UNITED STATES DEPARTMENT OF DEFENSE

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JUDICIAL PROCEEDINGS PANEL

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SUBCOMMITTEE MEETING

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THURSDAY
SEPTEMBER 17, 2015

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The Subcommittee met in Conference Room 150, Judicial Proceedings Panel Conference Room, 875 North Randolph Street, Arlington, Virginia, at 9:12 a.m., Hon. Barbara Jones, Chair, presiding.

PRESENT

Hon. Barbara Jones
Dean Michelle Anderson
Lisa Friel
Hon. Elizabeth Holtzman
Laurie Rose Kepros
Dean Lisa Schenck
Professor Stephen Schulhofer
BGen(R) James Schwenk
Jill Wine-Banks
MajGen(R) Margaret Woodward

WITNESSES

Congresswoman Lois Frankel
Elisha Morrow

STAFF:

Maria Fried, Designated Federal Official

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

Lieutenant Colonel Glen Hines, U.S. Marine Corps - Attorney Advisor

Sharon H. Zahn - Senior Paralegal

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P R O C E E D I N G S

9:l2 a.m.

MS. FRIED: Judge Jones, ready to start?

CHAIR JONES: Thank you. Thank you Maria. Have you opened the meeting?

MS. FRIED: Yes I have. Thank you.

CHAIR JONES: Okay, thanks.

MS. FRIED: We're opened.

CHAIR JONES: I want to begin this morning by thanking Dean Michelle Anderson for chairing the last meeting of the subcommittee, and having read the minutes, I can say doing a fabulous job in terms of going through the issues. I guess it's six or seven coercion issues, and I think really advancing the ball in terms of our thinking about it.

Since a number of us were not able to be at that meeting, Dean Anderson has graciously agreed to go through the issues with us again, and give us a little more sense of the proposals that were resolved, the proposals that are still

unresolved, issue by issue. Dean, again, my thanks. You did a wonderful job. I expect you to continue to do a wonderful job. Thank you very much.

DEAN ANDERSON: Absolutely, and thank you. I want to begin by apologizing if I have spammed anyone lately. My email has been apparently hacked twice this week, and so I'm sorry if you're getting -- if something comes from me and it says important, and it's a generic email, do not click on the link. I'm sure you all know that anyway, but I do want to apologize for that.

So last time there were actually a cluster of seven issues. Issues 6 and then 12 through 17, that were all related to the core agenda we had, both the testimony and then the deliberations.

The issues that we were grappling with were really about fundamentally the abuse of authority, and the relationships between trainers and trainees, and other relationships of power

imbalance in which the person in the higher rank uses their authority to obtain sex.

We had a wonderful group of a number of different panels presenting perspectives on how this happens, when this happens, what the consequences are when this happens, and how not to go too far and how the law has evolved over the past decade in the various iterations of Article 120, and also how prosecutors do a bit of a workaround when a coercive relationship does not fit within the confines of what's explicit under 120.

But that it may fall under our Article 92 or 93, and what is the decisional process that prosecutors engage in when trying to make decisions about whether or not to pursue something under Article 120 versus Article 92 primarily. So it was an enlightening set of panels, and I encourage you to read the testimony.

Then we went into a deliberation about well now that we've learned what we've learned

about how these relationships happen and how they're handled by prosecutors and defense attorneys, and what the perspectives are about whether or not we should change Article 120, we grappled with at first the fundamental question that is posed by all of the work that we do, whether or not we should tinker with the Statute, or whether or not we should try to issue some recommended executive order language that would end up in a jury instruction book or a benchbook -- Dean, can you hear me now?

DEAN SCHENCK: Yes, I can hear you. That's great.

DEAN ANDERSON: Terrific. So we were faced with in the beginning of our deliberations -- after we heard from a series of panels, we were faced with the fundamental questions of whether or not we wanted to change the language of Article 120 or recommend a set of executive orders/jury instruction that would land in a benchbook and lead to jury instructions on these issues related to coercive sexual misconduct and

abuse of authority.

We decided actually to set that aside, because we needed to grapple with what we wanted to do, based on what we had first, and then decide whether or not we could do what we felt was just and appropriate, given the limitations of the Statute as it's currently constructed, and then make a decision about whether or not to do it under the executive order rubric, or whether or not we felt we needed to intervene in the actual Statute.

So what I want to do is go through the seven issues that are related to coercive sexual misconduct and abuse of authority, and just give you our conclusions on the basis of the testimony we received and the deliberations we had. By the way, if you had a chance to re-read those deliberations, I thought they were -- they were great deliberations.

They were really -- we were really trying to grapple with some complicated questions about how to think about circumstances in which

someone tries to use their authority in ways that are potentially positive, potentially negative. We got into a very big discussion around that, a theoretical discussion, but then basically tried to set that aside because we wanted to focus on the offender's behavior, and whether or not there was an attempt to try to use authority to obtain sex inappropriately.

CHAIR JONES: It was very interesting. I really enjoyed the bribe versus extortion analysis.

DEAN ANDERSON: Wasn't that -- yes, yes. Professor Schulhofer has thought about these issues a lot, and it really helped, I think, us to understand the question of -- also of when the use of authority, discretionary authority is ultra vires, and how that impacts an analysis of -- the use of that authority, that discretionary authority, even if the discretionary authority could have been exercised in a way that was appropriate and negative, and how that can still be coercive so -- and

inappropriate, and fall within the scope of what we intuitively thought of as sexual assault.

By the way, unlike the proposal that is -- that we may discuss today, on the agenda today, we were focusing on sexual assault, not on the rape provision. So we were looking at coercive sexual relationships in this circumstance, not under the provision of rape, which is about threatening death, serious bodily harm -- those are the easy cases, right?

We were looking at the harder circumstances and thinking of it only under the provision of sexual assault. So if you go through the seven issues --

HON. HOLTZMAN: Where are they listed, by the way?

DEAN ANDERSON: There's a sheet that has --

HON. HOLTZMAN: Where is it?

DEAN ANDERSON: In this week's -- this week's black -- yes folder.

(Simultaneous speaking.)

LtCol HINES: Right. So in your navy folder, ladies and gentlemen, we have loose copies of the ten issues, and then the seven issues Dean Anderson is referring to are actually numbered Issues 6 and then 12 through 17, and that's what she's referring to right now.

DEAN ANDERSON: So at the top it says, "Issues related to coercive sexual misconduct and abuse of authority," and it starts with Issue 6.

HON. HOLTZMAN: Oh I see, okay. I see.

DEAN ANDERSON: Yes. So these are the issues we tackled, because this was the -- these were the issues, the chunk of issues that we felt related to coercive sexual misconduct.

