

went off the record at 3:12 p.m. and resumed at 3:30 p.m.)

DEAN ANDERSON: We are going to go ahead.

And since it seems like each of the small groups are already thinking about these issues -- and they are core to what we have been grappling with -- Issue 6, Issue 12 through 17, are all about the questions that have been raised by the panels that we have engaged with today.

I would try to take the -- because we are not going to complete all of these -- I am just going to say that as an assumption, a per se assumption -- that we will -- I would suggest that we would take these in slightly out of order, because some of the -- some of them, it seems to me, are preliminary questions, and then some are questions that kind of get down the pike a ways.

One of the preliminary questions is -- I take Issue 12 and 13 as somewhat similar, is the current practice of charging inappropriate relationships or maltreatment under Articles of

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the UCMJ. And I assume they are meaning Article 92 and 93, other than Article 120, appropriate and effective when sexual conduct is involved. And then, Issue 13 is, does the 2012 version of the UCMJ afford prosecutors the ability to effectively charge coercive sexual relationships or those involving abuse of authority under Article 12?

So this takes us a step back from the sex offender registry question, but the sex offender registry questions have been looming prominently over our analysis of some of this. But these two questions are actually about, do we have enough in the statute now to handle the kinds of abuse of authority cases that we are concerned about, either under Article 120 as it currently stands or under Articles 92 and 93 of the UCMJ.

Thoughts about those questions. Lisa?

MS. FRIEL: You know, it's interesting. I came into today really feeling like we should have some -- I love the term "per se." I think that's much more accurate than "strict liability," that we needed to have some per

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se crime. It would be the lowest level. We'd put it in Article 120, make it a separate offense, so we weren't amending language of the rest of Article 120 and throwing everything off on that.

And I spent the whole day listening to this and wondering, what if it's necessary, given what we heard -- and I think Glen is going to check back with some of the speakers from other times we have heard about this to find out, are they talking about more recent times with the cases they're seeing, or in the past?

I am very moved, and it is connected by the idea of this -- what would be the lowest level, so something in which you don't have the facts to convict somebody of an overt or implicit threat case, which is a decently broad area, especially if we can do something with the 2007 definition, somehow get that to be the instruction, that that's what it means, and that's a whole other area. We have to talk about what's the best way to do that.

But you don't fit in that, so you have this very lowest level, and then you're a

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registered sex offender with everything that comes with that. By the end, I am really kind of thinking, if we do something at all, maybe we should put it in 92 separate, or 93 or something.

I am kind of moved by the idea, because -- I will go back to my own experience in New York. When they first passed the sexual offender -- Megan's Law in New York, they did not have misdemeanors in it. And then, they had one misdemeanor but not the other. We had room to say, you know, as a prosecutor with discretion, this is not somebody that should register for life. I can't make this person register. It doesn't seem like it's just.

They took away that ability. In the end, it was everything that was a sex offense, and they put us in a box of not pleading to sex offenses. Now the guy has a criminal record without a sex offense on it, which, you know, was the total opposite of what you wanted to do.

There were times -- it's just not just to put everybody on the registry, because there are

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some incredibly real, detrimental effects of that.

MS. WINE-BANKS: I think you missed the conversation that we were just having about maybe forming some coalition to start trying to counter the expansion of sexual registration, and maybe to even eliminate it completely.

MS. FRIEL: Good luck with that.

MS. WINE-BANKS: I think Laurie's statements were --

MS. FRIEL: It's political.

MS. WINE-BANKS: -- really moving. It is political. But just because it's hard doesn't mean we shouldn't try, although I have to say my very first attempt at political action in college was to try to abolish zoos.

(Laughter.)

Look how much success I had with that.

(Simultaneous speaking.)

And it wasn't because of my love of animals, which came later. It was because I worked for the Department of Public Aid in Chicago and thought that we were spending too much money

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feeding Sinbad the Gorilla in the Lincoln Park Zoo instead of people on welfare.

Okay. So I am not the best judge of what's politically accomplishable.

But listening to today, I am appalled by the fact that a lot of the things that we are thinking need change, everybody is saying don't change because it will lead to sexual registration, and that has consequences that are horrible.

And then, listening to the fact that the registration does not in fact reduce recidivism, does not in fact help anybody, and it costs a lot of money, a lot of time, a lot of -- that could be much better spent on counseling, as you suggested, or other better uses of the money, and it affects how we decide to amend the laws.

So I am following up on what you are saying, and I agree. I started out thinking this is a sex crime, and let's treat it as a sex crime. And today I am more persuaded that where there is genuine fear from the coercive nature of the relationship from the power of the trainer over the

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life of the trainee, there should be a 120 prosecution.

Where it is consensual -- and at first I was saying, "Well, there can't be consensual if it's a coercive environment." Well, okay, maybe it can be. There are situations. And so we don't want to create too big a hammer or too big a law that would punish and not permit there ever to be a consensual.

Yet we need to treat it, and if the instructions that say use of rank is the kind of action that could count, well, then, we have enough to do it. That's why I asked if we could create a crime that was not registrable, but Laurie says you could but the states still might. And so that doesn't really --

MS. FRIEL: We had talked about that earlier.

MS. WINE-BANKS: So I'd say -- I guess I'm sort of -- I guess I'm saying the same thing as you are, just expanding that I think we should take some action about sexual offender

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registration.

MS. FRIEL: But it is also based on -- I think we're saying the same thing, that we come away with the idea that expanded instruction, at least instruction -- the --

MS. WINE-BANKS: Some way.

MS. FRIEL: -- 2007 that we have been given about what that means --

MS. WINE-BANKS: Or the new 2015.

MS. FRIEL: -- action or -- that we feel that that can be given and that will hold up. And so that is -- then, that is big enough to me to cover a lot of it, at least from what we're hearing. But I'm interested to hear especially what Maggie thinks about --

MAJ GEN WOODWARD: Well, it's interesting. I have gone back and forth on this probably 800 times since they did the Lackland investigation, and I probably went back and forth four or five times alone today.

I think I'm worried about when we say, "Well, we don't want to have them registered, but

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we think it should be under Article 120." And, in my mind, it's like the only reason we think it should be under Article 120 is because we believe that they are a sexual predator in using their power to assault somebody.

So, in my mind, we either say, okay, it is and it falls under 120, or it doesn't, and then why isn't 92 just fine, and then we don't have the sexual registry. So we need to decide how strongly we feel it is a sexual predator thing if an MTI uses their power to coerce a trainee into what, in essence, is consensual --

MS. FRIEL: Well, except that -- if that's the way you phrased it. If they use their power to coerce, then that is --

MS. WINE-BANKS: Then it is 120.

MS. FRIEL: -- within the statute the way it is.

MS. WINE-BANKS: Then we shouldn't be worried that they have to register.

MS. FRIEL: It's when there is no power to coerce. It's when just -- they met each other,

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one happens to be this, the other happens to be this, and they go to bed together, and the victim says, "He said nothing. He did nothing. And I wanted to go to bed with him. Totally -- I wanted to go to bed with him, but you have made a per se crime that says I can't, and now that's a sex offense."

MAJ GEN WOODWARD: Yes. So I think the conclusion I have come to today is that go ahead and go with 92 for -- as we are basically today --

MS. WINE-BANKS: For consensual.

MAJ GEN WOODWARD: -- and then use 120 and redefine and try to strengthen the language on use of threat or, you know, and try and make it clearer that by virtue of their power alone, without an overt threat, that is threatening, if that makes sense.

MS. WINE-BANKS: Yes.

DEAN ANDERSON: So it does seem to me -- since we are going down the line here, it does seem to me that if we take that route, what we would be doing is then interpreting the definition of

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"threatening" or placing another person in fear, which is obviously one of the questions posed here as Issue 14.

