WINE-BANKS: No, I'm sure it's all
18 the truth, I'm just trying to consolidate them.

19 LT COL HINES: Right.

20 MS. WINE-BANKS: Just in a court
21 hearing.

22 LT COL WILSON: Yes, ma'am. To follow

1 up on Lieutenant Colonel Hines, I read the
2 portions of the transcript from last month's
3 meetings and I know when General Renforth was
4 here and his attorney, they referenced some cases
5 that were, again, just follow-on training, not in
6 the initial boot camp setting.

7 And, certainly, I don't mean to
8 represent that there's no cases in our follow-on
9 schools because, certainly, we have had Article
10 120 allegations and substantiated cases in that
11 environment, the follow-on schools.

12 Whether, you know, we can send our
13 Marines to Fort Sill, for instance or to our own
14 Marine schools and at those schools, Marines have
15 their cell phones, they have weekend liberty,
16 they have different things going on that afford
17 more opportunity.

18 And, there's also that the gender
19 separation stops. So, a Marine that goes to
20 administration school at Camp Lejeune may very
21 well have a female instructor, a female with a
22 male instructor. And we have had those cases

1 outside.

2 As far as I know and the people I've
3 contacted, in the initial boot camp phase, I'm
4 not aware of any sexual assault allegations or
5 substantiated cases.

6 MS. WINE-BANKS: In terms of the
7 strict liability that we're looking at, would you
8 all feel that it's a different question at the
9 advanced training versus the basic training?

10 I mean, would you have any reaction to
11 saying yes, at the basic training level, maybe it
12 should be strict liability, but above that it
13 shouldn't? Or do you feel the same about both?

14 COL MORGAN: I feel the same about
15 both.

16 LCDR CASEY: I agree, ma'am. It's a
17 different analysis and probably the argument is
18 stronger for boot camp, but I am still pretty
19 strongly against the strict liability for either
20 boot camp or the advanced.

21 DEAN ANDERSON: Help us understand
22 why?

1 LCDR CASEY: Because I think it is
2 using, you know, a hammer to try to get something
3 that a toothpick would try to get at.

4 You're such a small amount of cases
5 would come under this Statute that I think a
6 strict liability Statute for a potential
7 consensual relationship, if we were talking
8 about, you know a Constitutional analysis almost
9 that a strict liability would almost carry over
10 too much if you narrowly -- even try to narrowly
11 tailor it, I think it just captures too much of
12 what would -- I would describe as a consensual
13 relationship.

14 DEAN ANDERSON: So, I guess the thing
15 that I'm wondering about is that these
16 relationships are already prohibited.

17 LCDR CASEY: Correct.

18 DEAN ANDERSON: And can be pursued
19 under Article 92. So, it's not that we're
20 suddenly making them, if we change. Do you know
21 what I mean? If we changed and clarified or
22 shifted in any number of possible ways on Article

1 120, it's not that we would suddenly be
2 criminalizing something that's not criminal in
3 the military.

4 What we would be doing is designating
5 it as a sexual offense. And so, I guess that's -
6 - and it's currently a strict liability offense.
7 Right? So, we're not changing that either.

8 If we were to, you know,
9 hypothetically, if one were to change it in under
10 Article 120, it would not be creating a strict
11 liability offense where it doesn't exist. It's
12 already strict liability, it would be designating
13 it as an Article 120 offense with a lot of
14 consequences that come from that, increasing the
15 range of potential punishments, collateral
16 consequences.

17 So can, rather than talk about strict
18 liability, which seems to me a little bit off the
19 mark because it's already a strict liability
20 offense, what's the argument or the objection, or
21 is there an objection, to making it an Article
22 120 offense?

1 COL MENDELSON: Ma'am, I agree. We
2 are -- it is currently a strict liability offense
3 and we are currently meting out appropriate
4 punishment under Article 92.

5 I advise many commanders and I do not
6 see any indication from them or the junior
7 commanders that what we are currently doing does
8 not provide them the appropriate tool to have
9 good order and discipline in their unit.

10 And so, currently, the way it's
11 structured, particularly when you have the
12 factual circumstance of the consensual
13 relationship, this has been more than
14 appropriate.

15 When you begin to broaden the 120 and
16 you increase the scope to say that it is now
17 rape, you're bringing it to a whole different
18 level, ma'am.

19 DEAN ANDERSON: Yes, so let's assume
20 it's not rape, let's assume it would be under
21 abuse of sexual contact or sexual assault. Does
22 that change the analysis for you or is it the

1 same?

2 COL MENDELSON: Ma'am, it would be the
3 same analysis because, although as lawyers we
4 understand this as it impacts the field, they
5 still see it as being under the rape rubric.

6 Ma'am, when I look at the MCM, and I'm
7 talking to my young trial counsel, I say this
8 book does not say military conviction, it says
9 military justice. And we take the gravamen of
10 the conduct and we apply the appropriate charge
11 to that conduct.

12 Doing this, I believe would be
13 criminalizing a turbo-charged adultery in a
14 manner which was not contemplated. We would be
15 stigmatizing people indicating that they are
16 rapists. They'd have felony convictions. They'd
17 be open to a greater range of punishment and
18 they'd be registered sex offenders.

19 Would it be a tool that could be used?
20 Yes, ma'am. But are we not bringing good order
21 and discipline with what we have? I believe it
22 is more than sufficient.

1 DEAN ANDERSON: That's a really
2 helpful analysis for us.

3 Anyone want to add to that? Other
4 questions or thoughts?

5 PROFESSOR SCHULHOFER: I had one
6 question.

7 I understand why at the AIT level you
8 wouldn't consider gender segregation at all. I
9 can see that's clear.

10 But, I'm wondering if there is a
11 reason why at the boot camp level why you have
12 gender segregation in the Marine Corps and not in
13 the other Services?

14 COL MORGAN: I think the Air Force
15 wants to integrate their sexes because that's the
16 way we live together in the operational Air
17 Force. And, there is a push on in basic military
18 training now to completely gender integrate, not
19 just having trainees in the same room, but the
20 flights, parades, all those things because that's
21 the way we actually operate.

22 PROFESSOR SCHULHOFER: So then, why

1 wouldn't that be the case in the Marine Corps?

2 LT COL WILSON: Well, sir, I believe
3 that the Marine Corps believes the most effective
4 way to train an inculcate someone into the Marine
5 Corps is to do it in a gender separated manner.

6 But, I honestly am not the -- probably
7 the right person for the right amount of rank to
8 speak to what the overall, you know, the
9 Commandant view as on why we continue to train
10 that way but other than it's been a successful
11 formula for us, you know, since our inception and
12 that we do begin the integration, you know,
13 immediately upon the completion of boot camp.

14 For instance, all Marines -- all the
15 Infantry Marines go to the School of Infantry,
16 but anyone who is non-infantry, whether they're
17 going to be administrative personnel or artillery
18 or whatever it may be, they go to MCT, Marine
19 Corps Training, and at that school, it's a month
20 of Infantry training and that is integrated with
21 both male and female instructors and, you know,
22 they're operating squads and platoons immediately

1 after boot camp, sir.

2 DEAN ANDERSON: Ms. Wine-banks?

3 MS. WINE-BANKS: Just, this is off
4 topic for our Panel, but when I was General
5 Counsel of the Army, it was at the time of basic
6 training being integrated and academies being
7 integrated. And so I was privy to a lot of the
8 studies of the results of the integration and it
9 was beneficial.

10 So, I would just suggest look at, for
11 example, MAXWAX, which was the study of the basic
12 training integration and see whether it isn't
13 better to integrate the genders at the basic
14 training level and no harm.

15 DEAN ANDERSON: Poor Lieutenant
16 Colonel Wilson.

17 MS. WINE-BANKS: It wasn't an issue,
18 I couldn't sit here and just let that pass,
19 you're still segregated.

20 DEAN ANDERSON: Well, what's
21 interesting is the way that you posited the
22 gender segregation as a possible rationale for

1 the fact that there have been no instances. And
2 yet, your colleagues in other Services also have
3 almost none, it sounds like, instances.

4 So, other thoughts or comments from
5 the Panel?

6 MS. KEPROS: Yes.

7 DEAN ANDERSON: Ms. Kepros?

8 MS. KEPROS: Honestly, I'm embarrassed
9 to ask this question. But, if as a civilian,
10 this is about the depth of my military experience
11 and I have the benefit of having all these
12 experts around me, so bear with me.

13 I started thinking about the movie Top
14 Gun which has a love story at center between an
15 instructor and a student. And it made me
16 curious, is that a scenario that would fall under
17 Article 92? Is that a prohibited relationship
18 and would liability flow from it?

19 Just because it gives me a visual of
20 a potentially consensual relationship or at least
21 what was portrayed as on in that film.

22 COL MORGAN: It does for the Air

1 Force. In fact, we've extended our reach on that
2 to putting it in contractors contracts. She was
3 a contract instructor.

4 MS. KEPROS: Yes.

5 COL MORGAN: But we had included it in
6 our contractors and our civilian personnel rules.

7 MS. KEPROS: Okay, thank you.

8 MAJ GEN WOODWARD: And served as the
9 Deputy Secretary of Defense recently.

10 MS. KEPROS: Is that right?

11 MAJ GEN WOODWARD: Christine Fox is
12 who it was based on.

13 MS. KEPROS: Okay, all right. That's
14 good to know.

15 COL MENDELSON: And so, Kelly McGillis
16 has moved up.

17 MAJ GEN WOODWARD: We gave her a hard
18 time in one of our sexual assault meetings about
19 when they --

20 (Simultaneous speaking.)

21 DEAN ANDERSON: So, I'm going to
22 circle back to the core question that we --

1 unless there are other?

2 The core question that we've grappled
3 with with the other panels, and that is trying to
4 figure out what to do in circumstances, and I
5 understand from your perspective, that these
6 circumstances are rare.

7 It sounds like you're convinced that
8 the training that you provide either effectively
9 prohibits it, deters it, and eliminates it,
10 except under very rare circumstances.

11 But the concern we have about
12 individuals in positions of authority with
13 predatory impulses to isolate and prey upon young
14 recruits, in circumstances in which those
15 recruits do not believe they can say no.

16 And, we're trying to figure out if ---
17 to us, I think, I'll speak for myself, to me that
18 sounds like a sexual offense. I understand that
19 there are serious consequences to having
20 something shifted to an Article 120 and that may
21 be a reason not to do it. The collateral
22 consequences and the other consequences.

1 Do you feel like that case that I
2 described or something like that is already under
3 120 or is that comfortably under a 92 and solved
4 by 92?

5 Was that too long a question?

6 COL MENDELSON: No. Ma'am, I believe
7 under the given factual scenario, 120 could be
8 utilized depending on the facts of the situation.

9 If I could pull back a little bit and,
10 I can't speak for other panel members, but sexual
11 assault, rape, happens in our Services. But, I
12 believe, in talking to commanders, in talking to
13 people on the ground, they get it. They truly
14 get it.

15 When I went down to speak to the basic
16 training brigade and I went to the schools to
17 talk to them, when I talked to them about, that
18 this is another element that was going to be
19 brought up, they just kind of raised their hands
20 and they said, we get it, we understand.

21 A lot of what this does, ma'am, is
22 they begin to question themselves. Am I not

1 doing the right thing or aren't I doing
2 everything that I'm supposed to be doing?

3 DEAN ANDERSON: I'm sorry, who's the
4 they?

5 COL MENDELSON: The they would be
6 either the drill sergeants or the cadre members.

7 DEAN ANDERSON: I see.

8 COL MENDELSON: And, essentially, what
9 you get, and a number of them said this, is we
10 begin to become afraid of our trainees.

11 And what you do is you build a gap and
12 a chasm between that trainer and trainee and that
13 very valuable mentoring/mentee relationship does
14 not occur at the level that you want. I'm sure
15 if you ask a number of senior enlisted, they will
16 tell you one of the single most important people
17 in their lives were that drill sergeant or that
18 trainer.

19 When we do things like this, and I'm
20 not saying that this individual provision would
21 do that, but when they hear about it and that
22 drum continues to beat, what you are doing is --

1 not you, not the Panel -- but you are building
2 that chasm. They're afraid of them.

3 The power and the authority flips
4 because some people understand that -- that now,
5 if they make a complaint, that drill sergeant,
6 that trainer, that cadre member is sidelined.

7 PROFESSOR SCHULHOFER: Isn't that true
8 now?

9 COL MENDELSON: I'm sorry?

10 PROFESSOR SCHULHOFER: Isn't that true
11 now?

12 COL MENDELSON: It is, yes, it is true
13 now. I'm just trying to get -- I'm not saying
14 that this will be the direct impact on what
15 you're saying, all I'm saying is please
16 understand that the more changes that we make,
17 the more provisions that we put in the field, the
18 more that we do, the message that is reached
19 below is very different than maybe what's
20 intended, in that, it widens the gap and it may
21 have a degradative impact in some missions which
22 you're not thinking about.

1 From a trial counsel perspective, from
2 a prosecutor, if I had this tool, would it be
3 effective? Absolutely. But are we really
4 getting at the heart of the matter? Are we
5 really covering a gap offense?

6 I just -- just a big policy issue that
7 I was thinking about when I was talking to them
8 and I know that was long, ma'am.

9 DEAN ANDERSON: Well, this is an
10 interesting and somewhat new perspective, the
11 relationship between the trainer and the trainee
12 and the importance of mentorship and a closeness
13 --

14 COL MENDELSON: Yes.

15 DEAN ANDERSON: -- professional --

16 COL MENDELSON: Yes.

17 DEAN ANDERSON: -- but close
18 relationship there. Do others agree that that is
19 a problem under the status quo and would this
20 contribute to the problem under the status quo?
21 Or is there no problem under the status quo
22 because people understand the distinction between

1 professional close and sexual misconduct?

2 COL MORGAN: I think our NCOs are very
3 gun shy right now based on everything that's
4 happened. And, they have become afraid of their
5 trainees to a certain extent. They're dealing
6 with it very well, but it is a frightening
7 prospect.

8 DEAN ANDERSON: How do you coach them?
9 How do you -- what --

10 COL MORGAN: We tell them they have to
11 do their job, that their job is to train trainees
12 and they need to interact with them and move on
13 from it.

14 But, many of them are -- have
15 expressed fear of their trainees, you know, all -
16 -- you believe the trainees over us every single
17 time. We won't get a chance to tell our side of
18 the story.

19 So, I agree with Colonel Mendelson
20 that it would harm that relationship. Maybe not
21 like he said the direct effect, but I think it is
22 a factor.

1 MS. FRIEL: You're hearing very much,
2 I can tell you, it's the same thing you're
3 hearing from teachers and coaches in the civilian
4 world. It has to do with where we are in today's
5 world with this kind of behavior.

6 And I'm hearing the exact same thing
7 from teachers who -- I don't want to be alone
8 with this kid anymore. I used to be a much
9 better mentor and, you know, so now you're doing
10 things like saying, well, then you shouldn't be
11 alone. There should be two people or leave the
12 door open or all kinds of ways to deal with it.

13 But, this is a pervasive feeling in
14 today's world.

15 COL MENDELSON: If I could ---

16 LCDR CASEY: And --

17 COL MENDELSON: I'm sorry sir, please,
18 please.

19 LCDR CASEY: The one thing I would add
20 to that, as an example, the worst case that I
21 dealt with as a Staff Judge Advocate onboard our
22 training center is the exact opposite of kind of

1 what we're talking about.

2 We had a member who was lying about
3 her status as a victim multiple times, three,
4 four, five, claiming that she had been raped or
5 assaulted four or five times.

6 DEAN ANDERSON: With different people?

7 LCDR CASEY: With different people.

8 DEAN ANDERSON: Wow.

9 LCDR CASEY: I mean she was on a roll
10 there for a while.

11 And that posed some significant
12 prosecutorial issues for us. I mean it was
13 getting congressional, Commandant level concern
14 because we had this person who was abusing these
15 policies that had been put in place.

16 We were, very obviously, for the right
17 reasons pro-victim. But our policies are so
18 skewed to the point where if somebody makes a
19 claim in the Coast Guard and you don't like the
20 ship you are on, you make a claim and you're off,
21 no questions asked and you're at station Key
22 West.

1 There is some unintended very serious
2 consequences to those policies and it's parallel
3 to, I think, this discussion that we really need
4 to be careful about the policies or the Statutes
5 that we create that have these consequences that
6 to prosecutors and the attorneys and the
7 commanders are handcuffed in not being able to
8 make their decisions.

9 DEAN ANDERSON: So, Lieutenant
10 Commander, it sounds like you believe that we've
11 already gone too far.

12 LCDR CASEY: I think we are on our way
13 and if we're not already there, we're too close
14 to going too far.

15 DEAN ANDERSON: Anyone else want to
16 take a bite at that?

17 MAJ GEN WOODWARD: Well, I'll tell you
18 when I was a SAPR Chief, that was one of my
19 biggest concerns is to make sure that anything
20 that we did for the victims, you know, you want
21 to support the victim as much as possible, but
22 you don't want to make anything seem beneficial

1 for them because there is such a huge bias out in
2 the field of all these false reports, right,
3 which we know statistically is really inaccurate.
4 But there's this bias out there that, you know, a
5 certain high percentage of them are false
6 reports.

7 And what they'll use to reinforce that
8 bias is, well, you know, because my big thing is,
9 okay, why would somebody come forward and deal
10 with all the negative consequences of coming
11 forward. So, then they throw out the positive.
12 They get to get reassigned to some place, you
13 know, really nice.

14 So, you know, my big thing was let's
15 be really careful as a Service that we don't give
16 the people with the bias any ammo to sit there
17 and say, well, they're false reporting.

18 And, you know, so that's a really
19 delicate balance that we --

20 MS. WINE-BANKS: That seems to me
21 since we know statistically there aren't that
22 many false reports and that this goes back to,

1 you know, 30, 40 years ago when a woman couldn't
2 be trusted to testify. She had to be
3 corroborated, that, you know, that women would
4 just make this up is such an old-fashioned view
5 that I --

6 MAJ GEN WOODWARD: But, you can't get
7 past that and you have to avoid the ability to
8 give somebody some honest, you know, ammo to use
9 to sit there and say this is happening.

10 LCDR CASEY: Yes, ma'am. And I think
11 I bring that up not just to actually add to the,
12 you know, instructors or teachers or coaches now
13 that that's a very -- that's the more serious
14 consequence that we're dealing with that we have
15 that separation.