And I think we made some headway on each one of them, and this is -- I'm not going to try to replicate the dialogue. I'm going to try to give you the upshot for where the dialogue led us, in the interests of time, and then obviously this group will do with that -- you know, with that information what it will.

First issue is: is the definition of threatening wrongful action ambiguous or too narrow?

CHAIR JONES: Would you just tell me what section that's in, in 120?

DEAN ANDERSON: Sure. In 120 --

CHAIR JONES: I'm sorry.

DEAN ANDERSON: No problem. Just to clarify, we are under Article 120(b), Sexual Assault.

CHAIR JONES: Right.

DEAN ANDERSON: And under (b), Sexual Assault, it's 1(A). The question is --

CHAIR JONES: Oh, where it says, "threatening or placing that other person in fear"?

MajGen WOODWARD: That's all they have right now.

CHAIR JONES: Right, okay.

MS. FRIEL: And then the definition of that.

DEAN ANDERSON: And then that's where

we are in that portion of 120 and then the definition. That's exactly right, Lisa. Thank you. Under --

MS. FRIEL: Seven.

DEAN ANDERSON: Seven, (g)(7). That's right, (g)(7) is threatening or placing that person in fear. So we're still in the Statute.

CHAIR JONES: Got it, got it.

DEAN ANDERSON: We're still in the Statute. The term threatening or placing that other person in fear means a communication or action that is of sufficient consequence to cause a reasonable fear that noncompliance will result in the victim or another person being subjected to the wrongful action contemplated by the communication or action.

MajGen WOODWARD: Whatever that means.

DEAN ANDERSON: Well, and that's one of the things we struggled with.

CHAIR JONES: Right.

DEAN ANDERSON: Right. Is it --

PROF. SCHULHOFER: Wrongful action in

1 particular.

2 DEAN ANDERSON: In particular, what's

3 the -- you know. So if this is the Statute -- so

4 there are ways that we could define threatening

5 or placing another person in fear, and that would

6 be changing the definitional portion of the

7 Statute.

8 Or we could interpret the language of

9 the Statute as it currently stands, and we really

10 focused on what is wrongful action under this

11 provision (7)(g) -- (g)(7) rather. Does that

12 help?

13 CHAIR JONES: Yes. Now I'm -- thank

14 you.

15 DEAN ANDERSON: Okay, sure.

16 CHAIR JONES: I always have trouble

17 finding everything in the Statute.

18 MS. WINE-BANKS: Can I just add one

19 complication based on the materials we read for

20 today's meeting. I'm starting to worry a little

21 bit about the use of the word fear in that

22 definition, as opposed to belief.

The testimony that was -- or the investigative reports and the summaries of the Coast Guard situation, basically the case got thrown out because the woman wasn't in fear, although she clearly believed that negative consequences would happen if she said no.

So that maybe the word -- placing a person in fear is causing a reasonable fear of noncompliance causing something, would be a reasonable belief that something bad would happen. So I just throw that in as we're considering all the things we said. I think nothing else changes except maybe that one word can be a problem.

MS. FRIEL: And I think part of what we talked about last night -- not having deliberations without someone present -- but was what is the natural meaning of words to people? We've heard a lot of testimony about how not every person who's involved in the system is as experienced or well-trained as some of the others.

So we're thinking about you hear the word fear, I think naturally people think fear of physical injury. That's what fear means naturally to most people. So if you have a victim who's being interviewed and said -- they go, "were you afraid?" And she goes, "no, I wasn't in fear," then they think they don't have the Statute, whereas somebody who's experienced would say, "well what did you think would happen if you did not comply with the request?"

It could be it was a fear of something else, and they're using it generically. So that's why we came up with this idea. Let's get rid of the idea that it's all about physical injury. That's our problem with bodily harm, you know. I don't want to go off on that tangent, but that it has a natural --

CHAIR JONES: Or at least not yet.

MS. FRIEL: -- meaning to most of us that isn't what, you know, the military has been interpreting it to mean.

DEAN ANDERSON: I think that's

helpful, and it's a little beyond the scope of what we talked about last time.

MS. WINE-BANKS: It is. I just think that it will color how we end up concluding, and so that it was worth throwing out as part of our thinking, as we listen to how we discussed it, because I didn't see that issue until reading today's materials.

DEAN ANDERSON: So that's another thing we need to consider. I think for the purposes of just getting through this before ten o'clock, I'll just try to report out.

CHAIR JONES: In any event, if we're on 7, it was unresolved and we need to -- are we on 7?

DEAN ANDERSON: No. We're on number 6.

CHAIR JONES: Oh six.

DEAN ANDERSON: Number 6, Issue 6.

CHAIR JONES: Okay. For some reason it skips. I got it, I got it, page 13.

DEAN ANDERSON: Right. So actually,

I think that there was fair consensus across the group last time that threatening wrongful action is ambiguous. Whether or not it was narrow or broad was a question, but that it was ambiguous and that we should try to explain it better.

HON. HOLTZMAN: Could you just -- before you go further -- just in 25 words or less, the elevator speech, tell us what the core of the ambiguity is?

DEAN ANDERSON: I think --

PROF. SCHULHOFER: We had 30 seconds last night to answer questions. So literally the clock ticking. If you don't mind, I could just say I think the core of the ambiguity is whether wrongful action applies to an offer of benefits, and that benefits could be -- include not reporting misconduct.

If a superior officer implies that he won't report misconduct that -- is that wrongful action on his part? Or that he implies that he will give the person a weekend leave that they're not entitled to. Is that wrongful?

CHAIR JONES: And the person accepts?

PROF. SCHULHOFER: Yes.

CHAIR JONES: Right

MajGen WOODWARD: And didn't we think, and didn't some folks testify, that just the terminology "contemplated wrongful action" is very confusing in and of itself.

DEAN ANDERSON: And also that there was disagreement with the 2007 version, which talked about positively or negatively affect the military career of someone, and that folks were objecting to the way that was conceptualized. Because that kind of brought to the fore the question of, that we circled around with the bribe versus extortion analysis.

HON. HOLTZMAN: So in other words, people didn't think that the prior language was ambiguous, positively or negatively affecting -- but thought that this language, wrongful, was ambiguous because what did it actually breach?

DEAN ANDERSON: Yes. I think that's fair. The 2007 language was more explicit, but

rejected obviously in the revision in 2012, and left some ambiguity, I think, in our -- and I think the sense, also from the panels we heard from, was that there was some ambiguity with this and that it could stand some clarification.