But I don't think it makes sense to interpret it in a way of just going back to the 2007. I think that risks it being overturned, if that's not where -- you know, or a misinterpretation of the law. I mean, if we are planning an executive -- to draft the executive order language, we'd better come up with slightly new language that really tracks this -- you know, what it means to have a wrongful action contemplated by a communication or action.

Actually, that came out of maybe the third panel. Someone said, you know, what you could do is interpret this word, what is the wrongful action here? And that would be a place. But I wouldn't want to just say, okay, well, let's go back to the 2007 interpretation of that, because that's not what --

MS. FRIEL: Yes. No, I guess I --

DEAN ANDERSON: They changed the

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language, you know.

MS. FRIEL: I just like the language of it, and then we can do exactly what you said, say, you know, wrongful action is, but use a lot of the language they used in that expanded definition.

DEAN ANDERSON: Or at least the idea of using one's, you know, abuse of power to -- you know, or command authority.

MS. FRIEL: And the positively and negatively, I like that language --

MS. WINE-BANKS: Yes.

MS. FRIEL: -- you know, in there, because you can do it with inducement as well as, you know, with negative.

MAJ GEN WOODWARD: Yes. I object to the positive. I don't like the -- I have the same negative reaction that we heard earlier. That implies a quid pro quo that I don't look at as --

MS. FRIEL: We think the positive is sexual harassment, quid pro quo.

MS. WINE-BANKS: Well, you don't have -- no, I think it goes back to, if you look

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at what the Model Penal Code discussion is, it's -- if I am offering to do for you a favor, something that you aren't entitled to, I won't write you a speeding ticket that you -- you were speeding. I caught you. But if you have sex with me, I'll skip the ticket.

MS. FRIEL: That's a positive inducement.

MS. WINE-BANKS: That's --

MS. FRIEL: That's coercive, and they do that all the time. Not all the time. I don't want to exaggerate. Police officers have done exactly that. "I won't arrest you if you have sex with me."

MS. WINE-BANKS: Or, "I will give you money if you have sex with me." Whatever the positive inducement is, I will reward you by making you an honor graduate, which you are not entitled to. You haven't been a good student. Those are positive things that you should be able to say, "I didn't earn it. I'm not taking it. And if I give in to you for this" -- I think this is what you're

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saying is that --

MS. FRIEL: Yes. It's a character thing.

MS. WINE-BANKS: -- that that shouldn't -- it shouldn't be something that is on the same par as, "If you don't, I am going to remove from your record the A+ you got in this course. I am going to give you a D. You'll pass. You'll still go out. But your whole career is going to have a D instead of an A+."

DEAN ANDERSON: So you've thought a lot about this and written a lot about this particular question of positive and negative inducements. Do you want to share with us your perspective?

PROFESSOR SCHULHOFER: Yes. I was listening to what people were saying, and I was hearing two different things. It may be that there is a difference of opinion about whether the, quote, positive inducement should or shouldn't -- I mean, I think we were in agreement that we should try to clarify that language, and Lisa was suggesting that we make clear that the wrongful

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action could be positive or negative consequences.  
And then I wasn't sure whether I was hearing from  
Jill and Maggie --

MS. WINE-BANKS: I was trying to --

PROFESSOR SCHULHOFER: -- agreement or  
disagreement.

MAJ GEN WOODWARD: Yes. My  
disagreement is I think that if I choose -- you  
know, if you offer me something positive in return  
for my sexual favors, that is completely different  
than you negatively -- to me, that's more -- I hate  
to say it, but that's -- you know, the terminology  
is not right, but prostitution versus you offer me  
something negative, and to me that's sexual  
assault.

PROFESSOR SCHULHOFER: Interesting.

MAJ GEN WOODWARD: And I don't think  
they fit in the same --

MS. FRIEL: What do you do with,  
"You'll do better in my class, if you sleep with  
me"?

MAJ GEN WOODWARD: Well, that --

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MS. FRIEL: Is that a positive inducement, that I'm going to give you a better grade than you deserve, or is that a veiled threat that you are going to flunk the class --

MAJ GEN WOODWARD: Well, but then that's a negative inducement, if you take it as a veiled threat, because that means that you are saying, if I'm taking it to say, "You're going to do worse if you don't sleep with me," then that's the negative, not the positive.

MS. FRIEL: Does it matter how the person -- and we've got to go back, and I can't -- that's the subjective, that that's how I took it, and then he sits there and says, "That's not how I meant it at all."

MAJ GEN WOODWARD: I think if you leave the positively in there, you know exactly what those guys were saying is -- you know, we're going too far, and you're really going to have negative consequences from the folks who look at it that way.

PROFESSOR SCHULHOFER: Here is a quick take on my -- the trajectory of my thinking, which

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I think was really 100 percent identical to what Lisa was describing. I walked in here feeling very strongly that this is predatory behavior, it's sexual, it's not the same as the gamut of other things that fall within Article 92, sort of -- I mean, you can see where I was coming from in my question about helping clean up the garage.

That's a crime, for the officer to do that. That's abuse of his authority, but it's nothing like this kind of behavior. And I was almost -- you know, I was shocked by the notion of amalgamating those two things.

But during the course of the day I really changed my mind, primarily because of the tail wagging the dog. That the -- I mean, we can't get away from the fact that putting it within Article 20 is going --

DEAN ANDERSON: 120.

PROFESSOR SCHULHOFER: -- 120 is going to have registration consequences. Whether it's on the Pentagon list or not, it's going to have consequences. So it led me to think that at least

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in situations where you don't have -- you haven't proved coercive threats, it is better handled in Article 92. That was sort of where I came out. And even maybe going a step beyond that, I started to think that breaking it out as a separate subsection of Article 92 could backfire, because then --

MS. WINE-BANKS: Or 93.

PROFESSOR SCHULHOFER: Or 93 as well, because then it would flag that it was a sexual offense, where we are trying to preserve -- it's sort of fighting fire with fire. You could say it's not intellectually honest, but I think the environment that is out there is not intellectually honest.

And we have to recognize that if you create Article 93 as a sex offense, then states are going to do -- we know what they are going to do with it. So I am circling around, but -- so where that left me tentatively is thinking let's just have Article 92 for abuse of authority in general, covering a wide gamut of behavior, and treat it

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within that, unless there is a coercive threat.

Then, I think I am a little bit on the fence on the issue that you three -- the three of you were discussing, which is whether an offer to do you a favor is a coercive threat, or whether it's just bribery, where a woman of character should just say, "No. I'll earn my own success." Generally speaking, is that a fair statement of the issue?

And one way I think about it is in connection -- if you take it out of the sexual context, we think about how we approach bribery and extortion in the ordinary law of property transactions. If a contractor goes to a politician and says, "There's \$1,000 in this brown bag, if you give me the contract," that's bribery and he is the offender.

But if the politician goes to the contractor and says, "You don't deserve this contract. It's going to go to the low bidder. But I can make it work for you if you put \$1,000 in this bag," that's extortion. We don't say -- we could

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say that the contractor is -- you know, he should just play straight and take what he earned.

But we view him as the victim of a crime, because I think as a practical matter in these situations is what Lisa described as a veiled threat. It's with public -- with people who have official authority. It is too hard to disentangle the offer of a benefit from the implicit threat of harm.

It's like the police officer who said, "You were speeding. I'm going to write -- you have no right not to get a ticket, and I will offer you the benefit of not getting the ticket if you sleep with me, or, you know, we have sex in the backseat."

So it is true that she -- I'm saying "she" -- the driver would be getting a benefit. And you could view it as a kind of prostitution. She is basically having sex in return for being paid by getting rid of the ticket. But any public official -- I mean, this is how I try to view it.

I think anybody who has government authority -- and that would include within the

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military, any commanding officer -- has discretion. And their duty, as I understand it, as a civilian, their duty is to exercise their discretion in an objective way, and not to say -- I mean, you might decide not to write the person up, but it should be for objective reasons. It shouldn't be colored by sex.