16 We need our instructors and our
17 trainers to be hands on with these trainees and
18 if we're creating policies and strict
19 liabilities, anything that would distance them to
20 the mission that they have which is training,
21 getting our folks ready for the fleet, that's a
22 very real consequence and Statutes and Article

1 120, believe it or not, in my opinion, can have
2 those effects.

3 COL MENDELSON: Ma'am, I know we're
4 only dealing with a limited substantive issue
5 here, but as you may or may not know, they're
6 talking about giving automatic privileged
7 immunity to sexual assault victims.

8 I actually just had to fill out a
9 questionnaire. I don't know if anybody else did,
10 that said what do you think about providing
11 victims who've reported sexual assault automatic
12 immunity against the collateral misconduct?

13 So, it's -- when I speak I'm not
14 speaking just of this, but I'm seeing the whole
15 panoply of issues and I'm trying to look at them
16 in total and that's how I'm responding.

17 And that big policy piece, and if I
18 can maybe even bring it back to kind of what you
19 were saying, the drill sergeants are primarily
20 male. The impacted -- the people who will be
21 impacted the greatest, will the young female
22 trainees. And that gender integration will not

1 come to fruition, that mentor and mentee
2 relationship -- the chasm will grow.

3 That's my fear, my personal fear as
4 all these things are introduced. I think the
5 females will be disproportionately impacted based
6 on any of the number of things we've already
7 talked about.

8 DEAN ANDERSON: So this is a real
9 challenging time for us to be doing the work that
10 we're doing in the context -- in a larger context
11 in which many members of the military feel like
12 there are so many new directives imposed upon
13 them and that those are having consequences.

14 Nevertheless, we still have to grapple
15 with the questions that are fairly narrow that we
16 face and your testimony and your help and insight
17 will help us come to something hopefully wise.

18 PROFESSOR SCHULHOFER: The --- just one
19 thought, not really a question. But, one of the
20 things that struck me this morning was the way
21 that many of our concerns about possible gaps in
22 Article 120 could be addressed and were being

1 addressed by very effective training procedures
2 and low level, not low level in a disparaging
3 way, but in the micro solutions like that came
4 out of your report, I think many of them, the
5 drop box, for example, is not something you think
6 about when you think about crafting substantive
7 criminal law.

8 But, at that level, many changes can
9 really impact the culture much more effectively
10 than rewriting the law.

11 And, one of the things I'm thinking
12 about here is whether some rethinking of that
13 kind might be appropriate in terms of the
14 relationship between the military training
15 instructor and the recruits because there has to
16 --- and the gender integration is here to stay.
17 There is, you know, we have to -- that's just
18 carved in stone. And it's going to percolate
19 down to the training level, probably boot camp
20 and, if not, certainly weeks shortly after that.

21 And so, it's a given that there has to
22 be a powerful mentoring relationship without a

1 sexual element. That has to be something that,
2 I'm just wondering whether there needs to be, for
3 the people who grew up in the old world of ten
4 years ago to rethink that relationship so that
5 the two things that have to remain the same don't
6 collide with each other, one of which is that,
7 the cross-gender relationship between instructor
8 and trainee on the one hand which keeps a sexual
9 distance without keeping a professional distance.

10 That was just my thought. And I don't
11 know how to do that.

12 COL MENDELSON: Yes, sir.

13 PROFESSOR SCHULHOFER: But, when I was
14 listening to you, I was thinking, this is the
15 same if you went back 20 or 30 years ago, there
16 were professors, my colleagues, who said, you
17 know, you can't mentor a female student without
18 having a very close personal relationship with
19 her. And --

20 DEAN ANDERSON: And a lot of us said
21 that could be a professional relationship.

22 MAJ GEN WOODWARD: But, we figured

1 that out. And that's what I would submit, you
2 know, is that, you know, it takes me back to the
3 35 years of my career and in the early days some
4 of the things that were said about just, you
5 know, being in the squadron.

6 So, I think ultimately people figure
7 out how to get around it. But change as things
8 are dictated to them, that is going to be the
9 natural reaction is they're going to say oh, this
10 is going to change the way we do everything. Oh,
11 shit, you know, but ultimately, I think they work
12 through it and it becomes just fine. But that's
13 my perspective.

14 COL MENDELSON: Yes, and, I hope my
15 comments were taken very much in the light which
16 you've laid out, Professor, is we have one --

17 PROFESSOR SCHULHOFER: That was very
18 helpful.

19 COL MENDELSON: We want that nurturing
20 relationship no matter what that sex is. But if
21 they're afraid of trainees who are they more --
22 who are the male drill sergeants more afraid of?

1 Because where do the predominate amount of
2 complaints come from?

3 And that's my personal fears. We need
4 to continue to integrate. Everybody needs to be
5 part of the team, an equal member, equal
6 contributing member. Just my thoughts and my
7 sentiments.

8 DEAN ANDERSON: Excellent thoughts to
9 end on, sir.

10 I think we'll take a break until 2:00.
11 Thank you all very much for your comments.

12 (Whereupon, the above-entitled matter
13 went off the record at 1:40 p.m. and resumed at
14 2:15 p.m.)

15 DEAN ANDERSON: So we will go back on
16 the record. And we're very excited to talk about
17 an issue that had dogged us all day, this
18 question of the collateral consequences of a
19 conviction for any of the sexual offenses under
20 Article 120.

21 And, we're extremely delighted to have
22 Mr. John Awtrey here to talk to us about his

1 expertise. So, I will give the mic over to you.

2 MR. AWTREY: Okay, thank you.

3 And I get to switch gears. I spent
4 the morning doing child abuse and neglect and
5 domestic issues and so, now I'll roll over and
6 talk about sex offenders.

7 I have a law enforcement policy about
8 this in DoD and sex offender registration falls
9 under my purview. I have the policy document.

10 And, what I'd like to do is -- there
11 are several things happening in this area. The
12 Scripps news service articles and our problems
13 with that and the legislation we have now and
14 pending legislation we're still looking at is all
15 just one piece of a bigger bunch of things that
16 are going on.

17 So, what I thought I'd do real quickly
18 is just back up and describe to you what we do
19 do, how we're SORNA compliant.

20 One thing we're doing in conjunction
21 with the security of our installations that's
22 gaining us information and then get into the

1 tracking piece with the legislation and how we're
2 approaching that.

3 Notification, the first slide, please.

4 What I've given you there is for the
5 military Servicemember community, those that are
6 convicted under the UCMJ of a covered offense, if
7 we don't incarcerate them, we convict them and we
8 separate them, put them on administrative leave.

9 The Service -- and you have the
10 Service regulations there, the Army regulation,
11 Air Force instruction and the SECNAV -- under my
12 policy make notification to the State Sex
13 Offender Registry where the individual tells us
14 he is going. And there are obvious problems with
15 that.

16 But, in terms of meeting the
17 requirements for SORNA, we notify the State Sex
18 Offender Registry and now we also notify the U.S.
19 Marshall Service National Sex Offender Targeting
20 Center who take the name, put them on a wait list
21 and at the 30-day point then check the State
22 where we said he was going to see if they

1 actually registered.

2 If they didn't, then they go on their
3 watch list and I'll describe the process from
4 there.

5 If they're incarcerated, different
6 policies, you see it there, 30, 25, 7, that
7 belongs to our legal policy shop and the Office
8 of the Undersecretary of Defense for Personnel
9 and Readiness. It's not mine, but same process.

10 We notify the State Registry, we
11 notify the Marshall Service.

12 And, those are the minimums. We have
13 cases where we notify -- the individual says
14 they're going back to Texas and they tell us what
15 town. We notify the town police, we notify the
16 county sheriff, we notify the State Registry. We
17 notify anyone we think that would be appropriate
18 to have the information that they have an inbound
19 that needs to register.

20 So, those notifications are made, more
21 on that in a bit.

22 Identification, we also have a large

1 population that live and work on our bases every
2 day in addition to our military Servicemembers.
3 And you see there are dependents, the civilian
4 employees and then the local population, those
5 that come and mow our grass, delivery milk to the
6 commissary.

7 Identification of who's a sex offender
8 and who isn't and monitoring those that are on
9 our bases that have restrictions placed on their
10 conviction.

11 The first thing was, how do we find
12 out? Well, post-Fort Hood I of the Hasan
13 shootings -- the next slide, please -- we've set
14 up a process, and you'll see there, IMESA. That
15 stands for the Information Machine for Evaluation
16 and Security Analysis. Don't ask me, I'm not a
17 wirehead.

18 But, what we've done is that we've got
19 an agreement with the FBI's Criminal Justice
20 Information Services Division out of Clarksburg,
21 West Virginia, they run the National Crime
22 Information Center with all the various files and

1 their wanted persons file and the National Sex
2 Offender Registry.

3 We've built automation at our front
4 gates, the Air Force and the Defense Logistics
5 Agency are fully employed now. Colonel Hines ran
6 into it at Fort Belvoir where the Army has
7 started to deploy theirs.

8 You come on our base and you see down
9 here in my little non-IT chart, the start, you
10 come to the gate, you swipe your CAC card, the
11 machine runs that information electronically up
12 to the Defense Manpower Data Center in the left
13 top left.

14 We have an extract of the National Sex
15 Offender Registry file, runs my name against
16 that, you get a green light. I'm not in the Sex
17 Offender Registry file. Proceed, come on on the
18 base.

19 If we get a hit, then that information
20 is batched and sent to the Military Criminal
21 Investigative organization, Army batch to CID,
22 Navy batched to NCIS, Air Force batched to OSI.

1 This is all still law enforcement information at
2 this point because it's come out of the National
3 Crime Information Center.

4 The three military criminal
5 investigative organizations will then parse out
6 the public releasable information for command
7 management letting the Secretary of the Navy,
8 Chief of Staff of the Army know how many we have,
9 what bases they're on, military dependents.

10 The only way to find out up until now
11 is I get a copy of Stars and Stripes. Sex
12 offender in Korea, why did you allow that to
13 happen? Well, female Army Major Commander
14 General Staff called at Fort Leavenworth, husband
15 is a registered sex offender in Kansas. She gets
16 orders to the 8th Army in Korea.

17 He goes to the Kansas registry and
18 says I'm a dependent, my wife's going overseas,
19 I'm leaving. They say, thank you very much,
20 you've made the appropriate notifications.
21 Kansas doesn't forward notice anywhere, they just
22 make a note, take him off the registry, pull him

1 out of the NCIC NSOR file.

2 He goes to Korea and it's discovered
3 he's a sex offender living on base in Yongson,
4 Stars and Stripes.

5 Dependent wife at Fort Hood doing a
6 periodic patrol of the zip codes of the Texas
7 State Registry discovers two doors down in base
8 housing, 17-year-old male dependent of a
9 Lieutenant Colonel is a registered sex offender.
10 How can he be allowed in base housing? Different
11 decision. First thing is, we didn't know.

12 As we field this process, we're
13 running our names against several criminal files
14 in the National Crime Information Center, but for
15 the purposes of this discussion and the purposes
16 of my policy, the Sex Offender Registry is one of
17 them.

18 So, at some point, when all major
19 posts have this and everybody's going through,
20 we'll get the hits and we'll know who within our
21 population are registered sex offenders.

22 The military, we pretty much know.

1 We've either incarcerated them or we've
2 administratively separated them. It's our
3 civilian population we really don't know about.
4 And I think we're going to have some surprises,
5 especially in our civilian employee workforce.

6 The other thing is that once you run
7 through a gate, your name is in our subscription
8 pool for five years. So, for five years, as long
9 as your CAC card is active, we're running your
10 name every day, every week against these files to
11 ensure that there's no derogatory criminal
12 history or criminal information on you.

13 So, this is how we're going to
14 discover outside of the military that we convict
15 under our own judicial system who we have on our
16 bases.

17 Some have restrictions based on their
18 convictions. The guy that mows the grass for
19 SCIC and SCIC has the contract for Fort Belvoir
20 grass mowing. Being a convicted sex offender
21 probably won't prohibit him from doing a good job
22 mowing the grass, but we don't want him mowing

1 the grass around the child care center or the DoD
2 school if there's a school on base.

3 I've talked to a number of State
4 registries and said that we have -- if we have
5 people that have restrictions, which you normally
6 monitor in the civilian community, either the
7 State Police or the county sheriffs or parole and
8 probation. Who's going to do that our
9 installations?

10 And, most of the unanimous answer I
11 get is that's federal property regardless of
12 jurisdiction. We're not coming on your base to
13 monitor to make sure the pedophile is not hanging
14 out around the daycare center.

15 So, this will fall to our law
16 enforcement so that the MCIO will notify the
17 local law enforcement, Provost Marshall, security
18 force squadron, that John Awtrey who delivers to
19 the commissary every day is a registered sex
20 offender. He's fit for that job, but you've got
21 to keep an eye out to make sure he's not
22 wandering around places that his restrictions

1 would otherwise prohibit him.

2 This is something new for us and, as
3 you can imagine, any time, especially cops, when
4 you tell them they've got to do something new,
5 you know, it's a great hubbub. But, it's
6 something we need to do. So, identification.

7 Now, what has happened post the
8 Scripps article -- next slide -- is go back to
9 the notification we started talking about.

10 I'm getting out of Leavenworth, out of
11 the DB, the Defense Disciplinary Barracks. I'm
12 going home to Washington, Army. Okay?
13 Notifications are made to the State of
14 Washington, the Marshall Service and I go to
15 Texas. I'm an absconder. I haven't registered
16 within 72 hours.

17 That's no different than John Awtrey
18 being a resident of the Commonwealth of
19 Massachusetts as a registered sex offender and
20 moving to Tennessee checking out of the Mass
21 State Registry and going to Minnesota.

22 Our jurisdiction ends once we separate

1 a person. However, according to the Scripps
2 article, it's our fault that these folks are out
3 there either reoffending or doing something bad.

4 So, Congress jumped in and decided
5 that we should put the names in the National
6 Crime Information Center's National Sex Offender
7 Registry file. And this will solve the problem.

8 And, when you're trying to explain to
9 them that I create a database, put the names of
10 all those covered offense -- all those people
11 we've convicted that are incarcerated or being
12 administratively separated in my database, I put
13 it in the National Sex Offender Registry file
14 with the FBI.

15 They tell me they're going to
16 Washington and they go to Texas. Nothing's
17 changed. The tie is with the Marshall's Service
18 whose job it is to track down fugitives and
19 they've made a partnership with us to do this.
20 Didn't seem to make a whole lot of difference.

21 So, here you see -- is this the, yes.
22 Public Law 114-22 now 42 USC 16928a, I've got to

1 create a database of those that we convict of
2 covered offenses, put them in the National Crime
3 Information Center National Sex Offender Registry
4 and make those names available to the DOJ's
5 public sex offender website, the pointer system
6 where you go type a name in and it searches all
7 the different State Sex Offender Registries to
8 see if that name is a registered sex offender.

9 We tried to explain that by providing
10 these names as we're separating the people to the
11 Marshall Service who belong to the Department of
12 Justice, we actually were informing DOJ that we
13 were putting people out that need to register.
14 But, somehow, there's this fixation on databases.

15 So, we've got the law. My directive-
16 type memorandum that establishes a policy for sex
17 offender management in DoD in on my
18 Undersecretary's desk right now for signature to
19 rapid revision to put this law into the policy at
20 a minimum.

21 So, I'm building the database and I'll
22 explain a little more in a little bit here.

1 Next slide?

2 Sex offender plus tracking, at the
3 same time, we have a section of the FY16 National
4 Defense Authorization Act and you see it there,
5 Section 557, which, for the first time in my
6 life, I've ever seen a law that revises a
7 document in the Department. You can see there
8 it's the revision of Department of Defense
9 Directive, that's my Directive that establishes
10 policy and we're going to have a law that revises
11 a Directive.

12 Understanding that a Directive is a
13 quick publication short term issuance. I've got
14 to turn that into an instruction, a permanent
15 regulation. So, this DTM is going to go away
16 next year.

17 However, I'm going to have -- I may
18 have a law that tells me that I've got to do the
19 following things in it.

20 This is Congresswoman Speier from
21 California. This would have us establish a
22 database, and you see it there. All active duty,

1 all reserve component, all civilian employees and
2 all former active duty or reserve component
3 members who are convicted of a sex offense in
4 forever.

5 When I first looked at this, and I
6 went to my UCMJ attorney and General Counsel and
7 said, we don't have jurisdiction over most of
8 these people. And he looked and said, this will
9 create jurisdiction. And so, I went, oh, good.

10 Yes, I don't know how you'd do this,
11 I really don't. And I'm sure that the 23-year-
12 old staffer that wrote this for Ms. Speier
13 doesn't have a clue either. However, it's -- so,
14 it's there.

15 We're using the Military Sex Offender
16 Registration Act of 2015 to appeal this and try
17 to not have this come through because, you see
18 the last one down there, reporting the number of
19 individuals we released were registered and not
20 registered. How do I find that out without
21 venturing outside the jurisdiction of DoD into
22 the State's business to see if they've registered

1 or not registered?

2 There are, as my attorneys have
3 pointed out to me, there are posse comitatus
4 considerations here that would be outside our
5 bounds, outside our scope in trying to implement
6 a law. So, I just -- I show you that because
7 it's a hanging chad, it's still there until we
8 know what's in the NDAA after Congress comes back
9 next month because this --

10 And, it doesn't seem to matter how
11 quickly I try to implement the existing law, this
12 one is still being held over me.

13 So, next slide?

14 So, I'm creating a database that will
15 hold the required information or report them to
16 the National Crime Information Center's National
17 Sex Offender Registry file. I'll have my IT guys
18 do whatever magic they do so that if someone
19 dials into the Dru Sjudin National Sex Offender
20 Public Website and looks up John Awtrey, they'll
21 find out that he's convicted under the UCMJ and
22 presently incarcerated at the Disciplinary

1 Barracks at Fort Leavenworth or at Lompoc or at
2 the Brig in Charleston with all the required
3 information that's there.

4 The trick here is that this is still
5 all law enforcement information and I can't just
6 have -- I can't hire an IT for them to build a
7 database and run it. It's got to be within the
8 criminal justice community.

9 And so, that busy slide I showed you
10 on our security process is going to gain us
11 information on sex offenders. We got an
12 exception from the FBI for our Defense Manpower
13 Data Center that runs the Defense Eligibility
14 Enrollment System, all the big data manpower
15 databases.