That's a fairly simple question. It's just is this ambiguous? Is there sufficient, you know -- have we passed a threshold to think, yes, this is ambiguous enough that we need to tackle it. I think our conclusion was -- in our deliberations was that we should try to tackle it because it is too ambiguous. Whether it was narrow or broad was another question, and that's a question of interpretation more than ambiguity.

So the next issue was Issue 12, that related to coercive sexual misconduct and abuse of authority. Issue 12 was the current practice of charging inappropriate relationships or maltreatment under the Articles of the UCMJ other than Article 120, and by this it's 92 and 93, appropriate and effective when sexual conduct is involved?

And this was an interesting part of our analysis because I think many of our minds changed as a result of the presentations, and whereas I think many of us came to the deliberations thinking that charging under 92 and 93 were -- really reaches, and not analogous to other violations of 92 and 93. I think we ended up -- the subcommittee ended up thinking, yes, that it is appropriate and effective.

It can be appropriate and effective, and that it may not be the only place we want to put these cases, but that it provides a residual charging opportunity that can be appropriate when these relationships come to the fore, these inappropriate relationship or sexual maltreatment comes to the fore.

We wanted to ensure that we clarified what fell within the scope of Article 120, but we didn't have a problem, I think it's fair to say, conceptually with prosecutors who make determinations about whether or not to charge under Article 120 or the more generic 92 and 93.

So our positions -- I think, many of our positions evolved over the course of deliberations, and we ended up coming to what I think was a consensus among the people who attended, that that practice of charging and that flexibility afforded to prosecutors, to make determinations to either charge a sexual offense under Article 120 or a more generic offense under 92 and 93, was appropriate and at times effective. So that was Issue 12.

Issue 13 was does the 2012 version, the current version of the UCMJ, afford prosecutors the ability to effectively charge coercive sexual relationships or those involving abuse of authority under Article 120?

The conclusion we reached was also, I think, very much influenced by the testimony we received, that the UCMJ does provide for an opportunity to charge coercive relationships under threatening or placing a person in fear, but that we needed to clarify that provision, threatening or placing another person in fear.

So these -- the reason we managed to plow through seven issues is that these issues were very much related to one another, and once we had a general sense of where we wanted to go, I think a lot of the answers to these questions were pretty straightforward and that was true with 13.

So it does say that I agreed to draft a proposed explanation, and I apologize for not having done that this morning. I believe that I can do that over lunch, and maybe we could have something to talk about in the afternoon if you'd like because I certainly took notes.

And I'll talk about -- if I get a chance this morning, talk about what are the things that we tentatively agreed to, in terms of what the executive order might look like or what the provision might look like. So the next --

PROF. SCHULHOFER: Michelle, if I could just interrupt here?

DEAN ANDERSON: Sure.

PROF. SCHULHOFER: So because it might

affect what you'll be doing instead of eating lunch. The ability of an executive order to clarify on this I think depends on whether it's clarifying in the direction of a narrower interpretation, or whether the clarification moves in the direction of a potentially broader. Because if it's the latter, I think there would -- its validity would be questioned.

DEAN ANDERSON: Challenged.

PROF. SCHULHOFER: So this again -- this comes back, I guess, to the question of substantively what we agree about whether wrongful action can be positive or negative, because if we want to say that wrongful action can include influencing someone's career in a positive way for the wrong reason, then that would still leave defendants to argue that this goes -- that this extends liability beyond what the statutory language covers. So --

DEAN ANDERSON: So that's a challenge, but I believe that we came to the conclusion that we were not going to highlight positively and

negatively, because that was what was most objectionable about the 2007 version.

MS. FRIEL: Yes. We decided, I think --

DEAN ANDERSON: That it was a balancing.

MS. FRIEL: Where we came out was we were going to take the positively out and leave that. It's still a wrongful action for somebody to say, I'll promote you if you sleep with me, but we didn't want that to be a sex crime and a registered sex offense. That should be under, what is it, 92.

DEAN ANDERSON: 92, right.

MS. FRIEL: And so you still can prosecute somebody for abusing their rank like that, but the negative is coercive and puts someone in fear of various kinds of things.

PROF. SCHULHOFER: So the clarification would be in the direction of -- that the wrongful action has to be negative?

DEAN ANDERSON: Well actually I don't

know --

MS. FRIEL: To be a sex crime.

PROF. SCHULHOFER: I'm not sure we resolved that.

DEAN ANDERSON: Let me share with you what I --

PROF. SCHULHOFER: I might agree -- I might agree, but I'm not sure we resolved it.

BGen SCHWENK: Well why don't we get through the rest of -- I mean I'd recommend we get through going through what happened, and then we can come back to the substantive discussion afterwards.

MS. FRIEL: Good, good.

BGen SCHWENK: Otherwise, we'll get off --

MS. FRIEL: So apparently what happened is we didn't finish discussing this.

BGen SCHWENK: No, it may well be we're going to discuss it more later --

MS. FRIEL: Yes, yes.

BGen SCHWENK: -- but since the first

goal is --

DEAN ANDERSON: Let's get through the report.

BGen SCHWENK: Get through the report, I recommend that maybe we do that.

DEAN ANDERSON: Thank you for that recommendation.

Okay. We are on Issue 14, should the definition of threatening or placing that other person in fear be amended to ensure that coercive sexual relationships or those involving abuse of authority are covered under the existing Article 120 provision.

And I -- the tentative conclusion was that yes, it should be. This was part of the ambiguity of that language, and we wanted to try to provide for circumstances in which there is a serious abuse of authority, to be better covered under Article 120.

If you read the transcript, there really is a consensus that some of these issues -- some of these relationships involving trainer

and trainee may be consensual in a meaningful way, and that that is certainly inappropriate, but shouldn't fall within the scope of Article 120. And that there are circumstances in which someone does use their authority to coerce or induce access to sex or sexual favors, and that that is a sexual crime and should come within the rubric of Article 120. So the language is what we need to hammer out, but I think this No. 14 is pretty straightforward, given where we landed.

Issue 15. Should a new provision be added under Article 120 specifically to address coercive sexual relationships or those involving abuse of authority? We came to the conclusion that no, there shouldn't be a new provision added to 120, that this should be about the interpretation of the provision that's already there.

We may change our mind based on additional information today, but just in terms of reporting out the dialogue that we had last time we met, our conclusion was no, that that

would be overreach and unnecessary given the possibilities of prosecuting under existing language.

Issue 16. Should sexual relationships between basic trainee -- training instructors and trainees be treated as a strict liability offense under Article 120? I think everyone rejected the idea of a strict liability offense. We talked about per se illegal. Should they be per se illegal as a slightly different conceptualization from strict liability.

In any case, we came to the conclusion that these relationships should not be per se illegal under Article 120. They were, of course, violations under 92 and 93, and could be pursued under those provisions, but that they should not be per se illegal under 120.