So, in that sense, I think it's still a threat. It's a threat not to use your discretion objectively.

MAJ GEN WOODWARD: This is the classic thing. I'm looking at it from the victim blaming versus "Oh, here I am, I'm victim blaming," when I think of it is that --

PROFESSOR SCHULHOFER: Yes.

MAJ GEN WOODWARD: -- you're looking at it from the perspective of the perpetrator, which is correct. So he is bribing instead of threatening.

PROFESSOR SCHULHOFER: or when the --

MS. WINE-BANKS: Accepting a bribe is equally a crime. Well, depending on who you are.

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In the case of this person that -- even in the military situation of sexual favors, it could be viewed as both are equally guilty of a bribery. The question is whether you want to make that bribery a sexual offense or just a 92 or 93 offense.

And listening to your discussion makes me feel more comfortable, actually, with saying, okay, if I threaten your career by saying, "I'm going to harm your career, I'm going to hold you back, you're going to have to repeat the course, I'm going to give you a bad grade," even though you deserve a good grade --

MAJ GEN WOODWARD: That's worse than bribery.

MS. WINE-BANKS: -- that's clearly, to me, a 120, and the facts of what I'm stating should be prosecutable if we are -- if we somehow make sure that the language says the wrongful action includes the use of your authority in a wrongful way.

Whereas, if I'm offering a benefit that you don't deserve, and you take it, you have the power to say no. "No, that's okay. I'll take my

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-- you know, I'll take the grade I earned. I'll be held back because I didn't do a good job."

PROFESSOR SCHULHOFER: This is where I'm suggesting --

MAJ GEN WOODWARD: Definitely less significant.

MS. WINE-BANKS: Right.

PROFESSOR SCHULHOFER: This is where I'm suggesting a different perspective, because I think when you are -- when a person who is in authority and has discretion and responsibility to exercise their discretion responsibly, when they offer the person a benefit, they are -- the person who is being -- getting the offer is still a victim of extortion, because the person --

MAJ GEN WOODWARD: That is much less significant. It's much easier to say, "No. Thank you, but I'm not going to take that bribe," than it is to avoid the threatening.

PROFESSOR SCHULHOFER: So suppose I'm a young -- suppose I'm an E6 or an E2 Airman -- you don't say Airwoman or Airperson?

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MAJ GEN WOODWARD: No. We're all Airmen.

PROFESSOR SCHULHOFER: That has to change. I don't know about that.

MAJ GEN WOODWARD: It covers all of us.

PROFESSOR SCHULHOFER: This is like an Ombudsperson. Ombudsman.

MS. WINE-BANKS: Chairman.

PROFESSOR SCHULHOFER: Yes. Chair. You can say Chairman. You're the Chair, right? Madam Chair, can -- you have to rule on that.

Okay. Anyway, where were we? Here is the example. This young woman who is an E2 comes back, goes out on leave and doesn't come back. She is late returning to duty, and she should be written up AWOL. And her relevant commanding officer says, "You know what? I should write you up. But I'm going to give you an offer that you can't refuse. I will offer not to write you up if we go in the back room and you give me oral sex."

MAJ GEN WOODWARD: Yes. She can refuse that.

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PROFESSOR SCHULHOFER: This happens?  
What?

MAJ GEN WOODWARD: She can refuse that.

PROFESSOR SCHULHOFER: She can -- can  
she?

MAJ GEN WOODWARD: Of course she can.

PROFESSOR SCHULHOFER: She just says,  
"Go ahead. Write me up for being AWOL"?

MAJ GEN WOODWARD: Yes.

DEAN ANDERSON: Doesn't that seem like  
a sexual offense to you?

MAJ GEN WOODWARD: It is.

DEAN ANDERSON: Doesn't that seem like  
abuse of authority?

MS. WINE-BANKS: It does seem like  
abuse of authority.

MAJ GEN WOODWARD: To me, it is not as  
significant as it is if I come and threaten you,  
though. I mean, to me, there is a significant  
difference in those.

(Simultaneous speaking.)

MS. WINE-BANKS: She can control

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saying, "Okay. I earned a D. I deserve to be written up for AWOL. And, okay, that's what I deserve." Whereas, if he threatens to take away something she has earned, he has the power to do that and she has no power to stop it. So that's the difference between them.

MS. KEPROS: Can I offer a comment on this? And I have just been staring, as you have been providing these examples, at both the 2007 and 2015 Benchbook language that we were handed, right, that has these subcategories, including the use or abuse of military position, rank.

At first I was staring at those words "either positively or negatively," and then I thought, you know, you can just strike those words, because this is such a bizarre thing to try to quantify in some instances.

MAJ GEN WOODWARD: It has a negative connotation if you throw it in there.

MS. KEPROS: Right. And then the other thing is that the term that is being defined is threatening or placing that other person in

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fear. So you are not contemplating a quid pro quo kind of benefit situation in the first place. That isn't what the plain language of putting someone in fear is. The fear is of having some sort of harm that you shouldn't be subject to.

The scenario that Professor Schulhofer just gave us of the -- you know, "Give me a blow job and I'll kind of look the other way," I think that probably is sexual harassment. That sounds like, you know, maybe an Article 93 kind of thing. And so that there is at least a place to say that is shameful and boorish behavior, but it is not triggering the event of a physical sexual assault on another person.

It's a completely, you know, horrible behavior that we can respond to in a serious way. But I just don't think it's the same as where someone has actually been physically subjected to some sort of sexual contact or sexual assault.

MS. WINE-BANKS: One can walk away from it, and one cannot.

MS. KEPROS: Right.

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MS. WINE-BANKS: And I think that's the big difference. If you can't walk away from it, if I don't do what you want, I am going to be hurt by whatever the consequences are. That's one thing. If I don't do something to earn a benefit, that's -- it seems to me it is different.

MS. FRIEL: And that's there, though. I think you stopped a little short of where I would have. It's threatening or placing another person in fear, blah, blah, blah, blah, of a lesser degree of harm than grievous bodily injury. We are talking about harm. So it's about what gets offered. I'm in fear of being harmed. You offer to give me something really good, and if I don't take the really good thing, I'm not going to be harmed; I'm just not going to get the really good thing. I think we agree.

MS. WINE-BANKS: Right.

MS. FRIEL: That should not be what we're talking about. But some of these other things, you know, I change your grade, I do whatever, I'm going to give you a better grade than

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you earned.

I can see, depending on how it's said, that it could cause a harm here to do things. And maybe that's not the right example, but I think the point is it's about putting you in fear that you're going to suffer a harm.

PROFESSOR SCHULHOFER: How do you folks feel about a situation of a police officer who pulls someone over for speeding, he calls in her license and registration, it comes back that she has got two speeding convictions on her record. So if she gets a third offense, her license is going to be revoked.

And he says, "I have discretion to issue a ticket here or not. You were nine miles over the speed limit, and, you know, I have discretion. And -- but here's the thing. You've got two prior convictions for speeding. So I can give you something pretty beneficial if we go in the backseat and you supply a little oral sex, you know, and satisfy me. I won't write you up."

And she can -- you know, she can get --

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take what she deserves. But let's -- would you -- she does this.

MS. FRIEL: But by not taking it, she is going to suffer a harm. She is probably going to have her license suspended, removed, something. So there is some harm there.

MAJ GEN WOODWARD: Well, she deserves the --

PROFESSOR SCHULHOFER: That's right. Well, that's -- okay. I mean, I think --

MAJ GEN WOODWARD: He's not threatening to do something that -- I mean, because I can choose to go, okay, give me --

PROFESSOR SCHULHOFER: Give me the ticket.

MAJ GEN WOODWARD: Give me the ticket, yes.