16 We got an exception for them to do
17 that matching with the criminal data. And what
18 I'm trying to do now with the FBI, and they're
19 receptive, we're just working the words is to
20 take that exception tent and move it a little to
21 the right to create space to allow me to have
22 DMDC who can build this database in two days and

1 won't complain about not getting money for it
2 because they work for me or for my organization,
3 to build the database and then have the Services
4 feed it.

5 We'll feed NCIC and, if there's
6 duplication with the States, we and the FBI are
7 not so concerned.

8 If I have a name in there, we've
9 convicted somebody and they're in the 90-day
10 window of being administratively separated and I
11 put them in there and I leave them there for 30
12 days, if they go and register and their name
13 ended up being duplicated with Kentucky, that's
14 okay. We discovered that they've met their
15 obligations and registered. I can pull my name
16 out.

17 If they abscond and the Marshals are
18 out looking for them, at least there's a point of
19 origin on them, that they were a DoD convicted
20 sex offender, Army, Navy, Air Force, Marine Corps
21 and they'll stay in NCIC until the Marshals can
22 round them up or bring some closure to the case.

1 The trick is, it still won't cover the
2 individual that tells us they're going to Texas
3 and goes to Florida. The Marshals will take care
4 of that in our partnership. But, we still can't
5 do anything with that.

6 So, this is -- we're going to spend
7 time and money, as we do with a lot of things
8 Congress directs, to build something to fix a
9 problem that doesn't really fix it. And in my
10 short term in federal government, we do that
11 quite a bit.

12 But, the getting a handle on who we
13 have on our bases that are registered sex
14 offenders and then building the database so we
15 have a set of those that we've convicted, I think
16 are the two big pieces of this.

17 And, we're 90 days out from the
18 Military Sex Offender Registration Act of 2015
19 being signed by the President and I get calls
20 from staff on the Hill and I get calls from
21 people wanting to know is the database up and
22 running and who's in it?

1 And I just, you know, I understand
2 this is Washington, you know, not everything is
3 real, but I still can't understand, the States
4 have the same gap we have with sex offenders. I
5 know, but instead of going to the SMART Office at
6 DOJ and trying to figure out how to cover down on
7 the gap and maybe have States have some process
8 for the States and federal agencies like us and
9 the Bureau of Prisons who release people to be
10 able to share information better and talk to each
11 other.

12 I called my home State of
13 Massachusetts, their sex offender registry up
14 there and they said, when someone leaves the
15 State, we make a note they have left and we keep
16 the name for future reference in case they come
17 back. Most States just take it out and then take
18 it out of the big registry at the FBI.

19 Well, what if I was leaving
20 Massachusetts to go to Georgia and they made a
21 notification saying we're required to, you know,
22 those kind of things. And then, put the Marshals

1 in the middle with their fugitive hunting group,
2 you know, to track that kind of stuff.

3 So, there's a bigger problem and there
4 are possible ways to ameliorate that bigger
5 problem. But, in the meantime, I'm going to
6 build a database, put our names in there.

7 And, I'll tell you, in terms of
8 numbers, the best numbers I have are based on the
9 FY13 reports from our prison system. We had
10 approximately -- at the end of FY13, we had
11 approximately 632 individuals that have what
12 would be considered covered convictions for this.

13 DEAN ANDERSON: What are the
14 convictions that are covered?

15 MR. AWTREY: Sex offenses.

16 DEAN ANDERSON: Are they only the
17 Article 120s?

18 MR. AWTREY: Well, 120s or some 134s.

19 MAJ GEN WOODWARD: Pretty small,
20 right, just rape, sexual assault, sexual contact,
21 abusive sexual contact.

22 MR. AWTREY: Yes. And, as it is with

1 the States, some things we convict individuals
2 of, depending on the State they move to, may not
3 be a registerable offense. It's the same as
4 State convictions versus a different State.

5 So, 632 at the end of FY13
6 incarcerated with convictions that would cause
7 them to have to register as a sex offender once
8 we threw them out. And, somewhere between 60 and
9 70 pending administrative separations, you know
10 30 to 120-day window waiting to be thrown out of
11 their Service. So, we're talking about 700
12 people at the end of '13 out of a population of
13 three million.

14 MAJ GEN WOODWARD: I'm sorry, is that
15 in all of DoD or within that year?

16 MR. AWTREY: Yes, all of the
17 military.

18 MAJ GEN WOODWARD: Okay.

19 MR. AWTREY: Yes.

20 MAJ GEN WOODWARD: Currently
21 residing.

22 MR. AWTREY: Yes, right, currently

1 residing, yes.

2 PROFESSOR SCHULHOFER: I'm sorry,
3 sir, you said currently residing where?

4 MAJ GEN WOODWARD: Within DoD.

5 MR. AWTREY: Within DoD.

6 PROFESSOR SCHULHOFER: Within the
7 database or --

8 MR. AWTREY: No.

9 PROFESSOR SCHULHOFER: -- on a -- is
10 that --

11 MR. AWTREY: They're either
12 incarcerated in one of our prisons or they're on
13 a base somewhere waiting administrative
14 separation.

15 PROFESSOR SCHULHOFER: Okay, thank
16 you.

17 MR. AWTREY: Yes.

18 MS. WINE-BANKS: Say the number
19 again?

20 MR. AWTREY: Roughly 700. And I
21 think our active military is around one and a
22 quarter million. So, that's the order of

1 magnitude of those that --

2 Now, you know, the other sort of
3 collateral damage, we also -- the DoD IG based on
4 all the hubbub over the Scripps article and the
5 Congressional interest caused us to go and look
6 at should DoD become a SORNA jurisdiction, become
7 the 51st State?

8 And, I did a study and I came back and
9 said that it doesn't solve the problem and it
10 would cost a whole lot of money. And, we have
11 examples of California has a sex offender
12 registry but they're not SORNA compliant. In
13 order to become SORNA compliant, California would
14 have to spend \$30 million. And they already have
15 a registry.

16 So, how many tanks do you not want to
17 buy? How many aircraft carriers do you want to
18 take out of commission? You know, it's --
19 there's a cost benefit to everything.

20 PROFESSOR SCHULHOFER: Sir, excuse
21 me. I apologize, it may be that I missed
22 something, but probably did. But, could you

1 summarize briefly what the Scripps article is?

2 MR. AWTREY: Scripps article found
3 two individuals, former Servicemembers, that were
4 convicted of sex offenses that absconded, they
5 didn't register as they were supposed to.

6 One reoffended and the article was
7 about the mother and the daughter and the
8 results, the revictimization or the victimization
9 of yet another one and how, if we had done what
10 we were supposed to do, that individual would
11 have been registered somewhere and wouldn't have
12 been able to reoffend. And, for the life of me,
13 I still I can't figure out how that works. But,
14 that's what Congress jumped on.

15 So, should we be a SORNA jurisdiction?
16 We throw someone out that's convicted of an
17 offense that they have to register in the State
18 registry for.

19 Even if we're a SORNA jurisdiction,
20 I'd have two populations in my jurisdiction,
21 those incarcerated and those about to be
22 separated. I'm sure the Governor of Kansas would

1 go ballistic if of that 632 prisoners I had in
2 2013, 500 are in the Disciplinary Barracks at
3 Leavenworth, so all of a sudden, Kansas' sex
4 offender numbers would jump 500 because they'd be
5 in that Zip Code.

6 And, I mean it just all kinds of
7 collateral problems.

8 So, we're identifying, we're making
9 all the proper notifications. We've partnered
10 with the Marshall Service to do those things we
11 have no jurisdiction for once we've separated
12 somebody. And, we're going to build a database
13 and put them in the National Sex Offender
14 Registry.

15 DEAN ANDERSON: So, you talked about
16 the requirement of former active duty or reserve
17 members?

18 MR. AWTREY: That's Ms. --

19 DEAN ANDERSON: Right. So, that's
20 now the law?

21 MR. AWTREY: No.

22 DEAN ANDERSON: No, that's a

1 proposal?

2 MR. AWTREY: That's pending in the
3 FY16 National Defense Authorization Act.

4 DEAN ANDERSON: Is there any way you
5 could meet that requirement?

6 MR. AWTREY: No.

7 DEAN ANDERSON: Yes. So, what if it
8 were -- so, let's say that someone is getting out
9 and moves to Kansas, do you remove the name from
10 the DoD sex offender registry and Kansas picks up
11 that person?

12 MR. AWTREY: What's supposed to
13 happen, yes, is we remove the name and they place
14 it in. When they leave us, we take it out and
15 when they register there, they put it in.

16 What we're talking about doing is
17 having an overlap where instead of immediately
18 taking it out, we leave it in for 30 days which
19 is the Marshal Service window for making sure the
20 individual registered.

21 DEAN ANDERSON: How long have you
22 been at this, Mr. Awtrey?

1 MR. AWTREY: Well, I published the
2 policy in March of this year, and that took about
3 a year to do. So, and I can't remember if the
4 Scripps article was at the beginning of the year,
5 the end of last year, I can't remember now.

6 DEAN ANDERSON: And in your research
7 or your experience, do you have any sense that
8 the sex offender registries help solve crimes?

9 MR. AWTREY: I honestly don't know.
10 I honestly don't know. I mean it's just it's --

11 DEAN ANDERSON: It's a lot of money.

12 MR. AWTREY: It's a data point for
13 those that have restrictions that are monitored,
14 or those that are on parole or probation, at
15 least there's someone watching, as perfect or
16 imperfect as parole and probation is.

17 DEAN ANDERSON: In the military, it
18 seems like the ability to watch and monitor is
19 somewhat easier, at least for the military
20 populations that are incarcerated or about to be
21 separated.

22 MR. AWTREY: Yes.

1 DEAN ANDERSON: Right? And, you
2 shared with us the attempt to monitor sex
3 offender behavior on military installations
4 coming and going. But, that ability to monitor
5 is very different in the civilian world, I would
6 gather.

7 MR. AWTREY: Yes it is. I mean the
8 Commonwealth of Virginia belongs to the Virginia
9 State Police. And, I mean they make periodic
10 checks, and the individual, depending on the
11 conviction and the tiering, are required to
12 report, just like parole. Whether they do or
13 they don't, you know, whether they've knocked
14 over three 7-11s in between visits, you know,
15 it's an attempt.

16 Part of the sex offender registry, at
17 least from my understanding, is to create a
18 public awareness. People can go in and look at
19 it. I don't know how many of you have dialed in
20 your own Zip Code on your State registry just to
21 see, you'd be surprised where, you know -- and
22 they have a picture, they have the conviction,

1 where they work and where they live.

2 And, as a matter of fact, where I live
3 out in Fairfax County, there's a house for sale
4 in the neighborhood behind me and the last time I
5 looked at the Virginia Sex Offender Registry,
6 there's a registered sex offender in the house
7 next to the one for sale. Do the realtors
8 telling you to go look at the registry before you
9 look at a neighborhood to buy in? Probably not.
10 But, I mean the information's there in part for
11 public safety, public awareness.

12 DEAN ANDERSON: I guess one of the
13 challenges I think that many of the panelists
14 we've heard today propose to us is sharpening or
15 expanding or redefining what's under these
16 identifiable crimes in Article 120. They believe
17 many, many people were concerned who have
18 testified here that it would be unfair to subject
19 them to sex offender registry. It's too onerous,
20 it changes someone's ability to ever get a job,
21 where they live, what they can do. Do you have a
22 response to that concern?

1 MR. AWTREY: Well, our Articles that
2 are considered to be equivalent are considered to
3 be equivalent to the civilian convictions. To
4 me, I suppose that's the price of being convicted
5 of one of those offenses. Now, you're into --
6 you're outside the law enforcement world and
7 you're in to Victim Services and other things
8 that, you know, that I understand and law
9 enforcement works with, but causing restrictions
10 on someone's life, I suppose is part of the
11 consequences of that kind of conviction.

12 DEAN ANDERSON: You sound somewhat
13 dispirited by the charge you've been given.

14 MR. AWTREY: Well, it's, you know,
15 it's one of many, and it just -- if I were going
16 to cause people to spend time and money on
17 something that was actually going to move towards
18 fixing the real problem, I'd probably be a little
19 cheerier.

20 DEAN ANDERSON: And, the real
21 problem, to you, is the gap in tracking because
22 we don't have an effective national database?

1 MR. AWTREY: The gap in transit, yes,
2 between registries. And, in our case, what will
3 be our database will act like a SORNA
4 jurisdiction, but we won't be one.

5 DEAN ANDERSON: Right.

6 MR. AWTREY: We'll have a database --

7 DEAN ANDERSON: But, it won't be
8 published?

9 MR. AWTREY: -- and that we'll share
10 information. But, yes, the -- I mean in one
11 meeting I sat in, I had a staffer actually ask
12 me, why can't you have MPs escort them to the
13 registry, where they're going?

14 DEAN ANDERSON: You've got a lot of
15 staff there?

16 MS. WINE-BANKS: And travel money?

17 DEAN ANDERSON: Yes, right.

18 MR. AWTREY: Yes, give me another
19 40,000 Military Police, change the law so that
20 they don't go to jail for doing this off base --

21 DEAN ANDERSON: Right.

22 MR. AWTREY: -- and, you know, we'd

1 love to help. But, yes, it just -- it's a
2 visceral problem that has some solutions, but the
3 solutions that are easier to force on people are
4 not the ones that fix the real problem, in my
5 estimation.

6 DEAN ANDERSON: Yes. Professor
7 Schulhofer?

8 PROFESSOR SCHULHOFER: Jill, do you
9 want to go first?

10 MS. WINE-BANKS: I just have a quick
11 question.

12 DEAN ANDERSON: Sure.

13 MS. WINE-BANKS: You mentioned that
14 this is just one of the consequences of being
15 convicted of the listed crimes.

16 MR. AWTREY: Yes.

17 MS. WINE-BANKS: But, tell me, if you
18 can, why sex offenses require registration and
19 burglary does not? Murder? Other crimes?

20 MR. AWTREY: You'd have to talk to
21 the Attorney General. That's --

22 MS. WINE-BANKS: In your experience,

1 is there any difference between the crimes? I
2 mean is there anything? Do you have thought on
3 this?

4 MR. AWTREY: Well, I mean --

5 MS. KEPROS: I can tell you why. I
6 mean, seriously, I just don't want to eat into
7 your time. The reason is because there have been
8 high profile cases where young children were
9 raped and murdered, and there has been a very
10 dramatic legislative response to these horrific
11 cases.

12 And, unfortunately, there has been now
13 tons of research on the registry, it's completely
14 ineffective. It provides a false sense of
15 security. It's extremely expensive and
16 burdensome. It has no effect on recidivism, or
17 it actually makes people offend at a higher rate,
18 because they become socially isolated and cut off
19 from other protective factors. But, we are
20 addicted to it as a nation. We now have -- and
21 the last number I saw was 750,000 people on the
22 National Registry. I know my State is inching up

1 to 20,000, and we're one of the smaller States.

2 It becomes completely arbitrary, as
3 you have some states like mine requiring anybody
4 who's ever had to register in any jurisdiction
5 have to go register again, even if they've been
6 let off other registries. You have other states
7 that do not require registration for some fairly
8 egregious conduct.

9 I mean, just the disparities, the
10 function of it. I actually was just sharing with
11 Steve that I know of a victim advocacy group that
12 has now spoken out against the registry, because
13 they say it is providing a false sense of
14 security.

15 So, I mean the answer is a political
16 answer. It is that it's a law that people felt -
17 - I mean I think the intentions were good, I
18 really do. People thought if people knew who the
19 bad guys were, great. Except that more than 90
20 percent of the sex crimes are committed by people
21 who know the victim. These are not strangers,
22 you know, jumping out of bushes.

1 And, interestingly, you mentioned the
2 house for sale. A study just came out this year
3 that shows that people who live close to
4 registered sex offenders experience lower rates
5 of sexual assaults in their communities. So,
6 now, living next to a sex offender is the
7 protective factor. I mean, who would have
8 guessed? Right?

9 There was great study out of New York
10 State where they looked at 20 years of data, ten
11 years pre- and post- the registry. And, 95
12 percent of the people who end up getting charged
13 with a sex crime have no history of committing a
14 sex crime.

15 So, you're putting all these resources
16 into the registry and achieving nothing in the
17 interest of public safety. At the same time, you
18 understand why people want to know. You
19 understand that people think if they have flagged
20 certain people, it's just the problem is, the
21 people who are most likely to harm your children
22 are the people living in your house, a registry

1 isn't going to do you a lot of good.

2 MS. WINE-BANKS: So, could we create
3 crimes like strict liability in the trainee
4 situation that are exempt from registration?
5 Could we specifically say, this is a unique crime
6 that we're going to treat as more than just an
7 Article 92, but it is exempt from registration?

8 MS. KEPROS: You can say that in the
9 military, but you can't control what the states
10 are going to do with it. And, my state says if
11 we think that sounds like a sex crime to us,
12 we're going to make you register even if the
13 sending jurisdiction, the jurisdiction of
14 conviction said it is not a registerable sex
15 crime.

16 MS. WINE-BANKS: Could you say that
17 an Article 92 is a sex crime --

18 MS. KEPROS: You might.

19 MS. WINE-BANKS: -- under those
20 factual circumstances?

21 MS. KEPROS: You might be able to.

22 MS. FRIEL: But, you think it's more

1 likely to put it in Article 120, which all about
2 sexual assault, then you've covered it, 92 or 93?
3 Somebody had a suggestion to add something to 93.

4 PROFESSOR SCHULHOFER: I think as
5 Article 92 is written now, it couldn't trigger a
6 registration, because I think the word sex is not
7 one of the elements of the offense.

8 LT COL HINES: Well, I was going to
9 ask Mr. Awtrey is he -- so, Mr. Awtrey, one of
10 the issues the subcommittee has resolved, and
11 it's issue 17, goes to this issue. I don't know
12 if you have a copy.

13 MS. ZAHN: I'll give it to him, sir.

14 LT COL HINES: But so, the question
15 is, as an alternative to amending Article 120,
16 should course of sexual relationships currently
17 charged under other Articles, other than 120 be
18 added? And, I guess my question would be, does
19 DoD do any -- is this list completely driven by
20 just the offense that shows up as a guilty
21 finding after trial, or did someone do a factual
22 analysis and add something that -- is there any

1 factual analysis like Ms. Kepros said is done on
2 a state level?