We're moving along. Issue 17 is as an alternative to further amending Article 120, should coercive sexual relationships currently charged under other Articles of the UCMJ be added to the Department of Defense's list of offenses

that trigger sex offender registration?

I think there was a consensus that sex offender registration, both generally in this country and specifically with the military, has a set of -- is a consequence that is very serious, and is something that we don't want to impose lightly, and that it probably extends further than many of us, I will say, are comfortable with under the status quo, and that we did not want to expand the reach of sex offender registration for these purposes.

Thus, really landing in a place where providing prosecutors the discretion to charge either under 120 as a sex offense that would be registrable, or under 92 and 93, which would likely not be registrable.

Okay. I'd like to talk a little bit about what we came up with as possible language, but --

HON. HOLTZMAN: I just have one question. I'm sorry. It takes us back to 13 and 14. How can both of these issues be answered

affirmatively?

In other words, Issue 13, can you effectively prosecute these coercive relationships under Article 120? The answer to that is yes, and I understood that that was the conclusion.

Then how can you have also answered Issue 14, that you need to amend the definition to ensure that coercive sexual relationships are covered?

DEAN ANDERSON: So that's a good point. I appreciate that. You're right, on its face --

HON. HOLTZMAN: I mean the reason I'm asking these questions is that somebody is going to ask us.

DEAN ANDERSON: Yes, yes.

HON. HOLTZMAN: Why are you doing this? I mean you say that it's effective. So why do we need to do anything, and I think we need to be very careful to make sure that, you know, we're clear that we need to -- you know, if

the subcommittee decides it needs to do something, that the predicate to that needs to be very clear.

DEAN ANDERSON: Completely agree, and I think the lack of clarity or inconsistency between our answers in 13 and 14 is important to point out.

I think what the Members of this subcommittee came to in terms of 13 is that the current version needs to be -- we need to tinker with the definition of threatening or placing the other person in fear, and so actually 13 and 14 are sort of questions that go together.

Once we clarify threatening or placing the other person in fear, we believe that the current version need not be scrapped. Does that make sense?

MS. WINE-BANKS: And I think we were careful because in 13, we said yes, it's effective but. There is a but.

DEAN ANDERSON: Exactly.

MS. WINE-BANKS: And so our language

here does say, yes, it's effective but the definition must be changed.

MS. FRIEL: And another way of saying that is we don't need a new Statute, a new crime. The crime is fine. We just need to define it a little better.

MS. WINE-BANKS: That's right, that's right.

MajGen WOODWARD: I mean we could say yes, if only we redefine it.

BGen SCHWENK: So 6, 13 and 14 we sort of analyzed together, and the answer was we think we can get to a go by an executive order that provides clarification of what the threatening provision means. But if at the end of the day, when we end up looking at what we've written, we have Steve's problem or some other problem and we decide we have to do something with the Statute, then we'll roll it into the Statute.

But we're going to start with trying to write something that is a clarification in an executive order, to make it clear. Okay, thank

you.

DEAN ANDERSON: I think that's accurate.

MS. WINE-BANKS: Good summary.

DEAN ANDERSON: So I wanted to go over, if we have time. I apologize, I didn't wear a watch this morning.

CHAIR JONES: We have 15 minutes.

DEAN ANDERSON: Fifteen minutes. So I wanted to go over a couple of ideas that came to the fore in our deliberations, that I was going to try to put together in the language to present to you, and we'll grapple with over lunch.

If you look at the 2007 provision that tries to define threatening or placing that other person in fear, actually this may be -- this language is actually similar to what was in the Statute itself in 2007; is that right, Lieutenant Colonel Hines?

LtCol HINES: Yes, Dean Anderson. The language that she's referring to, it's right here

on page 13 of that outline. If you look at -- so page 13 in Tab 1, in your read-ahead materials, under Issue 6.

DEAN ANDERSON: Yes, that's right.

LtCol HINES: I put that in there because that was something that several -- most of the presenters last month suggested as possibly being helpful, because it was more -- it went deeper in explaining this concept than the present version does.

Specifically, (b)(3), where it said through the use and abuse of military position, rank, et cetera, et cetera. That's something that the presenters thought was helpful in the previous Statute, but as Dean Anderson has noted, the Members, when they deliberated, didn't think that that was the prefect fix, but that it could possibly be --

DEAN ANDERSON: A starting place, that's right.

LtCol HINES: And also some of the presenters suggested clarifying that any threat

could be express or implied, because someone said -- a prosecutor said that's a problem too. If our victim can't come and say well he verbally threatened me or even impliedly threatened me, they thought that might be a gap in the Statute as well.

So you know, when you discuss this, you might want to consider adding that the threat could be verbal or implied, and then it would make its way into the benchbook, which would help the prosecution.

DEAN ANDERSON: So I think that's right. I think that's right. That was one of the -- so when we looked at this provision, which is the 2007 version, which was rejected and revised in the 2012, right? So there are merits to the 2012 version. There are merits to the 2007 version, but a lot of what we felt needed to be covered was more explicitly or implicitly covered in the 2007 version.

There were some changes, though, that we felt were necessary, and in the deliberations,

one of the problems with the 2007 version was that it said, "includes" -- "such lesser degree of harm includes," and then lists these, you know, (A) and (B), (i), (ii) and (iii).

One of the problems was that there was a concern among some that the word "includes" was not sufficiently inclusive, and that it needed to say, "includes but is not limited to," to make very clear that these were examples that were non-exhaustive. This was a non-exhaustive list. Okay. So that's one thing we came to.

The other thing we came to was under (A), that a physical injury to a victim or another person or to the victim or another person's property, that this could be the victim -- him or herself could be the one subjected to physical injury, although that may fall under the more serious version under rape, but there would be circumstances in which physical injury would not be grievous bodily harm and that the -- we really came down to (B)(iii).

So if we look at (B)(iii), you know,

accuse a person of a crime, expose a secret. Those are sort of traditional conceptualizations in other areas of the law -- of the criminal law, but (iii) is "through the use or abuse of the military position or rank," and for you it's right here. Yes.

It's in the center of page 13 or rather three-quarters of the way down the text, and it's (B)(iii), "through the use or abuse of military position, rank or authority to affect or threaten to affect, either positively or negatively, the military career of some person."

We had some problems with this language. First thing right out the gate is that no one liked the "either positively or negatively," because they felt that that was -- raised a whole thorny, you know, mess of problems.

And then folks thought that limiting it to threatening the career was too narrow. It could be or the conditions of Service. In other words, not necessarily their career five years

from now, but you know, give me 100 push-ups, the conditions of Service right now.