MS. WINE-BANKS: It's certainly much more of a threat. It wouldn't be --

MS. FRIEL: Well, does it change when she should go to jail, though? When it's not a speeding ticket, when it's a -- you know, you seem

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a little under the influence. "So you can give me a blow job, or I can arrest you and take you to jail." So now you've gotten sex by threatening to take away somebody's liberty.

MAJ GEN WOODWARD: But, see, he's is threatening versus -- you know, so that's --

DEAN ANDERSON: Can we just look at the language here?

MAJ GEN WOODWARD: -- keep turning it to threatening.

DEAN ANDERSON: Because if we are not going to change 120, then there is limited language that we can interpret, and it's the only thing we can do. If we decide that we are not going to revise the statute, then we have to interpret number 7 under the definition, and we have to interpret it in a way that makes use of the language that is given to us.

So the language under number 7 is "threatening or placing another person in fear," right? Which sounds like negative action. But let's see what the language of the actual statute

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says. It says, "The term 'threatening or placing another person in fear' means a communication or action," which we could define, "that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the victim or another person being subjected to the wrongful action contemplated by the communication or action."

I'll tell you, when I read this, I did not know what wrongful action was relating back to. It means a communication or action sufficient to cause a fear of another person or that person being subjected to a wrongful action contemplated by whom? The threatener, I assume, by the communication or action. What is the wrongful action?

This is the language we are going to have to interpret. If we limit ourselves to not revising 120, then we'd better come up with something that says -- that is interpretive language, that can be part of a jury instruction, it can be part of the Benchbook, it can be part of

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an executive order interpreting this language. And I just think that it would be good first to understand what this sentence means.

MS. WINE-BANKS: Well, it wouldn't be a wrongful action to give a ticket that -- for speeding because you were speeding. It would be a wrongful action to say, "I'm going to give you a speeding ticket, even though you weren't speeding, unless you give me a blow job."

DEAN ANDERSON: Well, that could be extortion.

(Simultaneous speaking.)

PROFESSOR SCHULHOFER: The second one is -- I like Lisa's example. Take the first one. He says, "You were speeding. I clocked you on radar. I can give you a ticket or not." But, let's say, number 1, she flunks the breathalyzer also, or, number 2, which also comes up frequently, she doesn't have her license or she has been revoked.

So in any of those scenarios, doing what he is legally entitled to do means she goes to jail.

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She has committed -- he has got her dead to rights on an offense that if he makes an arrest she is going to be in jail.

MAJ GEN WOODWARD: Then it's not wrongful action, because he is doing --

PROFESSOR SCHULHOFER: Yes. I'm just trying to elicit intuition here.

MS. WINE-BANKS: But exchanging his independent judgment -- his wrongful action is having sex with someone who he should be --

MS. FRIEL: Or offering to let you go and not -- if you give me sex. Is that the wrongful action?

DEAN ANDERSON: Well, so that's what we need to --

PROFESSOR SCHULHOFER: Can I just say something descriptively? I think that HYPO is clear, and I think people disagree about whether they are characterizing what happens to her as -- or what the alternative -- is the alternative that she is facing, is that a harm or a benefit? People differ in how they characterize it.

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DEAN ANDERSON: Can we, instead of focusing on the victim, focus on the predatory behavior of someone who uses their authority to coerce people to sexual advantage repeatedly? This isn't the first time he has asked for oral sex. Any time it's a prostitute or someone who is -- so someone who deploys their official authority in a coercive way to obtain sex is someone who is engaged in wrongful action.

MAJ GEN WOODWARD: Write it that like, I think, so you can --

DEAN ANDERSON: So let's figure out how to make sense of this language, because the only thing we can do --

MS. WINE-BANKS: But if what you're saying is true, then any action by an instructor to have sex --

DEAN ANDERSON: Using their authority.

MS. WINE-BANKS: -- using their authority --

MAJ GEN WOODWARD: Which makes sense.

MS. WINE-BANKS: -- whether it's a

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positive reinforcement or a negative reinforcement, sounds to me like it would be wrongful action.

DEAN ANDERSON: Provided it is -- you know, we are focused on the mind-set of the person who is engaging in the threat --

PROFESSOR SCHULHOFER: Right. Exactly.

DEAN ANDERSON: -- I think is the way to get out of it.

PROFESSOR SCHULHOFER: Another -- I think this is very parallel to what you are suggesting. If we -- I think lawyers know the Latin term "ultra vires." It means you're acting outside your authority or outside your role.

If a commanding officer or a police officer says, "I will exercise my command responsibilities in this way or that way for personal benefit," he is acting ultra vires. He is acting -- you know, as a commanding officer, if you would say, "I won't write you up as AWOL if you give me \$500 in cash," that's wrongful, right?

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MAJ GEN WOODWARD: Yes.

PROFESSOR SCHULHOFER: It's a bribe,  
but --

MAJ GEN WOODWARD: I think we're all in  
agreement. I just think we have to reword it so  
-- because the -- saying it positively or  
negatively has a hugely bad -- I won't say  
positively or negatively -- so if we just talk about  
the coercion we're okay.

DEAN ANDERSON: Okay. No, no. I  
think -- I think to the extent that the language  
itself triggers a lot of discontent culturally, in  
the military, let's figure out if we can avoid that.

MAJ GEN WOODWARD: Right.

DEAN ANDERSON: So, but still we are  
trying -- I'm sorry to keep harping on this. But  
it does seem to me that the only thing we can do,  
if we're not going to revise 120, is interpret 120.  
And so it's interpreting this language and trying  
to understand what threatening or placing another  
in fear means.

It's defined in this way, that it means

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communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in someone being subjected to the wrongful action -- I'm not sure what that is -- contemplated by the communication or action.

Now, the problem is --

MAJ GEN WOODWARD: When we said we didn't want to change 120, I think we are saying we don't want to change 120 to say all sex between trainers and trainees is --

MS. WINE-BANKS: Per se.

MAJ GEN WOODWARD: Yes. But we -- I don't think we all said we are not willing to change this line.

DEAN ANDERSON: So here are a couple of alternatives. One alternative is to change 120 by changing the definition. Or we interpret the language of the definition --

MS. FRIEL: That is already there is --

DEAN ANDERSON: Exactly. Exactly. That's another alternative, it seems to me.

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MS. FRIEL: In an executive --

DEAN ANDERSON: I think that's right. In an executive order that then gets filtered down through the jury instructions and the benchbooks.

Okay. So this is the question: do we want to change the language of the definition, or do we want to interpret the language of the definition? Right? I mean, those are the two alternatives.

So when we were talking about changing 120, we were talking about changing the causes of action. We have -- it sounds like there is a will on the panel not to change the causes of action as they are defined under 120(a), (b), (c), (d). And so now we're -- in any case, we're just in a definitional section, right?

So this is sort of a question. Do we want to change the definition, as it's written in 120, or do we want to accept the definition as it's written in 120 and try to issue an executive order interpreting it?

PROFESSOR SCHULHOFER: Could I say

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something on that? I'm sorry. This is kind of a prefatory comment about that, sort of off point. But we have not decided what to do about subsection 3, the definition of bodily harm, which means -- and which includes any non-consensual act. We have still left that -- that's a basic structural question.

And there is certainly sentiment for saying we shouldn't tinker with the statute, because we are opening up a can of worms. If we do that, we are giving Congress a Pandora's Box and saying, "Feel free to lift the lid." We don't want to do that.

And so, in that sense, the answer to the question as you put it is, let's leave the statute as it is and try to interpret it. However, it may be or not -- it may or may not be that when we get to number 3, bodily harm, it may be that we will decide with respect to that one that we do have to change the statute. And if that's true, if we're going to wind up doing that, then everything is up for grabs and we might as well fix other things in

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the statute, too.

MS. FRIEL: That's a good point. If we're changing other things, then let's just do it.

PROFESSOR SCHULHOFER: So maybe we should just figure out what we would like this to say, and then decide down the road whether we will do it by interpretation or not.