3 For instance, when the state
4 authorities get it, they're not just looking at
5 the offense, I think, is what you're saying,
6 Laurie, they're doing their own factual analysis.

7 MR. AWTREY: Are they?

8 MS. KEPROS: They are, depending on
9 the state. So, again, in my state, and we have
10 one of the broader policies, so I'm kind of
11 giving you what I guess was arguably the worst
12 case scenario, right?

13 PROFESSOR SCHULHOFER: But, where do
14 they get their facts from?

15 MS. KEPROS: They --

16 PROFESSOR SCHULHOFER: If it's not
17 their definition of --

18 MS. KEPROS: They contact law
19 enforcement. They sometimes investigate. They
20 contact probation and parole officials. I mean,
21 we have a mechanism to require people in the
22 registry for having what's called a sex factual

1 basis. So, you can be convicted of theft, and
2 now you have to register because there is this
3 sex factual basis.

4 And, I mean, ironically, you know, you
5 mentioned the consequence of conviction by
6 deregistration, because that's what the law says
7 it is, but our U.S. Supreme Court so far has said
8 registration is not punitive. Registration is
9 not a punishment. It is not, you know, it is
10 like having to have a driver's license or
11 something like that. Some State Supreme Courts
12 have now come up the other way. Recently,
13 Pennsylvania, Ohio, Maine have said no, it's
14 getting to the point that we're requiring so much
15 of people, it's become punitive.

16 But, you know, it's not happening in
17 the sentencing decision, they're administratively
18 ending up -- they've moved to Colorado, somebody,
19 you know, they get on somebody's radar and you
20 may have a clerk who's sitting there with her
21 high school diploma going this crime sounds like
22 a sex crime to me. I'm going to make you

1 register.

2 And, that's great if you do, and if
3 you don't, now you have a new charge of felony
4 failure to register and you've got a potentially
5 go to prison, at least fight it in the courts. I
6 mean, it's -- there's so many uncontrollable,
7 unforeseen consequences that I don't think the
8 military justice system can assume they have any
9 ability to control.

10 And once somebody gets in the national
11 database, like you mentioned, the Dru Sjodin
12 database or any of these other ones, now we're
13 also having international consequences where the
14 countries of Mexico and the Philippines have
15 denied access to many people who are no longer
16 under supervision from even going into those
17 countries, because they're popping up in our
18 national databases. And I think we're going to
19 see that trend continue as other countries get on
20 board with that.

21 MS. FRIEL: I actually had somebody
22 call up when I was doing consulting and saying

1 can you give me some names to help us. A guy was
2 convicted very, you know, in his 20s of a
3 statutory thing with somebody just under the
4 legal age. It was 20 years later, but it showed
5 and it got picked up because of the change in --

6 And I guess what we're doing going
7 from country to country and visa, and he could no
8 longer travel to where he needed to go for
9 business because this was on his record from 20
10 years ago. So, there are some real serious
11 effects of being registered.

12 DEAN ANDERSON: So, before we get
13 into deliberations, which I think that we have
14 some deliberations to do on this, I'd actually
15 like to have us have an opportunity to ask Mr.
16 Awtrey any additional questions and then allow
17 him to go about his way so that we don't keep him
18 for all of our conversations. But, Professor
19 Schulhofer?

20 PROFESSOR SCHULHOFER: Yes, I'm sorry
21 about that. I had a certain question for you.

22 MR. AWTREY: Sure.

1 PROFESSOR SCHULHOFER: So, and but,
2 actually, it may be partly foregrounded by what
3 everybody's been saying for the last 15 minutes.
4 You can have -- you can be on the registry and
5 the way that Lisa Friel just mentioned, for
6 statutory rape when you were 16 or 17. Is
7 someone who is on a registry automatically
8 ineligible for military service? Or could
9 somebody be on active duty and also be a
10 registered sex offender?

11 MR. AWTREY: Every once in a while,
12 the SMART Office at DOJ will send me a set of
13 pictures that they've been out trolling the state
14 registries, and they'll send me a set of pictures
15 of registered sex offenders in uniform.

16 PROFESSOR SCHULHOFER: Well, but so
17 --

18 MR. AWTREY: And they ask, are these
19 guys still in active duty? And, by and large,
20 what's happened is, they're convicted, they're
21 told they have 72 hours from conviction to go
22 register. So, they go down there in their battle

1 dress uniform, get their picture taken and go on
2 the registry then thrown out of the military. We
3 may have one or two for lesser offenses, but, by
4 and large, no, they're not on active duty any
5 more.

6 PROFESSOR SCHULHOFER: Yes, it's just
7 this last part of the question is what I was
8 interested in.

9 MAJ GEN WOODWARD: Hang on, I'm
10 sorry. When I was doing the Lackland survey, we
11 were looking at it and the Air Force had cut
12 down, you know, no felony convictions, but the
13 Army was still doing it, and I think that was a
14 change when we did the recommendations or the
15 report is that I thought that Secretary Hagel
16 switched it so that none of the Services could
17 assess anybody with a felony conviction anymore.

18 MR. AWTREY: And that's a recruiting
19 thing. And, in all honesty, in my time both in
20 the Army and as a civilian OSD, depending on
21 whether we're at war or not at war, the threshold
22 on that goes up and down.

1 PROFESSOR SCHULHOFER: So, this also
2 may be outside your jurisdiction?

3 MR. AWTREY: Yes. But, by and large,
4 if you're convicted of a felony offense, you're
5 not going to get to enlist in the military.

6 PROFESSOR SCHULHOFER: Just to
7 complete the thought, many, many people on the
8 sex offender registry have not been ever
9 convicted of a felony, they're convicted of
10 misdemeanors but have the word sex as one of
11 their elements and that could include -- well,
12 statutory rape is often a felony, but it may not
13 be if the people are within four years of age.
14 Many -- indecent exposure is typically a
15 misdemeanor.

16 And, just as a matter of first
17 principle, it seems to me an open question
18 whether a high school graduate who comes in and
19 says I have a conviction, a misdemeanor of the
20 second degree for indecent exposure or urinating
21 on a public sidewalk and I'm on -- you know,
22 should that person be eligible to join the

1 military or not? I mean I can see arguments
2 either way. It doesn't seem to me --

3 MR. AWTREY: I mean, this thing is
4 just full of all kinds of anomalies. When we
5 first started looking at this, the Department of
6 Navy published a policy that no registered sex
7 offenders were allowed on Navy installations,
8 period. Policy, not statute, not policy based in
9 statute, just a policy.

10 And so, our attorneys went back and
11 said, well, time out. If you're a retiree or a
12 dependent, you have certain statutory benefits
13 and privileges. You can't be denied access to
14 those statutory benefits and privileges on a
15 base. The base can tell you you have to come
16 through the Pence Gate and you can only come
17 through between 10 and 12 and you'll be escorted,
18 but you can't deny access to the base.

19 Well, that Navy policy still stands.
20 We're about to get -- we have a 1980 regulation,
21 DoD Directive 5200.27, it's Access to Personal
22 Information of Individuals Not Affiliated with

1 the DoD. And this came out of the Navy's, or the
2 Army's, missteps in the late Vietnam Era of
3 spying on U.S. citizens and collecting data on
4 them. So now, we have a 1980 prohibition where
5 the intelligence community can look at all your
6 information if there's a nexus, but the law
7 enforcement community can't.

8 And, our attorneys have determined
9 that we have one exception, and that's for
10 exigent circumstances. And, our attorneys have
11 determined that the only exigent circumstance is
12 that if there's a guy standing at the gate with a
13 bomb vest on. Otherwise, I've got to go and get
14 the lawyers to give me exceptions to look at.

15 So, right now, in order to get access
16 to the National Sex Offender Registry file, I
17 need an exception from this regulation. It's
18 sitting right now in our Defense -- the Deputy
19 Chief Management Officer's office, the civil
20 liberties and privacy folks.

21 Once we get that, then we'll turn on
22 the National Sex Offender Registry file. I'm

1 pretty sure that the first time we run all the
2 names, we have almost 300,000 names in our
3 subscribed pool now, we're going to get a bunch
4 of Navy civilians that are registered sex
5 offenders working on Navy bases that are
6 registered in the state they live for misdemeanor
7 through felony, whatever it is, but they're
8 registered somewhere.

9 We're going to send those names to the
10 Navy and the Navy's going to have a policy that
11 says they can't come on base and they're going to
12 have a handful of registered sex offenders. Over
13 to you, Navy, you know, what -- there are all
14 kinds of anomalies in this and every time you
15 think you have some of them padded down and
16 rationalized or standardized, five more pop up.

17 PROFESSOR SCHULHOFER: I just have
18 one more question.

19 MR. AWTREY: Sure.

20 PROFESSOR SCHULHOFER: And you can
21 answer it, feel free to answer it just very
22 briefly, that's fine. The -- or actually, going

1 back to the prior question, it should be, in
2 principle, it doesn't seem obvious that a person
3 with a misdemeanor conviction couldn't join --
4 couldn't enlist in the military. So, it's not,
5 and in principle, it seems quite possible that
6 there could be --

7 MR. AWTREY: And, we have in the past
8 during the first Iraq War, during Afghanistan and
9 Iraq, we --

10 PROFESSOR SCHULHOFER: So, if I --
11 just to get to my question, I think it should be
12 possible to determine how many people on active
13 duty are registered sex offenders. It should be
14 possible to determine, shouldn't it?

15 MR. AWTREY: Well, that's -- we're in
16 the process of finding out.

17 PROFESSOR SCHULHOFER: When you said
18 you were waiting for authorization, SORNA
19 requires that this information be readily
20 accessible to any member of the public. Are you
21 saying that DoD --

22 MR. AWTREY: From the SORNA

1 jurisdictions. Department of Defense is not a
2 SORNA jurisdiction, it's a federal Agency.

3 PROFESSOR SCHULHOFER: I can get
4 access, just as a citizen of this country, I can
5 get access to any registry.

6 MR. AWTREY: Sure, any one of us can.
7 That's what the Dru Sjodin National Public Sex
8 Offender Website -- it's not -- that is not a
9 national registry, it's a pointer system. You
10 put the name in and it tells you which state sex
11 offender registry --

12 DoD, two federal agencies, DoD and the
13 Bureau of Prisons have people under their
14 jurisdiction that have covered convictions. The
15 Bureau of Prisons puts people out, they have the
16 same problem, they don't go where they say
17 they're going. They don't register, they're
18 absconders. They're not a SORNA jurisdiction.
19 We're not a SORNA jurisdiction. What this
20 Military Sex Offender Registration Act of 2015
21 will do is we're building a database where you
22 will have access to our names, those that we have

1 convicted.

2 PROFESSOR SCHULHOFER: So, just one
3 other question. With the guys mowing the lawn?

4 MR. AWTREY: Yes?

5 PROFESSOR SCHULHOFER: And you learn
6 that he is a registered sex offender, so the
7 responsibility for monitoring him falls to the
8 Army, I guess, if it's a Fort Myer or something
9 like that?

10 MR. AWTREY: It would fall to the law
11 enforcement on the installation where that
12 individual works, if the individual is found fit
13 for the job and still allowed to do it.

14 PROFESSOR SCHULHOFER: What do they
15 do to monitor him? What do they do to monitor
16 him?

17 MR. AWTREY: If we have someone --
18 just, for instance, we have someone coming on
19 base to mow the lawn. We know that they're a
20 pedophile, they're a registered sex offender in
21 that state. They have certain restrictions, they
22 can't be within 500 feet of a school, childcare

1 center, places where children congregate,
2 playgrounds.

3 So, in the morning at roll call, the
4 patrol orders for those officers that are
5 patrolling the districts or zones on a base that
6 contain those places, it's like a be on the
7 lookout. This individual is on the orders of the
8 day, make sure when you run by the elementary
9 school on your rounds, when you make your rounds
10 past the daycare center, that you don't see this
11 guy sitting under the trees watching the
12 building.

13 PROFESSOR SCHULHOFER: So, I'll give
14 you two variations. One is that someone
15 convicted of an offense against a young child but
16 he's in a state, about half the states do not
17 impose residency or school zone restrictions,
18 about half don't have them, the other half do.

19 So, if he's in a state that does not
20 -- so here are the two variations. One is a
21 pedophile but he's registered in a state that
22 only requires community notification, but doesn't

1 have residency restrictions. Second variation is
2 someone who's convicted of an offense against an
3 adult, just simply sexual penetration without
4 consent, also not subject to any behavioral
5 restrictions. So, in those two variations, what
6 monitoring would occur?

7 MR. AWTREY: If there's no
8 requirement, the restrictions place no
9 requirement on us based on the individual's
10 function on the base. We don't monitor.

11 PROFESSOR SCHULHOFER: Okay.

12 DEAN ANDERSON: General Woodward, did
13 you have a question?

14 MAJ GEN WOODWARD: Just a quick --
15 how aggressively do the Marshals pursue, you
16 know, the ones that fail to register? Any idea
17 of how -- do they really go after them?

18 MR. AWTREY: Yes, they do. As a
19 matter of fact, we've gotten numbers on -- the
20 Army has been particularly aggressive of the
21 Services. They even have placed -- they have a
22 fellowship program where a young MP Officer in

1 lieu of going to Leavenworth is on a fellowship
2 in the National Sex Offender Targeting Center and
3 they work the Army cases both tracking deserters
4 and sex offenders. And, the numbers keep
5 growing.

6 Yes, they -- as we pass the names,
7 they go on the list and if they register that's
8 fine. If they don't, then they go on their watch
9 list. They're sent down to the local Marshal and
10 they go on their fugitive list and they're on the
11 active look for.

12 So, yes, I mean -- and that's what
13 they do for a living. So, they're not distracted
14 by other things, in spite of what you might in
15 the movies. So, yes, it's -- yes, the National
16 Sex Offender Targeting Center, this is what is
17 was established for and it's to the extent we can
18 tell, it's working well. It's really helping us.

19 DEAN ANDERSON: Other questions from
20 the Panel?

21 COL GREEN: One question I had as a
22 practitioner, and I think one of the issues the

1 Panel's been dealing with is the translation of
2 military offenses to the states and how the
3 states interpret those.

4 The 2007 version and 2012 included 43
5 offenses under the SORNA table that would trigger
6 registration requirements. The new version has
7 10. In your experience, how do the states
8 translate military offenses to their own state
9 registration requirements? Are -- I mean are
10 they inclusive? Do they see military offenses as
11 automatically triggering registration? Is there
12 any type of interpretation that's done? What
13 have you seen?

14 MR. AWTREY: Like most everything
15 with SORNA, it's state by state. The Services
16 get inquiries, and going back to your question
17 about behind the offense, lots of States, they'll
18 call Army CID or NCIS and say, we've got a 120 or
19 a 134 offense here, and we see on its face what
20 it says and you've said it's equivalent to
21 Nebraska and Oklahoma, but here in Kansas, we're
22 not so sure. We need more information from the

1 Report of Investigation and the result at trial
2 to make a determination on our part whether
3 they're registerable within our State. We do
4 that all the time.

5 And, just another sort of fallacy with
6 SORNA is there is a federal law, but the federal
7 law is only as sort of a minimum standards cover.
8 It's a state system. There are 50 registries, 50
9 ways of doing things, 50 judicial systems out
10 there. We could be considered the 51st once we
11 build our database because we have our own
12 judicial system. We have our own Code of
13 Military Justice or a Code of Justice, but, it's
14 essentially a state system.

15 And, also understand, that every time
16 Congress improves our 120 offenses, I mean I run
17 our Uniform Crime Reporting System and you can
18 see the -- I think this has the DIBRS Codes, the
19 Defense Incident-Based Reporting System in there.
20 And every time Congress improved our 120
21 offenses, I have to change them. So, that's why
22 you'll see, you know, prior to 2008, between 2008

1 and 2012, after --

2 Because I run an archival system,
3 historical system, I've got to keep it all. But
4 the 120s keep shifting. Some with whatever the
5 current spotlight is, some with thought. But,
6 it's -- and then that's us. Take this to the 50
7 states and you get 49 different answers.

8 COL GREEN: But, where, like for
9 example, the post-2012 Statute narrows it down to
10 10, and the only thing on the SORNA list is, I
11 mean, a fairly small list of 10 offenses. I
12 mean, do the states -- are they making that type
13 of interpretation on 120 offenses that come to
14 them in your experience? Or is it primarily
15 oriented towards the 134s and more the --

16 MR. AWTRAY: All of them.

17 COL GREEN: Okay.

18 MR. AWTRAY: Yes, all of them.

19 LT COL HINES: Mr. Awtrey, I was
20 going to ask one question on those lines. So,
21 when you look here, for 133 offenses and where it
22 says the offense is conduct unbecoming an officer

1 that describes conduct set out in any provision
2 of this Appendix, I mean, it sounds like this is
3 driven by SecDef, because it's an instruction.

4 So, if someone convinced SecDef that,
5 in addition to 133, we want Article 92, 93 and
6 like a laundry list that also describes this
7 conduct and the SecDef put it on the list, you
8 would report it out if that came to you, right?
9 Okay.

10 MR. AWTREY: Of if the General
11 Counsel approved it.

12 LT COL HINES: Right, right.

13 MR. AWTREY: I mean that's the
14 General -- this list comes to me via General
15 Counsel decisions.

16 DEAN ANDERSON: That's really helpful
17 clarification. Other questions for Mr. Awtrey?
18 Well, understanding the mechanics of how this
19 works is very helpful to our work and I very much
20 thank you for your time.

21 MR. AWTREY: No, I was happy to come
22 over. If there is anything else, I'm sure

1 Colonel Hines will let me know and I will provide
2 what information I can.

3 DEAN ANDERSON: Thank you.

4 MR. AWTREY: All right, thank you.

5 (Whereupon, the above-entitled matter
6 went off the record at 3:12 p.m. and resumed at
7 3:30 p.m.)

8 DEAN ANDERSON: We are going to go
9 ahead.

10 And since it seems like each of the
11 small groups are already thinking about these
12 issues -- and they are core to what we have been
13 grappling with -- Issue 6, Issue 12 through 17,
14 are all about the questions that have been raised
15 by the panels that we have engaged with today.