CHAIR JONES: Michelle, can I ask one quick question?

DEAN ANDERSON: Sure.

CHAIR JONES: So in the current Statute, which is 7 I guess is the definition. Is that what we're looking at here?

DEAN ANDERSON: Yes.

CHAIR JONES: In other words, in 2012, they simply said, "threatening or placing that other person in fear," and then defined it as the term means "a communication or action that is of sufficient consequence to cause a reasonable fact ending with contemplated."

Am I in the right spot here? In other words all of this that was in the 2007 was condensed into this single line in 2012?

DEAN ANDERSON: Yes.

CHAIR JONES: And is there -- did anyone testify about why?

DEAN ANDERSON: That's really

interesting, because we asked exactly that question, and we could not determine the answer to that. We had suggestions on a couple of different sides about why this larger piece was condensed to this smaller piece under (g)(7).

One theory was that it was more flexible because the articulation of these various types of threatening or placing another person in fear were interpreted by folks to mean only these, and so that this more generic language. That was one theory. It was not -- we weren't conclusive on that theory, but that was one theory that was reasonable and was advanced, I believe, by someone who was on the panel as well.

There were other possible interpretations of why this fuller explication became a narrower explication, or this specific explication became a more generic explication, and then became broader in some sense. So the analysis went both ways on that, and we don't have a conclusive reason why the change from 2007

to 2012.

HON. HOLTZMAN: I would just interject two points. Number one point is I believe that I had raised some questions during the Response Panel hearings about this issue of the wrongful conduct, and how prosecution could take place under it. I don't know -- Kyle's not here -- but maybe there's some testimony that will be useful to go back and check.

The second thing is, is there any -- I mean this is the wrong term for it, but is there any -- a requirement that the General -- what's the name of the committee, General Services Committee?

LtCol HINES: Joint Services Committee.

HON. HOLTZMAN: Joint Services Committee.

LtCol HINES: Yes, ma'am.

HON. HOLTZMAN: Give the background -- its reasoning when it writes these Statutes.

LtCol HINES: We could try to go back,

Ms. Holtzman. That was one of the reasons we called Brigadier General Pede and Chris Kennebeck, you know, to the meeting a few months ago and I don't think this particular issue came up. We could probably go back and see if they could speak to that.

HON. HOLTZMAN: There's nothing -- I mean they don't write a document saying what this -- why this change was made? I mean regardless of whether we call them, we shouldn't have to call someone to testify as to why they made a change.

LtCol HINES: We can certainly --

HON. HOLTZMAN: I mean there's no --

LtCol HINES: We can certainly go out and see if there's something out there where they addressed it.

HON. HOLTZMAN: No, but this is kind of a more generic question. Do they normally, as a matter of practice, explain their actions in writing?

LtCol HINES: The explanation that --

so the answer is typically the explanation you get is when it appears in the Manual for Courts-Martial because the JSC will go through -- and Brigadier General Schwenk could probably talk to this too -- but when they put the executive order into the Manual for Courts-Martial, you'll get a separate section outside the Punitive Articles that will be the analysis. That's where the Joint Service Committee gives an explanation or an analysis -- as close as what you could probably get, to the congressional history, that you're going to get.

So it's not a good answer, because you don't see that until it makes its way into the Manual for Courts-Martial. Now we could always try to go back and do an RFI or just a request to see what working papers they have over there on this issue, because it's pretty narrow.

HON. HOLTZMAN: Yes, but I'm not interested in working papers. I mean we don't have to issue an RFI to Congress to find out. I mean sometimes you can't find the legislative

history because there isn't any, just somebody's -- you know.

LtCol HINES: Well that was his answer, was that on this version, the legislative -- there isn't legislative history, that we were making it. That's what Brigadier General Pede's input was, and unfortunately --

HON. HOLTZMAN: What do you mean that we were making it?

LtCol HINES: Well, what he was saying is there's nothing -- and there isn't. I've researched. So the legislative history for the 2007 version is a couple of statements on the floor by Congresswoman Sanchez, and for this, there's really nothing.

HON. HOLTZMAN: But who drafted the language?

LtCol HINES: Someone on the Joint Service Committee.

HON. HOLTZMAN: Okay. When they draft the language, is there a little memorandum that goes along with this, saying this is why we came

up with this? Was this delivered to Congress, or was just Congress given the language and they just ran with it? I mean how does this work? This is not --

LtCol HINES: I believe it's the latter, ma'am, but I mean we will find it out. If there's a memorandum, we'll get it.

HON. HOLTZMAN: Now maybe, you know, maybe there's an issue here, such as we discovered with regard to the, you know, the lack of expeditiousness on issuing executive orders. I mean this may be a larger problem.

MS. FRIED: I think that -- I believe ma'am, if I may.

HON. HOLTZMAN: Please.

MS. FRIED: Usually the JSC publishes any changes in the Federal Register. So it's for public comment. So we may be able to look to that as well, and any comments they got, we could -- you know, to any of the comments they responded to, that would also be published.

HON. HOLTZMAN: Right, but publishing

the changes is not the same thing as saying this is why -- is explanation for it.

MS. FRIED: Usually the Federal Register, it would be in there though.

HON. HOLTZMAN: What would be in there?

MS. FRIED: The explanation as to why they're proposing the change.

HON. HOLTZMAN: But I'm asking do they normally do that?

MS. FRIED: Yes, yes, yes.

HON. HOLTZMAN: They do?

MS. FRIED: Yes.

HON. HOLTZMAN: So there should be something along with this?

MS. FRIED: Yes, yes.

HON. HOLTZMAN: And the Federal Register is when they send this to Congress with their --

MS. FRIED: They only send it to Congress after they've gotten public comment, and it's got to go through the OMB process as a

legislative proposal.

HON. HOLTZMAN: Okay, and then when it goes to Congress, does it come along with, well we think this is a good idea because A, B, C, D, and we got these comments and blah blah blah?

MS. FRIED: I think it does.

HON. HOLTZMAN: Really? Well that's good to know. So then can we get that for this?

MS. FRIED: Yes. I think we just need to go back.

CHAIR JONES: Well I'm not -- I'm sorry, go ahead.

BGen SCHWENK: My recommendation is that you go to Dwight and don't bother Chuck and those guys. Bother Dwight and tell him you need everything on this provision that -- starting with the JSC submission to the general counsel, including the publication in the Federal Register for notice and comment of the public, anything that came out of the public meeting that they hold, and the submission that went to the Hill, and anything else you can find.

LtCol HINES: Yes, sir.

BGen SCHWENK: And see what he comes up with.