MS. WINE-BANKS: And I agree with that completely. And I'm not willing, at this point, to say that I'm not in favor of changing or making recommendations that we change the actual Statute, because, as we listen to witnesses, some have said, "Well, don't change it, except do this." And everyone had a different "except."

And if you take all the exceptions, you are in fact changing the Statute. And if you're going to change the Statute, then we might as well make it as good as we think it can possibly be and not just tinker with A, B, and C. And that's what has been done, and it hasn't gotten to be the right thing.

So as we talk about each of these

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things, I think there is this -- what would be the best thing to do with this particular problem, and this is a particular and almost extractable issue that we can talk about and say, "What would be the right thing?" And I think there is a genuine disagreement on whether you would add the word "positive" as well as "negative."

We all agree that the use of military authority to get sex at some level, whether it's positive or negative threat, is and should be a crime, and at some point it should be a 120 crime. We also, I think, think that there may be some situations where there is consent enough, and the person is even in such a command position or in a subordinate position can still consent and can still be the initiator, and that shouldn't be a 120.

It should clearly be a violation of good order. It should be a 92, a 93. It should be something. And I don't know what 133 and 134, but they are mentioned in the sex crimes, so maybe it falls in there.

So we have certain things that I think

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we all agree on. It's the question of now what do we do with that, what would be our best recommendation for this particular problem.

DEAN ANDERSON: Okay. So if I could -- I think that's a fine articulation, Jill, and I think -- I'm sorry, did I miss you, Laurie?

MS. KEPROS: Yes.

DEAN ANDERSON: Okay. Well, Laurie.

MS. KEPROS: Well, I mean, I actually, although I am probably the least afraid to change the Statute, and have advocated for that and will continue to do so, this is an arena where I really don't think we should change the Statute, because I don't think we have a clear vision of something that would be better than this admittedly quite vague term, right? This wrongful action thing.

I just think that you can better describe the wrongful action in the context of a benchbook or a jury instruction. That's why I kept asking questions about that today, because it just seems something that is going to be very hard to get right in a statutory sense, and that maybe

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providing the kind of examples that the Benchbook can provide or describing some of these relationships is going to give sort of an opportunity to try stuff out, fix it if it's not fixed, and let the Services continue to tinker with the language if we're not getting it right.

Because I feel philosophically we have a consensus on this issue, right? I mean, I think what Jill just said is how we all feel. There are some things that are 120. There are some things that aren't. And you can't paint with too broad a brush, because you're going to have scenarios that fall on this spectrum.

But, you know, I think you could take the 2007 or 2015 Benchbook language, take this phrase, or another person being subject to, and then say "wrongful action," such as, and then it's this list of things, because the list is pretty good. I would take out the words "positively or negatively," because I, frankly, don't know what they mean in application. I just think it doesn't really advance the thing.

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And then you're just saying so anybody who is using their -- using or abusing their military position to affect or threaten to affect someone else's military career, that's, you know, a bad. That is that kind of wrongful action that we would go against.

And then you've avoided the concerns about over-tinkering with the Statute. You've got a flexible tool, but you'd better describe how that is a pathway to a successful 120 prosecution, if that is really warranted.

DEAN ANDERSON: So I guess my concern -- go ahead, Steve.

PROFESSOR SCHULHOFER: Well, if we were changing the Statute, why wouldn't the language that you read work perfectly well as a rewrite?

MS. KEPROS: Because I think it is -- it was taken out of the 2007 Benchbook for some reason. You know, people found it problematic in application. Making it a jury instruction allows the parties and the judge to craft, you know,

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slightly different language if they need to for some reason. I just think it makes it a better tool in trial, is my suspicion.

DEAN ANDERSON: So, point of order, do we know why it was changed in 2007? And ostensibly it appears to be narrowed, although I understand that there are different interpretations and other changes in the language. Do we know, Glen?

LTCOL HINES: I don't know definitively, Dean. I mean, I would suspect that the reason it became narrower was I think one of the counsel said earlier that what they were having was when you gave these three specific examples, the defense would come in --

DEAN ANDERSON: And say it's --

LTCOL HINES: -- and try to exclude anything else.

DEAN ANDERSON: Yes. Yes, I remember that.

LTCOL HINES: And so I think this might be deliberately narrower, because in some ways -- well, you don't have any -- you don't have

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a laundry list, so the counsel can argue that -- they are more freed up to argue whatever the government's theory is, and then the defense can counter that. But I can try to go back and find out, but I think that's probably what the answer is going to be.

DEAN ANDERSON: So that's helpful, and I do recall that testimony. I think, just to understand and to make sure that we all understand, this 2007 is language from the Benchbook?

LTCOL HINES: Yes. That's from the Benchbook, if you have -- and we still do have some cases that are percolating up that are from the old Statute, so that you would give that instruction instead of the other one.

DEAN ANDERSON: And help me understand. Article 120 -- I apologize, have forgotten 2007, not quite tight in my mind about exactly -- in 2007, was there a definition of threatening or placing that other person in fear in the language of Article 120?

LTCOL HINES: Yes.

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DEAN ANDERSON: Okay. And so the definition under 120 said what?

LTCOL HINES: It mirrors the language in the Benchbook instruction almost verbatim. It's really the --

DEAN ANDERSON: So 120 says all of this?

COL GREEN: Yes. I mean, under the definition of threatening or placing another person in fear, the term "threatening or placing another person in fear" means a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the victim or another being subjected to a lesser degree of harm than death, grievous bodily harm, or kidnapping.

Includes physical injury, a threat, and then a threat in Part 3 is through the use or abuse of a military position, rank, or authority, to affect or threaten to affect, either positively or negatively, the military career of some person.

DEAN ANDERSON: Okay. So that's

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extremely helpful, because it supports the theory that Lieutenant Colonel Hines advanced that -- and that one of our panel members indicated, that the specificity with which this is articulated constricted the kinds of cases that went forward, and that actually it was an attempt to try to relax or expand by being more general.

MS. FRIEL: And it struck all of us the opposite way.

DEAN ANDERSON: Yes. It sure did. It sure did.

MAJ GEN WOODWARD: When you list things, though, doesn't it tend to, okay, if you give me a list, then I'm limited to that list.

DEAN ANDERSON: Well, it's not exhaustive, but it --

(Simultaneous speaking.)

Colonel Green?

COL GREEN: I would just say that that -- I think that's a little speculative. When we heard from General Pede and Colonel Kennebeck, who unfortunately came in in the drafting part of this

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2012 version of Article 120 after the language had already been drafted, and I think the initiator of that is a military judge, and so we have not been able to hear directly from him.

But I don't know that they provided that exactly rationale. I think what we've heard is from -- that counsel may be speculating as to why that change was made. But I don't know that we've -- that the subcommittee has heard definitively that that is the case. It certainly --

DEAN ANDERSON: Well, so that's fair. Do we have access to the person who changed this and what their motivation might be?

COL GREEN: No. Unfortunately.

DEAN ANDERSON: Okay.

COL GREEN: We have not been able to get the specific reasoning for this -- the change in this language.

DEAN ANDERSON: Okay. Well, what we do know is that there are a lot of ways to interpret this change. And, you know, one interpretation is that it narrows it quite a bit. One interpretation

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is that it tries to relax it, and that maybe we should pull in some of this other language as part of a benchbook.

But I think Laurie's point is a good one, that we should try to grapple with first whether or not we are just going to -- whether or not we're going to change the Statute, and I feel like there is division on our team about whether or not we want to change the Statute or issue an executive order.

Given that disagreement, it might still be useful for us to try to draft language that either goes into a change in Article 120 or it goes into suggested executive order, so that either way let's try to make some progress on possible language that we would come up with.

So what should "threatening or placing another person in fear" mean?