16 I would try to take the -- because we
17 are not going to complete all of these -- I am
18 just going to say that as an assumption, a per se
19 assumption -- that we will -- I would suggest
20 that we would take these in slightly out of
21 order, because some of the -- some of them, it
22 seems to me, are preliminary questions, and then

1 some are questions that kind of get down the pike
2 a ways.

3 One of the preliminary questions is --
4 I take Issue 12 and 13 as somewhat similar, is
5 the current practice of charging inappropriate
6 relationships or maltreatment under Articles of
7 the UCMJ. And I assume they are meaning
8 Article 92 and 93, other than Article 120,
9 appropriate and effective when sexual conduct is
10 involved. And then, Issue 13 is, does the 2012
11 version of the UCMJ afford prosecutors the
12 ability to effectively charge coercive sexual
13 relationships or those involving abuse of
14 authority under Article 12?

15 So this takes us a step back from the
16 sex offender registry question, but the sex
17 offender registry questions have been looming
18 prominently over our analysis of some of this.
19 But these two questions are actually about, do we
20 have enough in the statute now to handle the
21 kinds of abuse of authority cases that we are
22 concerned about, either under Article 120 as it

1 currently stands or under Articles 92 and 93 of
2 the UCMJ.

3 Thoughts about those questions. Lisa?

4 MS. FRIEL: You know, it's
5 interesting. I came into today really feeling
6 like we should have some -- I love the term "per
7 se." I think that's much more accurate than
8 "strict liability," that we needed to have some
9 per se crime. It would be the lowest level.
10 We'd put it in Article 120, make it a separate
11 offense, so we weren't amending language of the
12 rest of Article 120 and throwing everything off
13 on that.

14 And I spent the whole day listening to
15 this and wondering, what if it's necessary, given
16 what we heard -- and I think Glen is going to
17 check back with some of the speakers from other
18 times we have heard about this to find out, are
19 they talking about more recent times with the
20 cases they're seeing, or in the past?

21 I am very moved, and it is connected
22 by the idea of this -- what would be the lowest

1 level, so something in which you don't have the
2 facts to convict somebody of an overt or implicit
3 threat case, which is a decently broad area,
4 especially if we can do something with the 2007
5 definition, somehow get that to be the
6 instruction, that that's what it means, and
7 that's a whole other area. We have to talk about
8 what's the best way to do that.

9 But you don't fit in that, so you have
10 this very lowest level, and then you're a
11 registered sex offender with everything that
12 comes with that. By the end, I am really kind of
13 thinking, if we do something at all, maybe we
14 should put it in 92 separate, or 93 or something.

15 I am kind of moved by the idea,
16 because -- I will go back to my own experience in
17 New York. When they first passed the sexual
18 offender -- Megan's Law in New York, they did not
19 have misdemeanors in it. And then, they had one
20 misdemeanor but not the other. We had room to
21 say, you know, as a prosecutor with discretion,
22 this is not somebody that should register for

1 life. I can't make this person register. It
2 doesn't seem like it's just.

3 They took away that ability. In the
4 end, it was everything that was a sex offense,
5 and they put us in a box of not pleading to sex
6 offenses. Now the guy has a criminal record
7 without a sex offense on it, which, you know, was
8 the total opposite of what you wanted to do.

9 There were times -- it's just not just
10 to put everybody on the registry, because there
11 are some incredibly real, detrimental effects of
12 that.

13 MS. WINE-BANKS: I think you missed
14 the conversation that we were just having about
15 maybe forming some coalition to start trying to
16 counter the expansion of sexual registration, and
17 maybe to even eliminate it completely.

18 MS. FRIEL: Good luck with that.

19 MS. WINE-BANKS: I think Laurie's
20 statements were --

21 MS. FRIEL: It's political.

22 MS. WINE-BANKS: -- really moving. It

1 is political. But just because it's hard doesn't
2 mean we shouldn't try, although I have to say my
3 very first attempt at political action in college
4 was to try to abolish zoos.

5 (Laughter.)

6 Look how much success I had with that.

7 (Simultaneous speaking.)

8 And it wasn't because of my love of
9 animals, which came later. It was because I
10 worked for the Department of Public Aid in
11 Chicago and thought that we were spending too
12 much money feeding Sinbad the Gorilla in the
13 Lincoln Park Zoo instead of people on welfare.

14 Okay. So I am not the best judge of
15 what's politically accomplishable.

16 But listening to today, I am appalled
17 by the fact that a lot of the things that we are
18 thinking need change, everybody is saying don't
19 change because it will lead to sexual
20 registration, and that has consequences that are
21 horrible.

22 And then, listening to the fact that

1 the registration does not in fact reduce
2 recidivism, does not in fact help anybody, and it
3 costs a lot of money, a lot of time, a lot of --
4 that could be much better spent on counseling, as
5 you suggested, or other better uses of the money,
6 and it affects how we decide to amend the laws.

7 So I am following up on what you are
8 saying, and I agree. I started out thinking this
9 is a sex crime, and let's treat it as a sex
10 crime. And today I am more persuaded that where
11 there is genuine fear from the coercive nature of
12 the relationship from the power of the trainer
13 over the life of the trainee, there should be a
14 120 prosecution.

15 Where it is consensual -- and at first
16 I was saying, "Well, there can't be consensual if
17 it's a coercive environment." Well, okay, maybe
18 it can be. There are situations. And so we
19 don't want to create too big a hammer or too big
20 a law that would punish and not permit there ever
21 to be a consensual.

22 Yet we need to treat it, and if the

1 instructions that say use of rank is the kind of
2 action that could count, well, then, we have
3 enough to do it. That's why I asked if we could
4 create a crime that was not registrable, but
5 Laurie says you could but the states still might.
6 And so that doesn't really --

7 MS. FRIEL: We had talked about that
8 earlier.

9 MS. WINE-BANKS: So I'd say -- I guess
10 I'm sort of -- I guess I'm saying the same thing
11 as you are, just expanding that I think we should
12 take some action about sexual offender
13 registration.

14 MS. FRIEL: But it is also based on --
15 I think we're saying the same thing, that we come
16 away with the idea that expanded instruction, at
17 least instruction -- the --

18 MS. WINE-BANKS: Some way.

19 MS. FRIEL: -- 2007 that we have been
20 given about what that means --

21 MS. WINE-BANKS: Or the new 2015.

22 MS. FRIEL: -- action or -- that we

1 feel that that can be given and that will hold
2 up. And so that is -- then, that is big enough
3 to me to cover a lot of it, at least from what
4 we're hearing. But I'm interested to hear
5 especially what Maggie thinks about --

6 MAJ GEN WOODWARD: Well, it's
7 interesting. I have gone back and forth on this
8 probably 800 times since they did the Lackland
9 investigation, and I probably went back and forth
10 four or five times alone today.

11 I think I'm worried about when we say,
12 "Well, we don't want to have them registered, but
13 we think it should be under Article 120." And,
14 in my mind, it's like the only reason we think it
15 should be under Article 120 is because we believe
16 that they are a sexual predator in using their
17 power to assault somebody.

18 So, in my mind, we either say, okay,
19 it is and it falls under 120, or it doesn't, and
20 then why isn't 92 just fine, and then we don't
21 have the sexual registry. So we need to decide
22 how strongly we feel it is a sexual predator

1 thing if an MTI uses their power to coerce a
2 trainee into what, in essence, is consensual --

3 MS. FRIEL: Well, except that -- if
4 that's the way you phrased it. If they use their
5 power to coerce, then that is --

6 MS. WINE-BANKS: Then it is 120.

7 MS. FRIEL: -- within the statute the
8 way it is.

9 MS. WINE-BANKS: Then we shouldn't be
10 worried that they have to register.

11 MS. FRIEL: It's when there is no
12 power to coerce. It's when just -- they met each
13 other, one happens to be this, the other happens
14 to be this, and they go to bed together, and the
15 victim says, "He said nothing. He did nothing.
16 And I wanted to go to bed with him. Totally -- I
17 wanted to go to bed with him, but you have made a
18 per se crime that says I can't, and now that's a
19 sex offense."

20 MAJ GEN WOODWARD: Yes. So I think
21 the conclusion I have come to today is that go
22 ahead and go with 92 for -- as we are basically

1 today --

2 MS. WINE-BANKS: For consensual.

3 MAJ GEN WOODWARD: -- and then use 120
4 and redefine and try to strengthen the language
5 on use of threat or, you know, and try and make
6 it clearer that by virtue of their power alone,
7 without an overt threat, that is threatening, if
8 that makes sense.

9 MS. WINE-BANKS: Yes.

10 DEAN ANDERSON: So it does seem to me
11 -- since we are going down the line here, it does
12 seem to me that if we take that route, what we
13 would be doing is then interpreting the
14 definition of "threatening" or placing another
15 person in fear, which is obviously one of the
16 questions posed here as Issue 14.

17 But I don't think it makes sense to
18 interpret it in a way of just going back to the
19 2007. I think that risks it being overturned, if
20 that's not where -- you know, or a
21 misinterpretation of the law. I mean, if we are
22 planning an executive -- to draft the executive

1 order language, we'd better come up with slightly
2 new language that really tracks this -- you know,
3 what it means to have a wrongful action
4 contemplated by a communication or action.

5 Actually, that came out of maybe the
6 third panel. Someone said, you know, what you
7 could do is interpret this word, what is the
8 wrongful action here? And that would be a place.
9 But I wouldn't want to just say, okay, well,
10 let's go back to the 2007 interpretation of that,
11 because that's not what --

12 MS. FRIEL: Yes. No, I guess I --

13 DEAN ANDERSON: They changed the
14 language, you know.

15 MS. FRIEL: I just like the language
16 of it, and then we can do exactly what you said,
17 say, you know, wrongful action is, but use a lot
18 of the language they used in that expanded
19 definition.

20 DEAN ANDERSON: Or at least the idea
21 of using one's, you know, abuse of power to --
22 you know, or command authority.

1 MS. FRIEL: And the positively and
2 negatively, I like that language --

3 MS. WINE-BANKS: Yes.

4 MS. FRIEL: -- you know, in there,
5 because you can do it with inducement as well as,
6 you know, with negative.

7 MAJ GEN WOODWARD: Yes. I object to
8 the positive. I don't like the -- I have the
9 same negative reaction that we heard earlier.
10 That implies a quid pro quo that I don't look at
11 as --

12 MS. FRIEL: We think the positive is
13 sexual harassment, quid pro quo.

14 MS. WINE-BANKS: Well, you don't have
15 -- no, I think it goes back to, if you look at
16 what the Model Penal Code discussion is, it's --
17 if I am offering to do for you a favor, something
18 that you aren't entitled to, I won't write you a
19 speeding ticket that you -- you were speeding. I
20 caught you. But if you have sex with me, I'll
21 skip the ticket.

22 MS. FRIEL: That's a positive

1 inducement.

2 MS. WINE-BANKS: That's --

3 MS. FRIEL: That's coercive, and they
4 do that all the time. Not all the time. I don't
5 want to exaggerate. Police officers have done
6 exactly that. "I won't arrest you if you have
7 sex with me."

8 MS. WINE-BANKS: Or, "I will give you
9 money if you have sex with me." Whatever the
10 positive inducement is, I will reward you by
11 making you an honor graduate, which you are not
12 entitled to. You haven't been a good student.
13 Those are positive things that you should be able
14 to say, "I didn't earn it. I'm not taking it.
15 And if I give in to you for this" -- I think this
16 is what you're saying is that --

17 MS. FRIEL: Yes. It's a character
18 thing.

19 MS. WINE-BANKS: -- that that
20 shouldn't -- it shouldn't be something that is on
21 the same par as, "If you don't, I am going to
22 remove from your record the A+ you got in this

1 course. I am going to give you a D. You'll
2 pass. You'll still go out. But your whole
3 career is going to have a D instead of an A+."

4 DEAN ANDERSON: So you've thought a
5 lot about this and written a lot about this
6 particular question of positive and negative
7 inducements. Do you want to share with us your
8 perspective?

9 PROFESSOR SCHULHOFER: Yes. I was
10 listening to what people were saying, and I was
11 hearing two different things. It may be that
12 there is a difference of opinion about whether
13 the, quote, positive inducement should or
14 shouldn't -- I mean, I think we were in agreement
15 that we should try to clarify that language, and
16 Lisa was suggesting that we make clear that the
17 wrongful action could be positive or negative
18 consequences. And then I wasn't sure whether I
19 was hearing from Jill and Maggie --

20 MS. WINE-BANKS: I was trying to --

21 PROFESSOR SCHULHOFER: -- agreement or
22 disagreement.

1 MAJ GEN WOODWARD: Yes. My
2 disagreement is I think that if I choose -- you
3 know, if you offer me something positive in
4 return for my sexual favors, that is completely
5 different than you negatively -- to me, that's
6 more -- I hate to say it, but that's -- you know,
7 the terminology is not right, but prostitution
8 versus you offer me something negative, and to me
9 that's sexual assault.

10 PROFESSOR SCHULHOFER: Interesting.

11 MAJ GEN WOODWARD: And I don't think
12 they fit in the same --

13 MS. FRIEL: What do you do with,
14 "You'll do better in my class, if you sleep with
15 me"?

16 MAJ GEN WOODWARD: Well, that --

17 MS. FRIEL: Is that a positive
18 inducement, that I'm going to give you a better
19 grade than you deserve, or is that a veiled
20 threat that you are going to flunk the class --

21 MAJ GEN WOODWARD: Well, but then
22 that's a negative inducement, if you take it as a

1 veiled threat, because that means that you are
2 saying, if I'm taking it to say, "You're going to
3 do worse if you don't sleep with me," then that's
4 the negative, not the positive.

5 MS. FRIEL: Does it matter how the
6 person -- and we've got to go back, and I can't -
7 - that's the subjective, that that's how I took
8 it, and then he sits there and says, "That's not
9 how I meant it at all."

10 MAJ GEN WOODWARD: I think if you
11 leave the positively in there, you know exactly
12 what those guys were saying is -- you know, we're
13 going too far, and you're really going to have
14 negative consequences from the folks who look at
15 it that way.

16 PROFESSOR SCHULHOFER: Here is a quick
17 take on my -- the trajectory of my thinking,
18 which I think was really 100 percent identical to
19 what Lisa was describing. I walked in here
20 feeling very strongly that this is predatory
21 behavior, it's sexual, it's not the same as the
22 gamut of other things that fall within

1 Article 92, sort of -- I mean, you can see where
2 I was coming from in my question about helping
3 clean up the garage.

4 That's a crime, for the officer to do
5 that. That's abuse of his authority, but it's
6 nothing like this kind of behavior. And I was
7 almost -- you know, I was shocked by the notion
8 of amalgamating those two things.

9 But during the course of the day I
10 really changed my mind, primarily because of the
11 tail wagging the dog. That the -- I mean, we
12 can't get away from the fact that putting it
13 within Article 20 is going --

14 DEAN ANDERSON: 120.

15 PROFESSOR SCHULHOFER: -- 120 is going
16 to have registration consequences. Whether it's
17 on the Pentagon list or not, it's going to have
18 consequences. So it led me to think that at
19 least in situations where you don't have -- you
20 haven't proved coercive threats, it is better
21 handled in Article 92. That was sort of where I
22 came out. And even maybe going a step beyond

1 that, I started to think that breaking it out as
2 a separate subsection of Article 92 could
3 backfire, because then --

4 MS. WINE-BANKS: Or 93.

5 PROFESSOR SCHULHOFER: Or 93 as well,
6 because then it would flag that it was a sexual
7 offense, where we are trying to preserve -- it's
8 sort of fighting fire with fire. You could say
9 it's not intellectually honest, but I think the
10 environment that is out there is not
11 intellectually honest.

12 And we have to recognize that if you
13 create Article 93 as a sex offense, then states
14 are going to do -- we know what they are going to
15 do with it. So I am circling around, but -- so
16 where that left me tentatively is thinking let's
17 just have Article 92 for abuse of authority in
18 general, covering a wide gamut of behavior, and
19 treat it within that, unless there is a coercive
20 threat.

21 Then, I think I am a little bit on the
22 fence on the issue that you three -- the three of

1 you were discussing, which is whether an offer to
2 do you a favor is a coercive threat, or whether
3 it's just bribery, where a woman of character
4 should just say, "No. I'll earn my own success."
5 Generally speaking, is that a fair statement of
6 the issue?

7 And one way I think about it is in
8 connection -- if you take it out of the sexual
9 context, we think about how we approach bribery
10 and extortion in the ordinary law of property
11 transactions. If a contractor goes to a
12 politician and says, "There's \$1,000 in this
13 brown bag, if you give me the contract," that's
14 bribery and he is the offender.

15 But if the politician goes to the
16 contractor and says, "You don't deserve this
17 contract. It's going to go to the low bidder.
18 But I can make it work for you if you put \$1,000
19 in this bag," that's extortion. We don't say --
20 we could say that the contractor is -- you know,
21 he should just play straight and take what he
22 earned.

1 But we view him as the victim of a
2 crime, because I think as a practical matter in
3 these situations is what Lisa described as a
4 veiled threat. It's with public -- with people
5 who have official authority. It is too hard to
6 disentangle the offer of a benefit from the
7 implicit threat of harm.

8 It's like the police officer who said,
9 "You were speeding. I'm going to write -- you
10 have no right not to get a ticket, and I will
11 offer you the benefit of not getting the ticket
12 if you sleep with me, or, you know, we have sex
13 in the backseat."

14 So it is true that she -- I'm saying
15 "she" -- the driver would be getting a benefit.
16 And you could view it as a kind of prostitution.
17 She is basically having sex in return for being
18 paid by getting rid of the ticket. But any
19 public official -- I mean, this is how I try to
20 view it.

21 I think anybody who has government
22 authority -- and that would include within the

1 military, any commanding officer -- has
2 discretion. And their duty, as I understand it,
3 as a civilian, their duty is to exercise their
4 discretion in an objective way, and not to say --
5 I mean, you might decide not to write the person
6 up, but it should be for objective reasons. It
7 shouldn't be colored by sex.

8 So, in that sense, I think it's still
9 a threat. It's a threat not to use your
10 discretion objectively.

11 MAJ GEN WOODWARD: This is the classic
12 thing. I'm looking at it from the victim blaming
13 versus "Oh, here I am, I'm victim blaming," when
14 I think of it is that --

15 PROFESSOR SCHULHOFER: Yes.

16 MAJ GEN WOODWARD: -- you're looking
17 at it from the perspective of the perpetrator,
18 which is correct. So he is bribing instead of
19 threatening.