CHAIR JONES: So I have one, I hope, quick question. The way I read this then, wrongful action in the 2012 Statute, I mean is it written so broadly that it no longer -- that it would ever cover threats of death, grievous bodily harm, et cetera?

DEAN ANDERSON: It should. It should be inclusive enough to cover those threats.

CHAIR JONES: Well that's what I'm saying. Does it -- then it's a total reverse here, because these are meant to -- in 2007, it was meant to be sort of a lesser threat, right?

DEAN ANDERSON: I think -- yes. I think it's always designed to be a lesser threat. So if you look at the 2007 version, there's the threats for rape and sexual -- and aggravated sexual contact, and then there's threats for aggravated sexual contact and abusive --

CHAIR JONES: Oh, I'm sorry. I missed

the parentheses.

DEAN ANDERSON: That's okay.

CHAIR JONES: Okay, right.

MajGen WOODWARD: So that's specifically for the lesser.

CHAIR JONES: Right.

DEAN ANDERSON: But it should be inclusive enough to include --

BGen SCHWENK: The (g)(7) definition applies to both the rape and the sexual assault, and then it obviously gets carried down into the other stuff.

DEAN ANDERSON: So then the last thing that I just want to mention in terms of the way we conceptualized it is that we want the language to include coercing or inducing compliance to a sexual act. Those -- that kind of language came up again and again in our deliberations, that inducing or -- coercing or inducing compliance to the sexual act.

Now I think that still comes under this provision. I would beg your indulgence

before we get too much into the weeds on that, to try to draft the pieces that we came up with last time, and then have us at least have something to work with or work from and disagree with or agree with, but use some of the pieces that we came to a conclusion on, or at least tentative consensus on, so that we can work with them and try to see if that's the language we want.

LtCol HINES: Judge, I would just -- Congresswoman Frankel, I think, is here.

DEAN ANDERSON: Oh she is.

LtCol HINES: I might suggest just a quick five minute break and we should be ready to have her come in.

CHAIR JONES: Okay, great. Thank you. I didn't know she was here.

(Whereupon, the above-entitled matter went off the record at 9:58 a.m. and resumed at 10:12 a.m.)

CHAIR JONES: I want to take this opportunity to welcome you, Congresswoman Frankel and Ms. Morrow, and I want to say in particular

that this is an interesting issue. It's an issue that we're considering very carefully, and it's very helpful always to us to hear from you.

And with respect to my own personal situation, I believe I missed your -- your appearances before the Panel, the full Panel last September. So I'm particularly interested this morning that you're back and I'm very happy to hear from both of you.

HON. FRANKEL: Thank you so much. Do you want us to start? You know, I -- well first of all, hello everyone.

VOICES: Good morning.

HON. FRANKEL: Thank you so much for having us here. It really is an honor for me. I'm Lois Frankel. I'm a Member of Congress from South Florida, a beautiful area. My district goes from Fort Lauderdale up the coast to Palm Beach, and I'm here with one of my constituents, and it really is truly an honor to be with Elisha Morrow. When you hear her story, I know you're going to feel the same way that I do.

What I thought I would do is let her start, because I think it will shorten what I have to say, and she really is the star and can really give you a lot of insight as to why we're here.

CHAIR JONES: All right, thank you. Ms. Morrow.

MS. MORROW: Good morning, everyone. Thank you for allowing me to be here today, and I've spoken with some of you on more than one occasion. So I appreciate you allowing me to speak and tell our story again.

Knowing where to begin is difficult. I speak on behalf of not only myself but three other military members named Tiffany, Paige and Megan, who share a near identical story. The four of us attended boot camp at different times between May 2009 and April 2010, with Tiffany and I being the only recruits attending together.

Ours is not an easy story to tell, and one that still turns my stomach to this day. No matter how many times I tell our story, it's

never easy. I suppose the best place to start is to take a moment to think about the day of an average recruit. You are given orders of when to sleep, to eat, to shower, to go see the priest. Anything that you want to do, you do at the discretion of those in charge. You are pushed to your physical and mental limits.

It's an environment where refusal to submit to orders is not an option. You give away any right that you have to independent behavior and thought. To deviate from any given order in any way is to be met with swift and harsh consequence. It is by design an isolated and miserable experience.

And that's okay. That's what makes our military great. Men and women who gut out the worst their company commanders or drill instructors can hurl at them, for the honor of becoming a member of the United States military. It's hard work, and at the end of the day, the hard work is kind of what makes you so proud to put on the uniform, to be able to say that I made

it.

But what happens in this setting if the person charged with your care doesn't have your best interest at heart? What if that person becomes a predator? Then what? When the person that has taken an oath to protect and train you to the best of your abilities turns into an enemy when no one else is looking, your life becomes a nightmare.

Regardless of their intentions, you're still required to do as they say. Once you step off the bus, there is no turning back. All military members, anyone who's been in the military in this room knows that. Once you're there, you are there and you are stuck.

The only way out is completion of your training. So if the commander tells you to come into his office after taps, you do it, no questions. If he says to close the door behind you, you close the door. If he says to take your hair down, asks you the price of your ball or pries into your personal life, you go with it.

If he spreads his legs and tells you to scrub the floor between them, you do it. Make no mistake; in that setting, there is no other option. There's nowhere to turn. Tiffany and I arrived to Cape May with excitement about our future in the Coast Guard and the adventure that we knew was ahead. We didn't know that we had just entered a world of trouble.

I was hand-chosen by our lead company commander for the position of house mouse, meaning that I was required to clean his office after taps when everyone else had retired their racks for the evening. This position, he explained, came with a few perks, to include being allowed to listen to his iPod, which obviously would have been drowning out any conversation that he was having with us, and speak to him in a more relaxed environment, as he put it.

He then went on to say that it was important that I not let the other recruits know about our arrangement, and I was to treat him

like a regular company commander when no one else was around. With the privacy that the position of my being the house mouse afforded him, it didn't take long for his abuse to begin.

He constantly made sexual comments, innuendoes, acting inappropriately, watching every move that I made. It was a very confined space in his office, and he would make a point to come closely behind him, to put himself in as close of a proximity as he could when he was talking to me, walk behind me, things like that, to be as close as he could possibly get, and he also advised me that I could take my hair down, which is a strict, strict uniform violation. I actually got in huge trouble one time when another company commander saw me with my hair down. I paid dearly.

He soon turned his attention to my fellow recruit Tiffany, who just like me was a young blonde with blue eyes. He would juggle time between being alone with me in one office one night, and having her clean a separate

unoccupied office next door. Her experience was nearly identical to mine, to the point of many of the phrases that he would use and questions that he would ask were the same word for word.