MS. KEPROS: I mean, I think what's in this Benchbook is very helpful. They are very concrete, and it just says it includes -- it is just where it says "to a lesser degree of harm," strike

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that phrase and substitute "subject to wrongful action." Right? Use the statutory language, and then just say here's what -- here are some examples of wrongful action.

I would -- instead of wrongful action, I would prefer to say "use or abuse or military position, rank, or authority, to affect or threaten to affect the military career" of some person.

MAJ GEN WOODWARD: In 3, Yes, B(3).

PROFESSOR SCHULHOFER: Yes.

MS. WINE-BANKS: So you're just taking out the "either positively or negatively."

MAJ GEN WOODWARD: Laurie, were you talking about changing up at the top where it says "such lesser degree of harm"?

MS. KEPROS: Yes. Where it says "subjected to" -- where it starts with "to a lesser degree of harm." Instead say "subjected to the wrongful action contemplated." Such wrongful action includes: a) physical injury, b) a threat, and then, I mean, I would include everything here, just because I feel like these are all fairly

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concrete examples. But that is also a non-exclusive list.

MAJ GEN WOODWARD: Yes. But do they take it that way? This is the outsider listening to the lawyers talk about -- because it seems like anytime you guys make a list you guys --

(Simultaneous speaking.)

I'm definitely staying outside that, because us outsiders, when you say "includes," we look at it as, okay, and there's a whole bunch of other things. But I've been listening to all of this and it's like, well, if you take out -- if you don't list "mistake of fact," then we can't use it.

DEAN ANDERSON: Well, how about this, lesser degree of harm includes, but is not limited to.

MS. KEPROS: Exactly. Did you hear that?

MS. FRIEL: As long as it makes it more obvious that you're -- I mean, that is something that struck me, that as lawyers, you know, generally when we write these things, we write that

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language in everything, "includes, but is not limited to," to make it very obvious that it's clear. And I noticed in your Statutes a number of places where it just said "includes," and I went, well, there's --

MAJ GEN WOODWARD: Yes. And we've heard people talk about it. It's like, well, you took that out, or you put that in, so it means something completely different. Remember, was it mistake of fact, or which one was it?

MS. FRIEL: Yes. It was mistake of fact.

MAJ GEN WOODWARD: And it was like, seriously? That's not logical.

MS. FRIEL: And actually we will vote to have exactly the things covered here in what was the Benchbook instruction. Almost everybody we heard today said we -- that would be helpful to us, to have an instruction that was more like 2007, you know, definitions. So they're like this.

DEAN ANDERSON: Okay. So let me -- well, I'm hesitant to throw this wrench in, because

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it seems like we are coalescing around a possible position. But it is not always the case in which someone is -- someone uses their authority to threaten the military career.

So, you know, the use of authority can be coercive without an explicit threat, either a communication or action, verbally or non-verbally, to -- they can use their authority to obtain sex without a threat to the career.

MS. KEPROS: What is this "to affect"?

DEAN ANDERSON: So maybe I would be a little more comfortable to include -- the word "career" sounds like you aren't getting the transfer you want. You know, it sounds like a projection of a career over time, rather than the conditions of recruitment or basic training, the conditions in which they are operating.

MS. WINE-BANKS: It could also be you want to go home to your mother's funeral.

DEAN ANDERSON: Right. That kind of stuff is not about their career. Do you know what I mean? So it's a little --

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MS. FRIEL: It's kind of their life, their military life, for what --

DEAN ANDERSON: And that's because the coercive authority is total control over their lives, unless you want to leave the military. You can -- that's an out, but that's a different kind of relationship of control and authority.

MAJ GEN WOODWARD: Can you just write in coerced, you know, through the use or abuse of military position, rank, or authority to coerce?

DEAN ANDERSON: Compliance.

MAJ GEN WOODWARD: Yes. Or is that -- is that too broad, if you do that?

MS. KEPROS: See, I don't know. I keep coming back to what was offered to us by several of our witnesses as an alternate theory of 120 prosecution, which is the bodily harm. Because that's where you get the non-consent kind of scenario, and you can use the definition of consent's element that it must be freely given.

And so I feel like you can already accomplish something that is explicitly coercive

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through an Article 120 prosecution under the bodily harm subsection. You don't even need to go under the section at all. This is just an alternate pathway where, you know, there is a threat or use of rank or something like that, they could be more subtle.

If it's not freely given, you don't have consent. You are in a basic non-consensual sexual assault at that point.

DEAN ANDERSON: So one of the interesting things about the prosecutor's panel was that that was very powerfully argued by the one gentleman. And the others sort of stared blankly, and they said, "Well, Yes, you know, I guess you could." But they hadn't conceptualized the bodily harm as an arm through which coercive attempts to obtain sex --

MAJ GEN WOODWARD: And as a layperson, I'm telling you that does not -- I mean, and I'm the kind of person that is going to be sitting on that jury -- that does not make sense to me at all compared to the coercion, any abuse of authority.

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So I would have a real problem with that, because I just don't think it would float. I think it would be a lot harder to get somebody -- a panel -- I don't know what you guys think, but I would think it would be really hard to get a conviction from a panel based on, you know, an Estacio LeBlanc scenario saying it's bodily harm.

PROFESSOR SCHULHOFER: It feels like it's kicking the can down the road. I think Laurie is right that we wouldn't have to resolve these issues under subsection 7, if it could fall under the term of what is freely -- is or isn't freely given. But it's not clarifying anything; it's just moving it under that ambiguous rubric instead of a different --

MS. WINE-BANKS: And we haven't resolved that rubric yet either.

PROFESSOR SCHULHOFER: Right.

MS. WINE-BANKS: You know, I mean, we have to go back to, what is freely given consent?

MAJ GEN WOODWARD: Right.

MS. WINE-BANKS: And there is a

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different element when it is an abuse of -- particularly in the trainer-trainee authority relationship where it's -- and I think we have even come to a point of basic training is different than advanced training.

And that in that vulnerable, depending on the Service, 12-week period, eight-week period, there is a very special responsibility of the drill instructor and a very special vulnerability of the recruit, or during the recruiting process as well with the recruiter who is driving the recruit around and has access in a way that wouldn't otherwise be available, even in the drill instructor situation where it would be harder to get them alone.

So I think we have to deal with the issue here and not just say, well, it's a consent question. We have to deal with consent, but --

COL GREEN: The other thing that I would -- I'm sorry. The other thing I would take you back to is in our earlier discussion you were talking about from the perspective of the victim

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versus the perspective of the offenders.

And I think you said when you look at it from the perspective of the victim that, you know, their perception of it is less important than, you know, the actions of the offender. And so I think with the consent issue you, again, turn the perspective looking totally at the victim, rather than how the offender is behaving. And so the --

DEAN ANDERSON: Using the coercive authority.

COL GREEN: Right. So --

MAJ GEN WOODWARD: Which gets to the bribery piece that I was having a hard time with.

DEAN ANDERSON: So how about to facilitate this dialogue and movement forward. I'm always looking to try to come to conclusion just because this stuff is so hard, and we've got so much of it to plow through. Right?

What about taking some of this language from 2007, changing it to match better some of the language here, and drafting this as an executive

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order with the knowledge that should we choose to revise 120, we may as well change 120 and go back and put some of this language directly into the Statute.

Because I think I'm hearing from this group that if we are going to tinker with 120, then we'd better tinker in all the ways that we think it should -- could be better, or revise it in all the ways that it could be better. But if we're really trying to avoid that, then we want to have language that could be either part of the Statute or part of an executive order that is tightly tied to the language that currently exists, so that it would pass muster.

Because I don't think just slapping down the 2007 language, that's a recipe to get that overturned, but using it as an interpretation of this language, this definition, I think we could work with. And I think we agree on what this language sort of looks like.