20 PROFESSOR SCHULHOFER: or when the --

21 MS. WINE-BANKS: Accepting a bribe is
22 equally a crime. Well, depending on who you are.

1 In the case of this person that -- even in the
2 military situation of sexual favors, it could be
3 viewed as both are equally guilty of a bribery.
4 The question is whether you want to make that
5 bribery a sexual offense or just a 92 or 93
6 offense.

7 And listening to your discussion makes
8 me feel more comfortable, actually, with saying,
9 okay, if I threaten your career by saying, "I'm
10 going to harm your career, I'm going to hold you
11 back, you're going to have to repeat the course,
12 I'm going to give you a bad grade," even though
13 you deserve a good grade --

14 MAJ GEN WOODWARD: That's worse than
15 bribery.

16 MS. WINE-BANKS: -- that's clearly, to
17 me, a 120, and the facts of what I'm stating
18 should be prosecutable if we are -- if we somehow
19 make sure that the language says the wrongful
20 action includes the use of your authority in a
21 wrongful way.

22 Whereas, if I'm offering a benefit

1 that you don't deserve, and you take it, you have
2 the power to say no. "No, that's okay. I'll
3 take my -- you know, I'll take the grade I
4 earned. I'll be held back because I didn't do a
5 good job."

6 PROFESSOR SCHULHOFER: This is where
7 I'm suggesting --

8 MAJ GEN WOODWARD: Definitely less
9 significant.

10 MS. WINE-BANKS: Right.

11 PROFESSOR SCHULHOFER: This is where
12 I'm suggesting a different perspective, because I
13 think when you are -- when a person who is in
14 authority and has discretion and responsibility
15 to exercise their discretion responsibly, when
16 they offer the person a benefit, they are -- the
17 person who is being -- getting the offer is still
18 a victim of extortion, because the person --

19 MAJ GEN WOODWARD: That is much less
20 significant. It's much easier to say, "No.
21 Thank you, but I'm not going to take that bribe,"
22 than it is to avoid the threatening.

1 PROFESSOR SCHULHOFER: So suppose I'm
2 a young -- suppose I'm an E-6 or an E-2 Airman --
3 you don't say Airwoman or Airperson?

4 MAJ GEN WOODWARD: No. We're all
5 Airmen.

6 PROFESSOR SCHULHOFER: That has to
7 change. I don't know about that.

8 MAJ GEN WOODWARD: It covers all of
9 us.

10 PROFESSOR SCHULHOFER: This is like an
11 Ombudsperson. Ombudsman.

12 MS. WINE-BANKS: Chairman.

13 PROFESSOR SCHULHOFER: Yes. Chair.
14 You can say Chairman. You're the Chair, right?
15 Madam Chair, can -- you have to rule on that.

16 Okay. Anyway, where were we? Here is
17 the example. This young woman who is an E-2
18 comes back, goes out on leave and doesn't come
19 back. She is late returning to duty, and she
20 should be written up AWOL. And her relevant
21 commanding officer says, "You know what? I
22 should write you up. But I'm going to give you

1 an offer that you can't refuse. I will offer not
2 to write you up if we go in the back room and you
3 give me oral sex."

4 MAJ GEN WOODWARD: Yes. She can
5 refuse that.

6 PROFESSOR SCHULHOFER: This happens?
7 What?

8 MAJ GEN WOODWARD: She can refuse
9 that.

10 PROFESSOR SCHULHOFER: She can -- can
11 she?

12 MAJ GEN WOODWARD: Of course she can.

13 PROFESSOR SCHULHOFER: She just says,
14 "Go ahead. Write me up for being AWOL"?

15 MAJ GEN WOODWARD: Yes.

16 DEAN ANDERSON: Doesn't that seem like
17 a sexual offense to you?

18 MAJ GEN WOODWARD: It is.

19 DEAN ANDERSON: Doesn't that seem like
20 abuse of authority?

21 MS. WINE-BANKS: It does seem like
22 abuse of authority.

1 MAJ GEN WOODWARD: To me, it is not as
2 significant as it is if I come and threaten you,
3 though. I mean, to me, there is a significant
4 difference in those.

5 (Simultaneous speaking.)

6 MS. WINE-BANKS: She can control
7 saying, "Okay. I earned a D. I deserve to be
8 written up for AWOL. And, okay, that's what I
9 deserve." Whereas, if he threatens to take away
10 something she has earned, he has the power to do
11 that and she has no power to stop it. So that's
12 the difference between them.

13 MS. KEPROS: Can I offer a comment on
14 this? And I have just been staring, as you have
15 been providing these examples, at both the 2007
16 and 2015 Benchbook language that we were handed,
17 right, that has these subcategories, including
18 the use or abuse of military position, rank.

19 At first I was staring at those words
20 "either positively or negatively," and then I
21 thought, you know, you can just strike those
22 words, because this is such a bizarre thing to

1 try to quantify in some instances.

2 MAJ GEN WOODWARD: It has a negative
3 connotation if you throw it in there.

4 MS. KEPROS: Right. And then the
5 other thing is that the term that is being
6 defined is threatening or placing that other
7 person in fear. So you are not contemplating a
8 quid pro quo kind of benefit situation in the
9 first place. That isn't what the plain language
10 of putting someone in fear is. The fear is of
11 having some sort of harm that you shouldn't be
12 subject to.

13 The scenario that Professor Schulhofer
14 just gave us of the -- you know, "Give me a blow
15 job and I'll kind of look the other way," I think
16 that probably is sexual harassment. That sounds
17 like, you know, maybe an Article 93 kind of
18 thing. And so that there is at least a place to
19 say that is shameful and boorish behavior, but it
20 is not triggering the event of a physical sexual
21 assault on another person.

22 It's a completely, you know, horrible

1 behavior that we can respond to in a serious way.
2 But I just don't think it's the same as where
3 someone has actually been physically subjected to
4 some sort of sexual contact or sexual assault.

5 MS. WINE-BANKS: One can walk away
6 from it, and one cannot.

7 MS. KEPROS: Right.

8 MS. WINE-BANKS: And I think that's
9 the big difference. If you can't walk away from
10 it, if I don't do what you want, I am going to be
11 hurt by whatever the consequences are. That's
12 one thing. If I don't do something to earn a
13 benefit, that's -- it seems to me it is
14 different.

15 MS. FRIEL: And that's there, though.
16 I think you stopped a little short of where I
17 would have. It's threatening or placing another
18 person in fear, blah, blah, blah, blah, of
19 a lesser degree of harm than grievous bodily
20 injury. We are talking about harm. So it's
21 about what gets offered. I'm in fear of being
22 harmed. You offer to give me something really

1 good, and if I don't take the really good thing,
2 I'm not going to be harmed; I'm just not going to
3 get the really good thing. I think we agree.

4 MS. WINE-BANKS: Right.

5 MS. FRIEL: That should not be what
6 we're talking about. But some of these other
7 things, you know, I change your grade, I do
8 whatever, I'm going to give you a better grade
9 than you earned.

10 I can see, depending on how it's said,
11 that it could cause a harm here to do things.
12 And maybe that's not the right example, but I
13 think the point is it's about putting you in fear
14 that you're going to suffer a harm.

15 PROFESSOR SCHULHOFER: How do you
16 folks feel about a situation of a police officer
17 who pulls someone over for speeding, he calls in
18 her license and registration, it comes back that
19 she has got two speeding convictions on her
20 record. So if she gets a third offense, her
21 license is going to be revoked.

22 And he says, "I have discretion to

1 issue a ticket here or not. You were nine miles
2 over the speed limit, and, you know, I have
3 discretion. And -- but here's the thing. You've
4 got two prior convictions for speeding. So I can
5 give you something pretty beneficial if we go in
6 the backseat and you supply a little oral sex,
7 you know, and satisfy me. I won't write you up."

8 And she can -- you know, she can get
9 -- take what she deserves. But let's -- would
10 you -- she does this.

11 MS. FRIEL: But by not taking it, she
12 is going to suffer a harm. She is probably going
13 to have her license suspended, removed,
14 something. So there is some harm there.

15 MAJ GEN WOODWARD: Well, she deserves
16 the --

17 PROFESSOR SCHULHOFER: That's right.
18 Well, that's -- okay. I mean, I think --

19 MAJ GEN WOODWARD: He's not
20 threatening to do something that -- I mean,
21 because I can choose to go, okay, give me --

22 PROFESSOR SCHULHOFER: Give me the

1 ticket.

2 MAJ GEN WOODWARD: Give me the ticket,
3 yes.

4 MS. WINE-BANKS: It's certainly much
5 more of a threat. It wouldn't be --

6 MS. FRIEL: Well, does it change when
7 she should go to jail, though? When it's not a
8 speeding ticket, when it's a -- you know, you
9 seem a little under the influence. "So you can
10 give me a blow job, or I can arrest you and take
11 you to jail." So now you've gotten sex by
12 threatening to take away somebody's liberty.

13 MAJ GEN WOODWARD: But, see, he's is
14 threatening versus -- you know, so that's --

15 DEAN ANDERSON: Can we just look at
16 the language here?

17 MAJ GEN WOODWARD: -- keep turning it
18 to threatening.

19 DEAN ANDERSON: Because if we are not
20 going to change 120, then there is limited
21 language that we can interpret, and it's the only
22 thing we can do. If we decide that we are not

1 going to revise the statute, then we have to
2 interpret number 7 under the definition, and we
3 have to interpret it in a way that makes use of
4 the language that is given to us.

5 So the language under number 7 is
6 "threatening or placing another person in fear,"
7 right? Which sounds like negative action. But
8 let's see what the language of the actual statute
9 says. It says, "The term 'threatening or placing
10 another person in fear' means a communication or
11 action," which we could define, "that is of
12 sufficient consequence to cause a reasonable fear
13 that non-compliance will result in the victim or
14 another person being subjected to the wrongful
15 action contemplated by the communication or
16 action."

17 I'll tell you, when I read this, I did
18 not know what wrongful action was relating back
19 to. It means a communication or action
20 sufficient to cause a fear of another person or
21 that person being subjected to a wrongful action
22 contemplated by whom? The threatener, I assume,

1 by the communication or action. What is the
2 wrongful action?

3 This is the language we are going to
4 have to interpret. If we limit ourselves to not
5 revising 120, then we'd better come up with
6 something that says -- that is interpretive
7 language, that can be part of a jury instruction,
8 it can be part of the Benchbook, it can be part
9 of an executive order interpreting this language.
10 And I just think that it would be good first to
11 understand what this sentence means.

12 MS. WINE-BANKS: Well, it wouldn't be
13 a wrongful action to give a ticket that -- for
14 speeding because you were speeding. It would be
15 a wrongful action to say, "I'm going to give you
16 a speeding ticket, even though you weren't
17 speeding, unless you give me a blow job."

18 DEAN ANDERSON: Well, that could be
19 extortion.

20 (Simultaneous speaking.)

21 PROFESSOR SCHULHOFER: The second one
22 is -- I like Lisa's example. Take the first one.

1 He says, "You were speeding. I clocked you on
2 radar. I can give you a ticket or not." But,
3 let's say, number 1, she flunks the breathalyzer
4 also, or, number 2, which also comes up
5 frequently, she doesn't have her license or she
6 has been revoked.

7 So in any of those scenarios, doing
8 what he is legally entitled to do means she goes
9 to jail. She has committed -- he has got her
10 dead to rights on an offense that if he makes an
11 arrest she is going to be in jail.

12 MAJ GEN WOODWARD: Then it's not
13 wrongful action, because he is doing --

14 PROFESSOR SCHULHOFER: Yes. I'm just
15 trying to elicit intuition here.

16 MS. WINE-BANKS: But exchanging his
17 independent judgment -- his wrongful action is
18 having sex with someone who he should be --

19 MS. FRIEL: Or offering to let you go
20 and not -- if you give me sex. Is that the
21 wrongful action?

22 DEAN ANDERSON: Well, so that's what

1 we need to --

2 PROFESSOR SCHULHOFER: Can I just say
3 something descriptively? I think that hypo is
4 clear, and I think people disagree about whether
5 they are characterizing what happens to her as --
6 or what the alternative -- is the alternative
7 that she is facing, is that a harm or a benefit?
8 People differ in how they characterize it.

9 DEAN ANDERSON: Can we, instead of
10 focusing on the victim, focus on the predatory
11 behavior of someone who uses their authority to
12 coerce people to sexual advantage repeatedly?
13 This isn't the first time he has asked for oral
14 sex. Any time it's a prostitute or someone who
15 is -- so someone who deploys their official
16 authority in a coercive way to obtain sex is
17 someone who is engaged in wrongful action.

18 MAJ GEN WOODWARD: Write it that like,
19 I think, so you can --

20 DEAN ANDERSON: So let's figure out
21 how to make sense of this language, because the
22 only thing we can do --

1 MS. WINE-BANKS: But if what you're
2 saying is true, then any action by an instructor
3 to have sex --

4 DEAN ANDERSON: Using their authority.

5 MS. WINE-BANKS: -- using their
6 authority --

7 MAJ GEN WOODWARD: Which makes sense.

8 MS. WINE-BANKS: -- whether it's a
9 positive reinforcement or a negative
10 reinforcement, sounds to me like it would be
11 wrongful action.

12 DEAN ANDERSON: Provided it is -- you
13 know, we are focused on the mind-set of the
14 person who is engaging in the threat --

15 PROFESSOR SCHULHOFER: Right.
16 Exactly.

17 DEAN ANDERSON: -- I think is the way
18 to get out of it.

19 PROFESSOR SCHULHOFER: Another -- I
20 think this is very parallel to what you are
21 suggesting. If we -- I think lawyers know the
22 Latin term "ultra vires." It means you're acting

1 outside your authority or outside your role.

2 If a commanding officer or a police
3 officer says, "I will exercise my command
4 responsibilities in this way or that way for
5 personal benefit," he is acting ultra vires. He
6 is acting -- you know, as a commanding officer,
7 if you would say, "I won't write you up as AWOL
8 if you give me \$500 in cash," that's wrongful,
9 right?

10 MAJ GEN WOODWARD: Yes.

11 PROFESSOR SCHULHOFER: It's a bribe,
12 but --

13 MAJ GEN WOODWARD: I think we're all
14 in agreement. I just think we have to reword it
15 so -- because the -- saying it positively or
16 negatively has a hugely bad -- I won't say
17 positively or negatively -- so if we just talk
18 about the coercion we're okay.

19 DEAN ANDERSON: Okay. No, no. I
20 think -- I think to the extent that the language
21 itself triggers a lot of discontent culturally,
22 in the military, let's figure out if we can avoid

1 that.

2 MAJ GEN WOODWARD: Right.

3 DEAN ANDERSON: So, but still we are
4 trying -- I'm sorry to keep harping on this. But
5 it does seem to me that the only thing we can do,
6 if we're not going to revise 120, is interpret
7 120. And so it's interpreting this language and
8 trying to understand what threatening or placing
9 another in fear means.

10 It's defined in this way, that it
11 means communication or action that is of
12 sufficient consequence to cause a reasonable fear
13 that non-compliance will result in someone being
14 subjected to the wrongful action -- I'm not sure
15 what that is -- contemplated by the communication
16 or action.

17 Now, the problem is --

18 MAJ GEN WOODWARD: When we said we
19 didn't want to change 120, I think we are saying
20 we don't want to change 120 to say all sex
21 between trainers and trainees is --

22 MS. WINE-BANKS: Per se.

1 MAJ GEN WOODWARD: Yes. But we -- I
2 don't think we all said we are not willing to
3 change this line.

4 DEAN ANDERSON: So here are a couple
5 of alternatives. One alternative is to change
6 120 by changing the definition. Or we interpret
7 the language of the definition --

8 MS. FRIEL: That is already there
9 is --

10 DEAN ANDERSON: Exactly. Exactly.
11 That's another alternative, it seems to me.

12 MS. FRIEL: In an executive --

13 DEAN ANDERSON: I think that's right.
14 In an executive order that then gets filtered
15 down through the jury instructions and the
16 benchbooks.

17 Okay. So this is the question: do we
18 want to change the language of the definition, or
19 do we want to interpret the language of the
20 definition? Right? I mean, those are the two
21 alternatives.

22 So when we were talking about changing

1 120, we were talking about changing the causes of
2 action. We have -- it sounds like there is a
3 will on the panel not to change the causes of
4 action as they are defined under 120(a), (b),
5 (c), (d). And so now we're -- in any case, we're
6 just in a definitional section, right?

7 So this is sort of a question. Do we
8 want to change the definition, as it's written in
9 120, or do we want to accept the definition as
10 it's written in 120 and try to issue an executive
11 order interpreting it?

12 PROFESSOR SCHULHOFER: Could I say
13 something on that? I'm sorry. This is kind of a
14 prefatory comment about that, sort of off point.
15 But we have not decided what to do about
16 subsection 3, the definition of bodily harm,
17 which means -- and which includes any non-
18 consensual act. We have still left that --
19 that's a basic structural question.

20 And there is certainly sentiment for
21 saying we shouldn't tinker with the statute,
22 because we are opening up a can of worms. If we

1 do that, we are giving Congress a Pandora's Box
2 and saying, "Feel free to lift the lid." We
3 don't want to do that.

4 And so, in that sense, the answer to
5 the question as you put it is, let's leave the
6 statute as it is and try to interpret it.

7 However, it may be or not -- it may or may not be
8 that when we get to number 3, bodily harm, it may
9 be that we will decide with respect to that one
10 that we do have to change the statute. And if
11 that's true, if we're going to wind up doing
12 that, then everything is up for grabs and we
13 might as well fix other things in the statute,
14 too.

15 MS. FRIEL: That's a good point. If
16 we're changing other things, then let's just do
17 it.

18 PROFESSOR SCHULHOFER: So maybe we
19 should just figure out what we would like this to
20 say, and then decide down the road whether we
21 will do it by interpretation or not.

22 MS. WINE-BANKS: And I agree with that

1 completely. And I'm not willing, at this point,
2 to say that I'm not in favor of changing or
3 making recommendations that we change the actual
4 Statute, because, as we listen to witnesses, some
5 have said, "Well, don't change it, except do
6 this." And everyone had a different "except."

7 And if you take all the exceptions,
8 you are in fact changing the Statute. And if
9 you're going to change the Statute, then we might
10 as well make it as good as we think it can
11 possibly be and not just tinker with A, B, and C.
12 And that's what has been done, and it hasn't
13 gotten to be the right thing.