His harassment continued and progressively worsened for eight weeks. We had nowhere to turn that felt safe. Our biggest fear in reporting was that whomever we dared tell would in turn tell our perpetrator. Putting our word against someone with over a decade of service was not an option, especially given the fact that the person who was perpetrating our harassment was the same person who on the first few days of boot camp had taught our sexual harassment class, and stated that if we had any issues, we were to come to him.

He once said if anyone gives you trouble, come to me, because no one's going to mess with my recruits. He was the course of action we were given to report to. So we stayed quiet. We had no other choice. We went into the fleet and we tried to forget that Cape May had

ever happened, and with our departure, another company arrived, another chance for our perpetrator to use his position for his own personal sick amusement.

This time he chose Megan, who like Tiffany and I had the same build, the same blonde hair and the same blue eyes. Her abuse started not unlike mine and Tiffany's, but it didn't stop where it had with us. I believe emboldened by our silence, he took his abuse a step further and began exposing himself, insisting that she watch and pressuring Megan for sexual favors.

Like us, she was bewildered by his behavior, being just a couple of years out of high school. I believe she may have been 19 at the time. Megan had never faced a situation like the one before her, and had no idea where to turn.

Doing everything she could to appear less attractive to her abuser, to include stopping shaving her legs, thinking maybe he'll leave me alone. She attempted to escape from the

abuse that she was enduring, but she found no escape. After several weeks, she was questioned one night as to if she used birth control. Confused, as any recruit would have been, she wanted to know why he was posing the question.

The following night, the question was answered. As she was ordered to remove her shorts in his bathroom, she was sexually assaulted. This occurred on at least one other occasion while Megan was at Cape May. Just like those before her, Megan left boot camp and tried her best to forget what happened and his abuse continued.

It wasn't until the fall of 2010 that I received a phone call from my friend Tiffany, who had also been in boot camp with me. She explained that she had met another member of the Coast Guard, Paige, who had recently graduated from boot camp and had been a recruit of the same company commander that we had.

Her abuse had been nearly identical to ours. He used the exact same tactics and

phrases, just as he had done with us, in an attempt to bait his recruits into sexual behavior. It was at that time that Tiffany and I made the decision to contact Coast Guard Investigative Services and break our silence.

An investigation ensued, and in the fall of 2012, we attended the sentencing hearing of our former company commander. Sitting side by side, the four of us, who looked more like sisters than fellow military members, listened as the judge issued his ruling. He was charged with multiple counts of maltreatment, failure to obey an order and adultery, which is an insult, and was given the maximum punishment allowable for those crimes.

However, he was unable to be prosecuted for his most serious offense, rape, under the specifications of Article 120 of the UCMJ. He raped one of his own recruits, a recruit he had taken an oath to train and protect, yet was given a slap on the wrist, serving nine months of a 12 month sentence and

received a bad conduct discharge.

In the debriefing with the prosecuting attorneys that followed the sentencing, we questioned as to why proving the case for rape would have been so terribly difficult, when it seemed so obvious. We were floored when the lieutenant commander in charge of our case opened the UCMJ to Article 120 and read aloud the criteria that must be met in order for the act of rape to be committed.

It stated that the perpetrator must use force against the other person, by threatening or placing that person in fear that any person would be subjected to death, grievous bodily or kidnaping, by causing grievous bodily harm, by rendering the victim unconscious or by administration of drug, intoxicant or a similar substance.

What this Article does not include, however, is rape that occurs under coercion or by an order of a superior. Due to this loophole, he was not tried for rape as he should have been.

Trying this would have been useless, as none of the criteria listed in UCMJ Article 120 had been met.

Even though when asked by Coast Guard Investigative Services if his sex with Megan had been consensual, he had replied with "I hope so," because even he knew the power that he wielded as a company commander of coercion.

In the Article 32 hearing that preceded our perpetrator's guilty plea, the Convening Authority said "It is my opinion that the accused created a trap to snare Megan, and that over time he wore down her resolve, and any opportunity she may have had to initially evade him."

She went on to say that she, Megan, "talked about how one night she finally had to have sex with him because she had run out of excuses, yet all the while her military duty required her to be at his office after taps." The confusion that the Convening Authority referenced was not only felt by Megan but by the

rest of us as well.

Our perpetrator was good at his job. He was a great company commander. He was a motivator, and had we not have known who he was when no one else was looking, he would have earned our respect. But when night fell and everyone was in bed sleeping but us, it was then that we saw the truth of who he was.

The only way that I can think to equate it is being a recruit in that situation is like having a head-on collision in your mind. Your brain is already so fogged with so many things, and then to try to sort out and rebuff the advances of the person that's supposed to lead you is nothing short of devastating.

Training instructors, drill instructors and company commanders have the authority to break or make a recruit's career in an instant. With this authority comes the need for great responsibility. When this authority is abused, the results are disastrous.

Recently, I was in a job interview to

be a police officer and I was asked the following question. Failure is a part of life. Tell us about a time that you failed and what you did to correct it, and my answer was pretty simple. My failure was for a time remaining silent. I left Cape May knowing that there was a predator in the ranks who was capable of hurting someone and I did nothing.

It took hearing the story of another recruit who had been abused to realize the cowardice of my inaction, and because I failed, two more members of the Coast Guard had to suffer harm. I'm asking you today to not fail as I have done. You are tasked with the choice to recommend amending UCMJ Article 120 or to leave it as it is.

Know that when you make your decision, you're answering a question. You're giving an answer to Tiffany, to Paige, to Megan and to myself. Do we matter? Does our story matter, and more importantly, do the Servicemen and women who suffer the unthinkable and become victims of

this horror matter?

There are sexual predators who escape from justice because of Article 120. Our story is proof that it's defective. How many miscarriages of justice are too many? Thank you for your time.

CHAIR JONES: Thank you. Thank you very much. It takes a great deal of courage to come in and tell your story and we appreciate it.

MS. MORROW: Thank you.

CHAIR JONES: Congresswoman Frankel, did you want to say a few words, and then I'll open it up to the Committee.

HON. FRANKEL: Yes. Thanks again, Ms. Morrow. We have some recommended language that we're going to -- do you have the documents?

CHAIR JONES: Yes, we have it.

(Simultaneous speaking.)

Col GREEN: We have the version you provided in September.

HON. FRANKEL: No, this is a new version.

VOICES: Okay.

HON. FRANKEL: Because the new version is based on -- there were some concerns with our old version. So we have a better version, okay. So first again, I want to thank you all, the Judicial Proceedings Panel. I know some of -- I think a couple of you were on it, and we appreciate their work. I want to thank all of you for your service.