MS. WINE-BANKS: Well, if we look at the 2007 language, and having had the discussion

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we just had, I see it a little differently now, because it says, "Lesser harm includes a physical injury," which obviously would be less than death and kidnapping, because that's covered in a different section, although it doesn't say that, so that's a defect.

A threat to accuse any person of a crime -- well, is it a threat -- I'm going to accuse you of a crime you actually committed, or I'm going to make it up and accuse you and you're going to have to defend yourself.

To expose a secret -- okay, that's okay. Through the use of position, rank, or authority -- I agree "career" is too narrow. We want it to be more than just "career."

Positively or negatively, we have different opinions on. But if we go back to the "such lesser harm includes a threat through the use of military position to effect" -- rather than just "the use of military position" to affect -- you could stop after "to use military rank or authority." Period. In a wrongful manner.

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I mean, it's not -- you want that to be as broad as possible, right?

MAJ GEN WOODWARD: Yes. Well, that's where you get to the "to coerce" --

DEAN ANDERSON: Compliance.

MAJ GEN WOODWARD: -- "compliance." I think that's pretty broad.

MS. WINE-BANKS: Right.

MAJ GEN WOODWARD: If you do it that way.

PROFESSOR SCHULHOFER: I think coerce or induce.

MAJ GEN WOODWARD: Yes.

PROFESSOR SCHULHOFER: "Coerce" gets you -- that's something defense attorneys can really work on, whether it was really coercion. Then, they start bringing up, well, the other person wanted it, so in --

MS. WINE-BANKS: Well, let's look back at the Statute, because the Statute is commits a sexual act upon another person by threatening or placing the other person in fear. Then, we are

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defining threatening or placing the other person in fear of a physical injury less than would be for rape, or placing them in fear of a threat to use military rank or authority to induce -- the wrongful action in this case would be to induce the commission of sex, which would make it non-consensual. So we're avoiding the non-consensual in a way, but getting back to consensual.

MAJ GEN WOODWARD: Yes. Listing to accuse a person of a crime or to expose a secret, to me those are weird. I don't know.

MS. FRIEL: Well, you know, so I'm sure it's other states, too. New York State has a coercion Statute. If somebody is in fear of being physically injured, then it's going to be a sexual assault. Okay? If you are in fear of some other thing happening to you that the person threatened, then it's coercion, not sexual assault, even if the coercion had you have sex.

So if I say, "Lisa, I'm going to accuse you of a crime," and that's how you get to have sex

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with me, we charge that as coercion in New York. And the same with expose a secret. That language is right from New York State's coercion Statute, and there are, I want to say, six different subsections of that Statute of things like that.

But this gets back to --

PROFESSOR SCHULHOFER: Where this comes from is -- from a sort of general criminal law perspective, language like this is classic blackmail. And if you have committed a crime, and you really committed the crime, and I go to you and say, "Look, I'm going to accuse you of this crime unless you pay me \$100 a month for the rest of your life," the person who has committed the crime, you could view them as, you know, they are getting a benefit.

But we view them as a victim of blackmail. That's a classic --

MAJ GEN WOODWARD: Couldn't you say a threat to blackmail, then? I mean, why specifically a crime, because you could blackmail somebody for all kinds of things, right?

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PROFESSOR SCHULHOFER: Yes.

MS. FRIEL: And that's what they did. That's -- the secret, that's blackmail. "I'm going to tell everybody you had an abortion last year," and -- or an affair or whatever it is.

PROFESSOR SCHULHOFER: I think it shines a spotlight on why we view the person who receives that kind of a proposal as a victim. A lot of philosophers struggle with this, because they are really getting something they are not entitled to. But I think for hundreds of years society has viewed the target of blackmail as a victim of a kind of coercion, something unconscionable, that they are being -- their arm is being twisted and they are paying out money to the blackmailer, even though what they're doing is paying the person to remain silent about something shameful.

MS. WINE-BANKS: So going back to number 3, who can give me an example of something that is an abuse of rank, position, authority, that isn't to affect the military career. What other

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-- how else could I --

PROFESSOR SCHULHOFER: Your example -- like saying "I'm not going to let you go home for your mother's funeral" --

MS. WINE-BANKS: So that's not career. That's right. How about your -- but it seems to me it has to be related to the military, because if I'm using my rank or authority, it's not to expose a secret. It's to affect either your career or your well-being or your military life or --

MAJ GEN WOODWARD: I think you could just say "to coerce compliance." I mean, I think --

DEAN ANDERSON: Yes. Or to induce compliance to a sexual act.

PROFESSOR SCHULHOFER: Yes. Yes.

MS. WINE-BANKS: So you think that would cover it all.

DEAN ANDERSON: Well, this is interesting. I think that actually if it's a -- what we have done, I think, is develop language that we could either put in an executive order as

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interpretive language of the definition, or we could use to place in if we make a decision, you know, depending on our decision of how interventionist to be in our project. Right?

And so, you know, I think what would work is simply saying "threatening or placing another person in fear," maybe we would want to include this other language. Maybe we wouldn't. We could say, "Includes, among other things, but is not limited to, a) physical injury of another person or another person's property, b) a threat to accuse any person of a crime, to expose a secret, et cetera, or to use or abuse military position, rank, or authority to induce compliance to a sexual act." That I think --

MS. WINE-BANKS: Well, that would be tautological, though, because the crime is -- if you commit a sexual act by using your military rank.

DEAN ANDERSON: So the question is how to interpret a threat or placing another person in fear, and --

MS. FRIEL: In fear of what? I think

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what they are trying to define is in fear of what.

DEAN ANDERSON: Right.

MS. FRIEL: What, in addition to grievous bodily injury, and blah, blah, blah.

DEAN ANDERSON: And that's why people have -- that's why the language here talks about the military career. So if we're saying, well, the career is too narrow, we want to include the conditions of life for the recruit, or the condition -- you know --

PROFESSOR SCHULHOFER: Conditions of service?

DEAN ANDERSON: Conditions of service. What do you guys think about that?

MS. WINE-BANKS: Say that again.

DEAN ANDERSON: Conditions of service.

MS. WINE-BANKS: Yes.

PROFESSOR SCHULHOFER: Military career or conditions of service.

MS. KEPROS: Is there terminology for this? I mean, in the military?

MS. WINE-BANKS: Well, I'm just trying

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to figure this out. I mean, somebody is going to get into that. I mean, any time you get too specific, then I think that's problematic.

DEAN ANDERSON: Yes. We're actually trying to be more broad, in general. So if this isn't the way -- you know, when I say get down and do 100 pushups or something, you know, that is the condition of your service. But it's not going to affect your whole career.

MS. WINE-BANKS: "Career" is too broad. I mean, too narrow.

DEAN ANDERSON: "Career" is too narrow. So then how do we capture --

MAJ GEN WOODWARD: Condition of service is not going to -- I don't think that -- that doesn't translate for me. That's --

(Simultaneous speaking.)

MS. WINE-BANKS: Maybe there is no military language or -- is things like you're going to not -- I won't agree to let you go to your mother's funeral.

DEAN ANDERSON: I'll make your basic

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training miserable.

MS. WINE-BANKS: I will make you do 100 pushups every hour.

MAJ GEN WOODWARD: Yes. So, I mean, I think rewriting it just to say abuses power to coerce them, I mean, you know --

MS. FRIEL: Abuse of power to coerce or induce somebody to have sex.

MAJ GEN WOODWARD: Yes. I mean, I think trying to go beyond that is --

MS. WINE-BANKS: You're saying it's -- if you read the Statute, it's commits a sexual act upon another by threatening or placing that person in fear through the use of military position, rank, or authority. Period. You can't repeat the "to induce the action," because the action is already induced above. You're just repeating it, and it just gets confusing.

MAJ GEN WOODWARD: This is saying threatening to place this person in fear includes use of --

MS. WINE-BANKS: Right.

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MAJ GEN WOODWARD: Okay.