14 So as we talk about each of these
15 things, I think there is this -- what would be
16 the best thing to do with this particular
17 problem, and this is a particular and almost
18 extractable issue that we can talk about and say,
19 "What would be the right thing?" And I think
20 there is a genuine disagreement on whether you
21 would add the word "positive" as well as
22 "negative."

1 We all agree that the use of military
2 authority to get sex at some level, whether it's
3 positive or negative threat, is and should be a
4 crime, and at some point it should be a 120
5 crime. We also, I think, think that there may be
6 some situations where there is consent enough,
7 and the person is even in such a command position
8 or in a subordinate position can still consent
9 and can still be the initiator, and that
10 shouldn't be a 120.

11 It should clearly be a violation of
12 good order. It should be a 92, a 93. It should
13 be something. And I don't know what 133 and 134,
14 but they are mentioned in the sex crimes, so
15 maybe it falls in there.

16 So we have certain things that I think
17 we all agree on. It's the question of now what
18 do we do with that, what would be our best
19 recommendation for this particular problem.

20 DEAN ANDERSON: Okay. So if I could
21 -- I think that's a fine articulation, Jill, and
22 I think -- I'm sorry, did I miss you, Laurie?

1 MS. KEPROS: Yes.

2 DEAN ANDERSON: Okay. Well, Laurie.

3 MS. KEPROS: Well, I mean, I actually,
4 although I am probably the least afraid to change
5 the Statute, and have advocated for that and will
6 continue to do so, this is an arena where I
7 really don't think we should change the Statute,
8 because I don't think we have a clear vision of
9 something that would be better than this
10 admittedly quite vague term, right? This
11 wrongful action thing.

12 I just think that you can better
13 describe the wrongful action in the context of a
14 benchbook or a jury instruction. That's why I
15 kept asking questions about that today, because
16 it just seems something that is going to be very
17 hard to get right in a statutory sense, and that
18 maybe providing the kind of examples that the
19 Benchbook can provide or describing some of these
20 relationships is going to give sort of an
21 opportunity to try stuff out, fix it if it's not
22 fixed, and let the Services continue to tinker

1 with the language if we're not getting it right.

2 Because I feel philosophically we have
3 a consensus on this issue, right? I mean, I
4 think what Jill just said is how we all feel.
5 There are some things that are 120. There are
6 some things that aren't. And you can't paint
7 with too broad a brush, because you're going to
8 have scenarios that fall on this spectrum.

9 But, you know, I think you could take
10 the 2007 or 2015 Benchbook language, take this
11 phrase, or another person being subject to, and
12 then say "wrongful action," such as, and then
13 it's this list of things, because the list is
14 pretty good. I would take out the words
15 "positively or negatively," because I, frankly,
16 don't know what they mean in application. I just
17 think it doesn't really advance the thing.

18 And then you're just saying so anybody
19 who is using their -- using or abusing their
20 military position to affect or threaten to affect
21 someone else's military career, that's, you know,
22 a bad. That is that kind of wrongful action that

1 we would go against.

2 And then you've avoided the concerns
3 about over-tinkering with the Statute. You've
4 got a flexible tool, but you'd better describe
5 how that is a pathway to a successful 120
6 prosecution, if that is really warranted.

7 DEAN ANDERSON: So I guess my concern
8 -- go ahead, Steve.

9 PROFESSOR SCHULHOFER: Well, if we
10 were changing the Statute, why wouldn't the
11 language that you read work perfectly well as a
12 rewrite?

13 MS. KEPROS: Because I think it is --
14 it was taken out of the 2007 Benchbook for some
15 reason. You know, people found it problematic in
16 application. Making it a jury instruction allows
17 the parties and the judge to craft, you know,
18 slightly different language if they need to for
19 some reason. I just think it makes it a better
20 tool in trial, is my suspicion.

21 DEAN ANDERSON: So, point of order, do
22 we know why it was changed in 2007? And

1 ostensibly it appears to be narrowed, although I
2 understand that there are different
3 interpretations and other changes in the
4 language. Do we know, Glen?

5 LTCOL HINES: I don't know
6 definitively, Dean. I mean, I would suspect that
7 the reason it became narrower was I think one of
8 the counsel said earlier that what they were
9 having was when you gave these three specific
10 examples, the defense would come in --

11 DEAN ANDERSON: And say it's --

12 LTCOL HINES: -- and try to exclude
13 anything else.

14 DEAN ANDERSON: Yes. Yes, I remember
15 that.

16 LTCOL HINES: And so I think this
17 might be deliberately narrower, because in some
18 ways -- well, you don't have any -- you don't
19 have a laundry list, so the counsel can argue
20 that -- they are more freed up to argue whatever
21 the government's theory is, and then the defense
22 can counter that. But I can try to go back and

1 find out, but I think that's probably what the
2 answer is going to be.

3 DEAN ANDERSON: So that's helpful, and
4 I do recall that testimony. I think, just to
5 understand and to make sure that we all
6 understand, this 2007 is language from the
7 Benchbook?

8 LTCOL HINES: Yes. That's from the
9 Benchbook, if you have -- and we still do have
10 some cases that are percolating up that are from
11 the old Statute, so that you would give that
12 instruction instead of the other one.

13 DEAN ANDERSON: And help me
14 understand. Article 120 -- I apologize, have
15 forgotten 2007, not quite tight in my mind about
16 exactly -- in 2007, was there a definition of
17 threatening or placing that other person in fear
18 in the language of Article 120?

19 LTCOL HINES: Yes.

20 DEAN ANDERSON: Okay. And so the
21 definition under 120 said what?

22 LTCOL HINES: It mirrors the language

1 in the Benchbook instruction almost verbatim.

2 It's really the --

3 DEAN ANDERSON: So 120 says all of
4 this?

5 COL GREEN: Yes. I mean, under the
6 definition of threatening or placing another
7 person in fear, the term "threatening or placing
8 another person in fear" means a communication or
9 action that is of sufficient consequence to cause
10 a reasonable fear that non-compliance will result
11 in the victim or another being subjected to a
12 lesser degree of harm than death, grievous bodily
13 harm, or kidnapping.

14 Includes physical injury, a threat,
15 and then a threat in Part 3 is through the use or
16 abuse of a military position, rank, or authority,
17 to affect or threaten to affect, either
18 positively or negatively, the military career of
19 some person.

20 DEAN ANDERSON: Okay. So that's
21 extremely helpful, because it supports the theory
22 that Lieutenant Colonel Hines advanced that --

1 and that one of our panel members indicated, that
2 the specificity with which this is articulated
3 constricted the kinds of cases that went forward,
4 and that actually it was an attempt to try to
5 relax or expand by being more general.

6 MS. FRIEL: And it struck all of us
7 the opposite way.

8 DEAN ANDERSON: Yes. It sure did. It
9 sure did.

10 MAJ GEN WOODWARD: When you list
11 things, though, doesn't it tend to, okay, if you
12 give me a list, then I'm limited to that list.

13 DEAN ANDERSON: Well, it's not
14 exhaustive, but it --

15 (Simultaneous speaking.)

16 Colonel Green?

17 COL GREEN: I would just say that that
18 -- I think that's a little speculative. When we
19 heard from General Pede and Colonel Kennebeck,
20 who unfortunately came in in the drafting part of
21 this 2012 version of Article 120 after the
22 language had already been drafted, and I think

1 the initiator of that is a military judge, and so
2 we have not been able to hear directly from him.

3 But I don't know that they provided
4 that exactly rationale. I think what we've heard
5 is from -- that counsel may be speculating as to
6 why that change was made. But I don't know that
7 we've -- that the subcommittee has heard
8 definitively that that is the case. It certainly
9 --

10 DEAN ANDERSON: Well, so that's fair.
11 Do we have access to the person who changed this
12 and what their motivation might be?

13 COL GREEN: No. Unfortunately.

14 DEAN ANDERSON: Okay.

15 COL GREEN: We have not been able to
16 get the specific reasoning for this -- the change
17 in this language.

18 DEAN ANDERSON: Okay. Well, what we
19 do know is that there are a lot of ways to
20 interpret this change. And, you know, one
21 interpretation is that it narrows it quite a bit.
22 One interpretation is that it tries to relax it,

1 and that maybe we should pull in some of this
2 other language as part of a benchbook.

3 But I think Laurie's point is a good
4 one, that we should try to grapple with first
5 whether or not we are just going to -- whether or
6 not we're going to change the Statute, and I feel
7 like there is division on our team about whether
8 or not we want to change the Statute or issue an
9 executive order.

10 Given that disagreement, it might
11 still be useful for us to try to draft language
12 that either goes into a change in Article 120 or
13 it goes into suggested executive order, so that
14 either way let's try to make some progress on
15 possible language that we would come up with.

16 So what should "threatening or placing
17 another person in fear" mean?

18 MS. KEPROS: I mean, I think what's in
19 this Benchbook is very helpful. They are very
20 concrete, and it just says it includes -- it is
21 just where it says "to a lesser degree of harm,"
22 strike that phrase and substitute "subject to

1 wrongful action." Right? Use the statutory
2 language, and then just say here's what -- here
3 are some examples of wrongful action.

4 I would -- instead of wrongful action,
5 I would prefer to say "use or abuse or military
6 position, rank, or authority, to affect or
7 threaten to affect the military career" of some
8 person.

9 MAJ GEN WOODWARD: In 3, Yes, B(3).

10 PROFESSOR SCHULHOFER: Yes.

11 MS. WINE-BANKS: So you're just taking
12 out the "either positively or negatively."

13 MAJ GEN WOODWARD: Laurie, were you
14 talking about changing up at the top where it
15 says "such lesser degree of harm"?

16 MS. KEPROS: Yes. Where it says
17 "subjected to" -- where it starts with "to a
18 lesser degree of harm." Instead say "subjected
19 to the wrongful action contemplated." Such
20 wrongful action includes: a) physical injury, b)
21 a threat, and then, I mean, I would include
22 everything here, just because I feel like these

1 are all fairly concrete examples. But that is
2 also a non-exclusive list.

3 MAJ GEN WOODWARD: Yes. But do they
4 take it that way? This is the outsider listening
5 to the lawyers talk about -- because it seems
6 like anytime you guys make a list you guys --

7 (Simultaneous speaking.)

8 I'm definitely staying outside that,
9 because us outsiders, when you say "includes," we
10 look at it as, okay, and there's a whole bunch of
11 other things. But I've been listening to all of
12 this and it's like, well, if you take out -- if
13 you don't list "mistake of fact," then we can't
14 use it.

15 DEAN ANDERSON: Well, how about this,
16 lesser degree of harm includes, but is not
17 limited to.

18 MS. KEPROS: Exactly. Did you hear
19 that?

20 MS. FRIEL: As long as it makes it
21 more obvious that you're -- I mean, that is
22 something that struck me, that as lawyers, you

1 know, generally when we write these things, we
2 write that language in everything, "includes, but
3 is not limited to," to make it very obvious that
4 it's clear. And I noticed in your Statutes a
5 number of places where it just said "includes,"
6 and I went, well, there's --

7 MAJ GEN WOODWARD: Yes. And we've
8 heard people talk about it. It's like, well, you
9 took that out, or you put that in, so it means
10 something completely different. Remember, was it
11 mistake of fact, or which one was it?

12 MS. FRIEL: Yes. It was mistake of
13 fact.

14 MAJ GEN WOODWARD: And it was like,
15 seriously? That's not logical.

16 MS. FRIEL: And actually we will vote
17 to have exactly the things covered here in what
18 was the Benchbook instruction. Almost everybody
19 we heard today said we -- that would be helpful
20 to us, to have an instruction that was more like
21 2007, you know, definitions. So they're like
22 this.

1 DEAN ANDERSON: Okay. So let me --
2 well, I'm hesitant to throw this wrench in,
3 because it seems like we are coalescing around a
4 possible position. But it is not always the case
5 in which someone is -- someone uses their
6 authority to threaten the military career.

7 So, you know, the use of authority can
8 be coercive without an explicit threat, either a
9 communication or action, verbally or non-
10 verbally, to -- they can use their authority to
11 obtain sex without a threat to the career.

12 MS. KEPROS: What is this "to affect"?

13 DEAN ANDERSON: So maybe I would be a
14 little more comfortable to include -- the word
15 "career" sounds like you aren't getting the
16 transfer you want. You know, it sounds like a
17 projection of a career over time, rather than the
18 conditions of recruitment or basic training, the
19 conditions in which they are operating.

20 MS. WINE-BANKS: It could also be you
21 want to go home to your mother's funeral.

22 DEAN ANDERSON: Right. That kind of

1 stuff is not about their career. Do you know
2 what I mean? So it's a little --

3 MS. FRIEL: It's kind of their life,
4 their military life, for what --

5 DEAN ANDERSON: And that's because the
6 coercive authority is total control over their
7 lives, unless you want to leave the military.
8 You can -- that's an out, but that's a different
9 kind of relationship of control and authority.

10 MAJ GEN WOODWARD: Can you just write
11 in coerced, you know, through the use or abuse of
12 military position, rank, or authority to coerce?

13 DEAN ANDERSON: Compliance.

14 MAJ GEN WOODWARD: Yes. Or is that --
15 is that too broad, if you do that?

16 MS. KEPROS: See, I don't know. I
17 keep coming back to what was offered to us by
18 several of our witnesses as an alternate theory
19 of 120 prosecution, which is the bodily harm.
20 Because that's where you get the non-consent kind
21 of scenario, and you can use the definition of
22 consent's element that it must be freely given.

1 And so I feel like you can already
2 accomplish something that is explicitly coercive
3 through an Article 120 prosecution under the
4 bodily harm subsection. You don't even need to
5 go under the section at all. This is just an
6 alternate pathway where, you know, there is a
7 threat or use of rank or something like that,
8 they could be more subtle.

9 If it's not freely given, you don't
10 have consent. You are in a basic non-consensual
11 sexual assault at that point.

12 DEAN ANDERSON: So one of the
13 interesting things about the prosecutor's panel
14 was that that was very powerfully argued by the
15 one gentleman. And the others sort of stared
16 blankly, and they said, "Well, Yes, you know, I
17 guess you could." But they hadn't conceptualized
18 the bodily harm as an arm through which coercive
19 attempts to obtain sex --

20 MAJ GEN WOODWARD: And as a layperson,
21 I'm telling you that does not -- I mean, and I'm
22 the kind of person that is going to be sitting on

1 that jury -- that does not make sense to me at
2 all compared to the coercion, any abuse of
3 authority.

4 So I would have a real problem with
5 that, because I just don't think it would float.
6 I think it would be a lot harder to get somebody
7 -- a panel -- I don't know what you guys think,
8 but I would think it would be really hard to get
9 a conviction from a panel based on, you know, an
10 Estacio LeBlanc scenario saying it's bodily harm.

11 PROFESSOR SCHULHOFER: It feels like
12 it's kicking the can down the road. I think
13 Laurie is right that we wouldn't have to resolve
14 these issues under subsection 7, if it could fall
15 under the term of what is freely -- is or isn't
16 freely given. But it's not clarifying anything;
17 it's just moving it under that ambiguous rubric
18 instead of a different --

19 MS. WINE-BANKS: And we haven't
20 resolved that rubric yet either.

21 PROFESSOR SCHULHOFER: Right.

22 MS. WINE-BANKS: You know, I mean, we

1 have to go back to, what is freely given consent?

2 MAJ GEN WOODWARD: Right.

3 MS. WINE-BANKS: And there is a
4 different element when it is an abuse of --
5 particularly in the trainer-trainee authority
6 relationship where it's -- and I think we have
7 even come to a point of basic training is
8 different than advanced training.

9 And that in that vulnerable, depending
10 on the Service, 12-week period, eight-week
11 period, there is a very special responsibility of
12 the drill instructor and a very special
13 vulnerability of the recruit, or during the
14 recruiting process as well with the recruiter who
15 is driving the recruit around and has access in a
16 way that wouldn't otherwise be available, even in
17 the drill instructor situation where it would be
18 harder to get them alone.

19 So I think we have to deal with the
20 issue here and not just say, well, it's a consent
21 question. We have to deal with consent, but --

22 COL GREEN: The other thing that I

1 would -- I'm sorry. The other thing I would take
2 you back to is in our earlier discussion you were
3 talking about from the perspective of the victim
4 versus the perspective of the offenders.

5 And I think you said when you look at
6 it from the perspective of the victim that, you
7 know, their perception of it is less important
8 than, you know, the actions of the offender. And
9 so I think with the consent issue you, again,
10 turn the perspective looking totally at the
11 victim, rather than how the offender is behaving.
12 And so the --

13 DEAN ANDERSON: Using the coercive
14 authority.

15 COL GREEN: Right. So --

16 MAJ GEN WOODWARD: Which gets to the
17 bribery piece that I was having a hard time with.

18 DEAN ANDERSON: So how about to
19 facilitate this dialogue and movement forward.
20 I'm always looking to try to come to conclusion
21 just because this stuff is so hard, and we've got
22 so much of it to plow through. Right?

1 What about taking some of this
2 language from 2007, changing it to match better
3 some of the language here, and drafting this as
4 an executive order with the knowledge that should
5 we choose to revise 120, we may as well change
6 120 and go back and put some of this language
7 directly into the Statute.

8 Because I think I'm hearing from this
9 group that if we are going to tinker with 120,
10 then we'd better tinker in all the ways that we
11 think it should -- could be better, or revise it
12 in all the ways that it could be better. But if
13 we're really trying to avoid that, then we want
14 to have language that could be either part of the
15 Statute or part of an executive order that is
16 tightly tied to the language that currently
17 exists, so that it would pass muster.

18 Because I don't think just slapping
19 down the 2007 language, that's a recipe to get
20 that overturned, but using it as an
21 interpretation of this language, this definition,
22 I think we could work with. And I think we agree

1 on what this language sort of looks like.

2 MS. WINE-BANKS: Well, if we look at
3 the 2007 language, and having had the discussion
4 we just had, I see it a little differently now,
5 because it says, "Lesser harm includes a physical
6 injury," which obviously would be less than death
7 and kidnapping, because that's covered in a
8 different section, although it doesn't say that,
9 so that's a defect.

10 A threat to accuse any person of a
11 crime -- well, is it a threat -- I'm going to
12 accuse you of a crime you actually committed, or
13 I'm going to make it up and accuse you and you're
14 going to have to defend yourself.

15 To expose a secret -- okay, that's
16 okay. Through the use of position, rank, or
17 authority -- I agree "career" is too narrow. We
18 want it to be more than just "career."

19 Positively or negatively, we have
20 different opinions on. But if we go back to the
21 "such lesser harm includes a threat through the
22 use of military position to effect" -- rather

1 than just "the use of military position" to
2 affect -- you could stop after "to use military
3 rank or authority." Period. In a wrongful
4 manner.

5 I mean, it's not -- you want that to
6 be as broad as possible, right?

7 MAJ GEN WOODWARD: Yes. Well, that's
8 where you get to the "to coerce" --

9 DEAN ANDERSON: Compliance.

10 MAJ GEN WOODWARD: -- "compliance."
11 I think that's pretty broad.

12 MS. WINE-BANKS: Right.

13 MAJ GEN WOODWARD: If you do it that
14 way.

15 PROFESSOR SCHULHOFER: I think coerce
16 or induce.

17 MAJ GEN WOODWARD: Yes.

18 PROFESSOR SCHULHOFER: "Coerce" gets
19 you -- that's something defense attorneys can
20 really work on, whether it was really coercion.
21 Then, they start bringing up, well, the other
22 person wanted it, so in --

1 MS. WINE-BANKS: Well, let's look back
2 at the Statute, because the Statute is commits a
3 sexual act upon another person by threatening or
4 placing the other person in fear. Then, we are
5 defining threatening or placing the other person
6 in fear of a physical injury less than would be
7 for rape, or placing them in fear of a threat to
8 use military rank or authority to induce -- the
9 wrongful action in this case would be to induce
10 the commission of sex, which would make it non-
11 consensual. So we're avoiding the non-consensual
12 in a way, but getting back to consensual.

13 MAJ GEN WOODWARD: Yes. Listing to
14 accuse a person of a crime or to expose a secret,
15 to me those are weird. I don't know.

16 MS. FRIEL: Well, you know, so I'm
17 sure it's other states, too. New York State has
18 a coercion Statute. If somebody is in fear of
19 being physically injured, then it's going to be a
20 sexual assault. Okay? If you are in fear of
21 some other thing happening to you that the person
22 threatened, then it's coercion, not sexual

1 assault, even if the coercion had you have sex.

2 So if I say, "Lisa, I'm going to
3 accuse you of a crime," and that's how you get to
4 have sex with me, we charge that as coercion in
5 New York. And the same with expose a secret.
6 That language is right from New York State's
7 coercion Statute, and there are, I want to say,
8 six different subsections of that Statute of
9 things like that.

10 But this gets back to --

11 PROFESSOR SCHULHOFER: Where this
12 comes from is -- from a sort of general criminal
13 law perspective, language like this is classic
14 blackmail. And if you have committed a crime,
15 and you really committed the crime, and I go to
16 you and say, "Look, I'm going to accuse you of
17 this crime unless you pay me \$100 a month for the
18 rest of your life," the person who has committed
19 the crime, you could view them as, you know, they
20 are getting a benefit.

21 But we view them as a victim of
22 blackmail. That's a classic --

1 MAJ GEN WOODWARD: Couldn't you say a
2 threat to blackmail, then? I mean, why
3 specifically a crime, because you could blackmail
4 somebody for all kinds of things, right?

5 PROFESSOR SCHULHOFER: Yes.

6 MS. FRIEL: And that's what they did.
7 That's -- the secret, that's blackmail. "I'm
8 going to tell everybody you had an abortion last
9 year," and -- or an affair or whatever it is.

10 PROFESSOR SCHULHOFER: I think it
11 shines a spotlight on why we view the person who
12 receives that kind of a proposal as a victim. A
13 lot of philosophers struggle with this, because
14 they are really getting something they are not
15 entitled to. But I think for hundreds of years
16 society has viewed the target of blackmail as a
17 victim of a kind of coercion, something
18 unconscionable, that they are being -- their arm
19 is being twisted and they are paying out money to
20 the blackmailer, even though what they're doing
21 is paying the person to remain silent about
22 something shameful.

1 MS. WINE-BANKS: So going back to
2 number 3, who can give me an example of something
3 that is an abuse of rank, position, authority,
4 that isn't to affect the military career. What
5 other -- how else could I --

6 PROFESSOR SCHULHOFER: Your example --
7 like saying "I'm not going to let you go home for
8 your mother's funeral" --

9 MS. WINE-BANKS: So that's not career.
10 That's right. How about your -- but it seems to
11 me it has to be related to the military, because
12 if I'm using my rank or authority, it's not to
13 expose a secret. It's to affect either your
14 career or your well-being or your military life
15 or --

16 MAJ GEN WOODWARD: I think you could
17 just say "to coerce compliance." I mean, I think
18 --

19 DEAN ANDERSON: Yes. Or to induce
20 compliance to a sexual act.

21 PROFESSOR SCHULHOFER: Yes. Yes.

22 MS. WINE-BANKS: So you think that

1 would cover it all.

2 DEAN ANDERSON: Well, this is
3 interesting. I think that actually if it's a --
4 what we have done, I think, is develop language
5 that we could either put in an executive order as
6 interpretive language of the definition, or we
7 could use to place in if we make a decision, you
8 know, depending on our decision of how
9 interventionist to be in our project. Right?

10 And so, you know, I think what would
11 work is simply saying "threatening or placing
12 another person in fear," maybe we would want to
13 include this other language. Maybe we wouldn't.
14 We could say, "Includes, among other things, but
15 is not limited to, a) physical injury of another
16 person or another person's property, b) a threat
17 to accuse any person of a crime, to expose a
18 secret, et cetera, or to use or abuse military
19 position, rank, or authority to induce compliance
20 to a sexual act." That I think --

21 MS. WINE-BANKS: Well, that would be
22 tautological, though, because the crime is -- if

1 you commit a sexual act by using your military
2 rank.

3 DEAN ANDERSON: So the question is how
4 to interpret a threat or placing another person
5 in fear, and --

6 MS. FRIEL: In fear of what? I think
7 what they are trying to define is in fear of
8 what.

9 DEAN ANDERSON: Right.

10 MS. FRIEL: What, in addition to
11 grievous bodily injury, and blah, blah, blah.

12 DEAN ANDERSON: And that's why people
13 have -- that's why the language here talks about
14 the military career. So if we're saying, well,
15 the career is too narrow, we want to include the
16 conditions of life for the recruit, or the
17 condition -- you know --

18 PROFESSOR SCHULHOFER: Conditions of
19 service?

20 DEAN ANDERSON: Conditions of service.
21 What do you guys think about that?

22 MS. WINE-BANKS: Say that again.

1 DEAN ANDERSON: Conditions of service.

2 MS. WINE-BANKS: Yes.

3 PROFESSOR SCHULHOFER: Military career
4 or conditions of service.

5 MS. KEPROS: Is there terminology for
6 this? I mean, in the military?

7 MS. WINE-BANKS: Well, I'm just trying
8 to figure this out. I mean, somebody is going to
9 get into that. I mean, any time you get too
10 specific, then I think that's problematic.

11 DEAN ANDERSON: Yes. We're actually
12 trying to be more broad, in general. So if this
13 isn't the way -- you know, when I say get down
14 and do 100 pushups or something, you know, that
15 is the condition of your service. But it's not
16 going to affect your whole career.

17 MS. WINE-BANKS: "Career" is too
18 broad. I mean, too narrow.

19 DEAN ANDERSON: "Career" is too
20 narrow. So then how do we capture --

21 MAJ GEN WOODWARD: Condition of
22 service is not going to -- I don't think that --

1 that doesn't translate for me. That's --

2 (Simultaneous speaking.)

3 MS. WINE-BANKS: Maybe there is no
4 military language or -- is things like you're
5 going to not -- I won't agree to let you go to
6 your mother's funeral.

7 DEAN ANDERSON: I'll make your basic
8 training miserable.

9 MS. WINE-BANKS: I will make you do
10 100 pushups every hour.

11 MAJ GEN WOODWARD: Yes. So, I mean,
12 I think rewriting it just to say abuses power to
13 coerce them, I mean, you know --

14 MS. FRIEL: Abuse of power to coerce
15 or induce somebody to have sex.

16 MAJ GEN WOODWARD: Yes. I mean, I
17 think trying to go beyond that is --

18 MS. WINE-BANKS: You're saying it's --
19 if you read the Statute, it's commits a sexual
20 act upon another by threatening or placing that
21 person in fear through the use of military
22 position, rank, or authority. Period. You can't

1 repeat the "to induce the action," because the
2 action is already induced above. You're just
3 repeating it, and it just gets confusing.

4 MAJ GEN WOODWARD: This is saying
5 threatening to place this person in fear includes
6 use of --

7 MS. WINE-BANKS: Right.

8 MAJ GEN WOODWARD: Okay.

9 MS. WINE-BANKS: Also, just as a
10 technical matter, I'd just note, physical injury
11 to another person or to another person's
12 property, whereas above it is to the victim or
13 another person. So both of those should be to
14 the victim or other person, if we were going to
15 use that language. So the victim --

16 DEAN ANDERSON: And I also think
17 that --

18 MS. WINE-BANKS: -- or to the victims
19 or another person's property.

20 DEAN ANDERSON: Right. Presuming that
21 is not included within death, grievous bodily
22 injury, or kidnapping.

1 And I also am thinking just
2 technically that the threat under B should be
3 threat or placing another person in fear, to
4 accuse another person of a crime. In other
5 words, I am in fear of this.

6 MS. WINE-BANKS: Right.

7 DEAN ANDERSON: But, so that would
8 just be mimicking the language of the Statute
9 itself.

10 MS. WINE-BANKS: Right.

11 DEAN ANDERSON: So I'm willing to try
12 to draft what we have talked about and circulate
13 it.

14 PROFESSOR SCHULHOFER: Yes. Good
15 idea.

16 DEAN ANDERSON: As at least a
17 discussion piece for next time. It's not going
18 to be perfect. We are going to want to revise
19 it. But something that tries to capture what we
20 have discussed here. That could either be in an
21 executive order or it could be changing the
22 Statute, depending on how we choose to proceed.

1 MS. KEPROS: I wonder if it would be
2 possible for Staff in crafting our agenda for the
3 next couple of meetings, if we are going to do
4 the more deliberative function, to try to
5 delineate the issues we are going to be
6 discussing and voting on. I mean, can we do that
7 and say like, this hour is going to be, you know,
8 Issue 6, or whatever.

9 Just because I'm concerned about the
10 issue that some of us were discussing this
11 morning that it's hard to know what to be really
12 read up on and what to review and revisit, so
13 that you can have a substantive conversation,
14 especially since at our next meeting the rest of
15 our subcommittee who has missed today's testimony
16 and the evolution that many of us have
17 articulated happening just as a consequence of
18 hearing that testimony --

19 LTCOL HINES: I think what we can do,
20 and I have been working with Colonel Green, is I
21 think our plan for September, Laurie, is to block
22 off the afternoon for deliberations, and then the

1 entire October meeting --

2 MS. KEPROS: For deliberations.

3 LTCOL HINES: -- for deliberations.

4 We can certainly, as we do the agenda, we can set
5 aside an hour -- there is going to be 17 issues
6 that you need to decide in the end, including the
7 11 that you have already been talking about.

8 So if it's -- we have to go an hour
9 for each issue -- and I know even an hour sounds
10 like very little time for each of these issues.
11 But if you're concerned about getting -- you
12 know, getting to all the issues, we can sort of
13 get everyone's thought process on how you want to
14 bracket the time allotted per issue or how to
15 group those.

16 MAJ GEN WOODWARD: What testimony do
17 we have in September?

18 LTCOL HINES: Just either Senators or
19 Representatives who want to come down and speak
20 to the subcommittee, ma'am, and give their input,
21 like Ms. Frankel, Congresswoman Frankel
22 definitely wants to come speak and give her

1 input.

2 MS. FRIEL: Are these dates right?
3 September 17th and October 8th?

4 LTCOL HINES: October 22nd. We moved
5 that meeting to the 22nd.

6 COL GREEN: Our concern with the
7 deliberations today was that -- how many of the
8 subcommittee weren't here, and so we left this a
9 little bit more free-flowing for you, just for
10 you to have some time to start to discuss the
11 philosophical issues and start to work this out.
12 But weren't sure how far you'd want to get with -
13 - although you have a quorum, and certainly have
14 notes, but obviously everybody --

15 DEAN ANDERSON: So not to preempt the
16 input and insight of the three people who were
17 not here, I do think that we have tentatively
18 answered many of these questions. Seventeen is
19 whether or not the current practice is
20 inappropriate, of using the -- both Article 92
21 and 120, and I think the answer is we don't think
22 that that's inappropriate. We think that that's

1 appropriate and it covers slightly different
2 contexts, slightly different circumstances.

3 Thirteen is, does 202 version give
4 prosecutors the ability to effectively charge
5 coercive sexual relationships? And I think the
6 answer to that is yes, and we may want to change
7 Article 120. We may want to provide an executive
8 order interpreting Article 120.

9 Issue 14 is, should the definition be
10 amended? That is exactly what we are grappling
11 with, and we are going to try to have some
12 language around that.

13 Issue 15 is, should a new provision be
14 added? And I think that we don't think that
15 there should be a new provision. Tell me if I'm
16 wrong about that. I think we don't think that we
17 need a new provision.

18 Issue 16 is, should sexual
19 relationships between basic training instructors
20 and trainees be treated as strict liability
21 offenses? And I think the answer is no from this
22 panel. I'm just trying to -- you know, I think

1 we've made some progress.

2 Issue 17 is, as an alternative, should
3 coercive sexual relationships currently charged
4 under other Articles be added to the DoD's list
5 of triggering sex offender registration? And I
6 think, without even talking about, my sense is
7 that the answer to that is going to be no, pretty
8 resoundingly, given our own reaction to the
9 concerns about sex offender registration.

10 So we've actually made a lot of
11 progress, you all.

12 COL GREEN: Just one note that I
13 have --

14 MS. WINE-BANKS: And then we come up
15 with another issue, which is, should we abolish
16 sexual registration?

17 DEAN ANDERSON: A little bit beyond
18 the scope of what we are doing here, but it's an
19 important thing for us to think about.

20 Colonel Green?

21 COL GREEN: Just one note, and just to
22 kind of clarify, because there was some

1 discussion earlier in terms of the definition in
2 the Statute as to whether you provide a
3 clarifying definition for the term that is
4 already defined in the Statute, threatening or
5 placing that other person in fear, or whether you
6 could provide a clarifying definition for a term
7 within that definition of the term "wrongful
8 action contemplated," which is not otherwise
9 defined, and whether you want to narrow what that
10 recommendation is rather than encompassing the
11 entire definition.

12 The only reason I say that is, you
13 know, one of the things we heard from the
14 appellate counsel was the concern that
15 substituting a new definition for the statutory
16 term may lend itself to concerns among the
17 appellate courts, whereas looking at only that
18 term within the definition may be less
19 concerning.

20 DEAN ANDERSON: I think all of us are
21 very cognizant of the challenges and the
22 tradeoffs with changing the definition itself

1 versus defining part of what is the definition,
2 defining a term within the definition as it's
3 currently written.

4 And I think, you know, maybe what --
5 and I'm willing to volunteer if anybody else
6 wants to do it, that's great, too. I don't have
7 a pride of authorship in this, but trying to
8 crystalize this conversation into two
9 alternatives, one which would be a definition in
10 an executive order of wrongful action, and I
11 think we've got this here, and one that would be
12 a substitution of the definition that is written
13 in Article 120.

14 MAJ GEN WOODWARD: So actually
15 changing the law there.

16 DEAN ANDERSON: Right. And then we
17 would decide which way we want to go based on
18 what we're doing in a lot of different
19 provisions.

20 MS. WINE-BANKS: One of the things
21 that would concern me is some of the comments
22 that were made about whether the courts would

1 ignore an amendment to the definition, or through
2 instructions.

3 MS. FRIEL: Interpretation.

4 MS. WINE-BANKS: The interpretation of
5 the definition. What do you guys think? Would
6 that be an effective solution, or are we just
7 spinning our wheels if that's what we do?

8 COL GREEN: No. I think -- I do want
9 to talk to the experts on the executive order
10 process, because my understanding is with the
11 punitive Articles there are no other executive
12 orders that provide clarifying definitions of the
13 punitive Articles themselves.

14 The executive orders provide other
15 guidance, and obviously the Rules for Courts-
16 Martial and other terms, but binding definitions
17 of how terms are interpreted tends not to be
18 something that is done within the executive order
19 process. So we will take that and take a look at
20 that and provide you more information at the next
21 meeting.

22 DEAN ANDERSON: That would be helpful.

1 COL GREEN: But something within the
2 Benchbook, I mean, I think the default -- and
3 we'll let the military judge -- I mean, those are
4 pretty dispositive on issues.

5 LTCOL HINES: I think that's the way
6 it's done. I mean, the judiciary routinely will
7 -- they understand I think -- they go through the
8 process. They want to -- if you're going to
9 explain something, they don't want to contradict
10 the Texas Statute. And like Mr. Sullivan has
11 come in and told us, as long as you're just
12 explaining what something says, that's fine.

13 And the way that that would get
14 challenged is the judge would give that
15 instruction, and then if there was a conviction
16 they would have to appeal that up to the
17 appellate courts, and the appellate courts would
18 simply look at not necessarily the Benchbook
19 instruction; they would just look to see, is this
20 instruction correct in law?

21 And they do the typical civilian court
22 review of, is the judge's judicial instruction

1 correct in law? And you don't know until they
2 come out and say that. But typically the way our
3 instructions in the Benchbook are made are two
4 ways, like what you're doing here and the JSC or
5 the judiciary puts it in there, or a case comes
6 out where CAAF has said, "This is what this term
7 means," and then the judiciary adjusts and puts
8 that in the Benchbook, so --

9 DEAN ANDERSON: I think we are in good
10 shape. I think we should close for the day.

11 Bill?

12 MR. SPRANCE: The meeting is now
13 closed.

14 (Whereupon, the above-entitled matter
15 was concluded at 4:48 p.m.)

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In the matter of: Judicial Proceedings Panel

Before: US DOD

Date: 08-27-15

Place: Arlington, VA

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