MS. WINE-BANKS: Also, just as a technical matter, I'd just note, physical injury to another person or to another person's property, whereas above it is to the victim or another person. So both of those should be to the victim or other person, if we were going to use that language. So the victim --

DEAN ANDERSON: And I also think that --

MS. WINE-BANKS: -- or to the victims or another person's property.

DEAN ANDERSON: Right. Presuming that is not included within death, grievous bodily injury, or kidnapping.

And I also am thinking just technically that the threat under B should be threat or placing another person in fear, to accuse another person of a crime. In other words, I am in fear of this.

MS. WINE-BANKS: Right.

DEAN ANDERSON: But, so that would just be mimicking the language of the Statute itself.

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MS. WINE-BANKS: Right.

DEAN ANDERSON: So I'm willing to try to draft what we have talked about and circulate it.

PROFESSOR SCHULHOFER: Yes. Good idea.

DEAN ANDERSON: As at least a discussion piece for next time. It's not going to be perfect. We are going to want to revise it. But something that tries to capture what we have discussed here. That could either be in an executive order or it could be changing the Statute, depending on how we choose to proceed.

MS. KEPROS: I wonder if it would be possible for Staff in crafting our agenda for the next couple of meetings, if we are going to do the more deliberative function, to try to delineate the issues we are going to be discussing and voting on. I mean, can we do that and say like, this hour is going to be, you know, Issue 6, or whatever.

Just because I'm concerned about the issue that some of us were discussing this morning

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that it's hard to know what to be really read up on and what to review and revisit, so that you can have a substantive conversation, especially since at our next meeting the rest of our subcommittee who has missed today's testimony and the evolution that many of us have articulated happening just as a consequence of hearing that testimony --

LTCOL HINES: I think what we can do, and I have been working with Colonel Green, is I think our plan for September, Laurie, is to block off the afternoon for deliberations, and then the entire October meeting --

MS. KEPROS: For deliberations.

LTCOL HINES: -- for deliberations. We can certainly, as we do the agenda, we can set aside an hour-- there is going to be 17 issues that you need to decide in the end, including the 11 that you have already been talking about.

So if it's -- we have to go an hour for each issue -- and I know even an hour sounds like very little time for each of these issues. But if you're concerned about getting -- you know, getting

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to all the issues, we can sort of get everyone's thought process on how you want to bracket the time allotted per issue or how to group those.

MAJ GEN WOODWARD: What testimony do we have in September?

LTCOL HINES: Just either Senators or Representatives who want to come down and speak to the subcommittee, ma'am, and give their input, like Ms. Frankel, Congresswoman Frankel definitely wants to come speak and give her input.

MS. FRIEL: Are these dates right? September 17th and October 8th?

LTCOL HINES: October 22nd. We moved that meeting to the 22nd.

COL GREEN: Our concern with the deliberations today was that -- how many of the subcommittee weren't here, and so we left this a little bit more free-flowing for you, just for you to have some time to start to discuss the philosophical issues and start to work this out. But weren't sure how far you'd want to get with -- although you have a quorum, and certainly have

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notes, but obviously everybody --

DEAN ANDERSON: So not to preempt the input and insight of the three people who were not here, I do think that we have tentatively answered many of these questions. Seventeen is whether or not the current practice is inappropriate, of using the -- both Article 92 and 120, and I think the answer is we don't think that that's inappropriate. We think that that's appropriate and it covers slightly different contexts, slightly different circumstances.

Thirteen is, does 202 version give prosecutors the ability to effectively charge coercive sexual relationships? And I think the answer to that is yes, and we may want to change Article 120. We may want to provide an executive order interpreting Article 120.

Issue 14 is, should the definition be amended? That is exactly what we are grappling with, and we are going to try to have some language around that.

Issue 15 is, should a new provision be

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added? And I think that we don't think that there should be a new provision. Tell me if I'm wrong about that. I think we don't think that we need a new provision.

Issue 16 is, should sexual relationships between basic training instructors and trainees be treated as strict liability offenses? And I think the answer is no from this panel. I'm just trying to -- you know, I think we've made some progress.

Issue 17 is, as an alternative, should coercive sexual relationships currently charged under other Articles be added to the DoD's list of triggering sex offender registration? And I think, without even talking about, my sense is that the answer to that is going to be no, pretty resoundingly, given our own reaction to the concerns about sex offender registration.

So we've actually made a lot of progress, you all.

COL GREEN: Just one note that I have --

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MS. WINE-BANKS: And then we come up with another issue, which is, should we abolish sexual registration?

DEAN ANDERSON: A little bit beyond the scope of what we are doing here, but it's an important thing for us to think about.

Colonel Green?

COL GREEN: Just one note, and just to kind of clarify, because there was some discussion earlier in terms of the definition in the Statute as to whether you provide a clarifying definition for the term that is already defined in the Statute, threatening or placing that other person in fear, or whether you could provide a clarifying definition for a term within that definition of the term "wrongful action contemplated," which is not otherwise defined, and whether you want to narrow what that recommendation is rather than encompassing the entire definition.

The only reason I say that is, you know, one of the things we heard from the appellate counsel was the concern that substituting a new

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definition for the statutory term may lend itself to concerns among the appellate courts, whereas looking at only that term within the definition may be less concerning.

DEAN ANDERSON: I think all of us are very cognizant of the challenges and the tradeoffs with changing the definition itself versus defining part of what is the definition, defining a term within the definition as it's currently written.

And I think, you know, maybe what -- and I'm willing to volunteer if anybody else wants to do it, that's great, too. I don't have a pride of authorship in this, but trying to crystalize this conversation into two alternatives, one which would be a definition in an executive order of wrongful action, and I think we've got this here, and one that would be a substitution of the definition that is written in Article 120.

MAJ GEN WOODWARD: So actually changing the law there.

DEAN ANDERSON: Right. And then we

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would decide which way we want to go based on what we're doing in a lot of different provisions.

MS. WINE-BANKS: One of the things that would concern me is some of the comments that were made about whether the courts would ignore an amendment to the definition, or through instructions.

MS. FRIEL: Interpretation.

MS. WINE-BANKS: The interpretation of the definition. What do you guys think? Would that be an effective solution, or are we just spinning our wheels if that's what we do?

COL GREEN: No. I think -- I do want to talk to the experts on the executive order process, because my understanding is with the punitive Articles there are no other executive orders that provide clarifying definitions of the punitive Articles themselves.

The executive orders provide other guidance, and obviously the Rules for Courts-Martial and other terms, but binding definitions of how terms are interpreted tends not

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to be something that is done within the executive order process. So we will take that and take a look at that and provide you more information at the next meeting.

DEAN ANDERSON: That would be helpful.

COL GREEN: But something within the Benchbook, I mean, I think the default -- and we'll let the military judge -- I mean, those are pretty dispositive on issues.

LTCOL HINES: I think that's the way it's done. I mean, the judiciary routinely will -- they understand I think -- they go through the process. They want to -- if you're going to explain something, they don't want to contradict the Texas Statute. And like Mr. Sullivan has come in and told us, as long as you're just explaining what something says, that's fine.

And the way that that would get challenged is the judge would give that instruction, and then if there was a conviction they would have to appeal that up to the appellate courts, and the appellate courts would simply look

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at not necessarily the Benchbook instruction; they would just look to see, is this instruction correct in law?

And they do the typical civilian court review of, is the judge's judicial instruction correct in law? And you don't know until they come out and say that. But typically the way our instructions in the Benchbook are made are two ways, like what you're doing here and the JSC or the judiciary puts it in there, or a case comes out where CAAF has said, "This is what this term means," and then the judiciary adjusts and puts that in the Benchbook, so --

DEAN ANDERSON: I think we are in good shape. I think we should close for the day.

Bill?

MR. SPRANCE: The meeting is now closed.

(Whereupon, the above-entitled matter was concluded at 4:48 p.m.)

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