We had to visit at the first hearing. First, I want to say Elisha, I don't think you're a failure in any way. I mean I think it's just amazing what you have done. I'm very, very proud of you. I am the mother of a United States Marine and so I know firsthand the courage and generosity of a young person entering the military.

I know the overwhelming pride when you get to put on a uniform in the United States of America. I also heard my son telling me about his boot camp experience, which I never thought he would actually enter the Marines after I heard

about it, but he did.

BGen SCHWENK: Did he go to Paris Island?

HON. FRANKEL: He was at Quantico.

BGen SCHWENK: At Quantico. Oh, okay.

HON. FRANKEL: Yes. So when I heard this story, and obviously I don't need to repeat it again; but when I heard her story, I was absolutely -- I was shocked and I was very sad, very sad. I still am, and I've told her story over and over to folks and the reaction I get is complete disbelief. How could the law sort of be so ignorant?

And so I decided that, you know, I would try to do something to take corrective action. So I'm going to just jump forward. You asked, you posed six questions that I got in an email, six questions that you had, and I want to sort of jump to that to get to the point.

The investigation, as Elisha mentioned, showed that the commander had a pattern and practice of sexually harassing his

female recruits and in at least one case had forced himself upon one of them using boot camp tactics, wearing her down and ordering her to have sex with him.

But because he had not used physical force, he hadn't drugged her, he hadn't put her in fear of her life, he was charged with these lesser crimes of maltreatment of a subordinate, failure to obey a lawful order and adultery, and eventually sentenced to one year confinement.

So you asked, posed six questions, which I'll go through quickly, and I just want to say just say that I had the help of a JAG officer, Chuck Mason, who now works in the Congressional Research Service. I know Representative Holtzman knows that service well, and he helped me with this and my little bit of -- in my former life. So don't hold this against me, but I was a lawyer.

MAJ GEN WOODWARD: There are a few in the room.

HON. FRANKEL: And I was an assistant

public defender actually, so I had some experience in the criminal justice system, and did civil work. But I'm not going to use my experience. Anyway, so is the current -- the first question was is the current practice of charging inappropriate relationships or maltreatment under Articles of the UCMJ, other than Article 120 appropriate and effective when sexual conduct is involved?

I respectfully agree with the finding of the Judicial Panel, when they said the answer is no, and I agree with that, because in answering number two, which was the 2012 version now.

This happened before 2012, so does the 2012 version of UCMJ afford prosecutors the ability to effectively charge coercive sexual relationships or those involved in the abuse of authority under Article 120, and I again answered that no.

Then the third, next question, should the -- should there be -- well, we'll get to the

more important one. Should there be something added under Article 20 to specifically address coercive sexual relationships? And I respectfully would suggest yes. We've given you a new version, which you will see that for the definitions of rape, sexual assault, we have added a new provision, which is --

So rape would be any person subject to this chapter who commits a sexual act upon another person by, and there's a new subsection 6, "using their position of authority." Same thing with sexual assault.

Now what makes this a little different than our original submission is how we've defined, if you go to the last page, position of authority and using position of authority, which was one of the questions that one of the Panel Members in the first Panel asked about.

So we have "Position of authority means a position of superior rank to the other person or position or authority, regardless of rank to the other person," and using a position

of authority -- the term "using a position of authority" means explicitly or implicitly using a position of authority to coerce or compel a subordinate.

I think had that -- had this been in the law, it might have been a different outcome. I mean I don't know exactly what the outcome would have been, but at least would have had a much more serious charge to have brought against this commander.

The next question, which is should sexual relationships between basic training instructors and trainees be treated as strict liability offenses under Article 120. I will say that my point of view is a little bit different than I think -- I was hoping Speier did testify.

Now my background comes into play, because I -- which was I have a hard time with -- having a felony without an attempt. I mean that's -- I'm not, you know, that section isn't as important. I mean that probably takes a lot more thought than I probably have given it, I

just want to say.

But my concern about 5 is that you might put a -- if you actually had a consenting relationship, you might put the consenting person who you call the victim in the position of having to lie or commit perjury, which would be concerning for me.

But some other people, I've heard Jackie Speier talk about this, and she feels, I know, very strongly that this relationship is so sacred between the trainer and the recruit that there should be some kind of strict liability.

You know, maybe the strict liability might not be a felony. Maybe it's something lesser is a possibility. But now I'm just sort of -- those are just ideas that have popped into my head, but I don't know. I'm more concerned about where you truly have a situation like we have now, where there was really -- there was no consent on the part of victim, and the intent is obviously inappropriate.

CHAIR JONES: You know, I'm sorry. I

was not listening to you.

HON. FRANKEL: Yes. I think the -- the last question asked whether or not this could be done by the executive order, and I think it would be much better to do a statutory change. That's my opinion of that.

CHAIR JONES: Listening to you, I just want to say that it sounds an awful lot -- an awful lot like us talking with each other during the first Panel deliberations. We've heard all the issues and expressed any opinions that have passed between us, and this could not be more timely, because we are right now taking a look at precisely these issues with respect to the Statute. Dean Anderson, I know you have a question.

DEAN ANDERSON: Yes. I'm going to begin by addressing Ms. Morrow. You asked do we four victims matter, and I want to say yes, and I want to say that we are deeply grateful to you for coming forward. You talked about cowardice, why? You are not a coward. I think of you as a

real hero, and I want to put that on the record, because you're willing to come forward and share your personal experience.

It greatly enriches our ability to understand these issues and to make sense of the subtlety of the kind of coercion you experienced. So you are a hero for doing this, and I really want to thank you for doing it.

MS. MORROW: Thank you.

DEAN ANDERSON: I want to ask you one question and then turn to Congresswoman Frankel. When did this occur, because we have different versions of the UCMJ that we're grappling with?

In your original, I know that there were four different assaults that came forward by this particular offender, who was charged with astonishingly maltreatment, failure to obey an order and adultery, which I believe you was insulting. What time frame are we talking about?

MS. MORROW: Each boot camp block was eight weeks. I attended from --

DEAN ANDERSON: Just the year.

MS. MORROW: Oh, 2009 to '10.

HON. FRANKEL: And what about for Megan?

MS. MORROW: Megan was I believe maybe a company after mines. So it would have been the latter part of 2009, maybe the beginning of 2010.

DEAN ANDERSON: Okay. So we were probably under the 2007 provisions. That's really helpful, and you know, I think that boy, what an ineffective prosecution, given the charges.

MS. MORROW: I don't know if it's relevant at all, but our sentencing wasn't until 2012, or you know we didn't go -- I have no idea if that's relevant.

DEAN ANDERSON: It's okay. It's not relevant. But it's very helpful to hear both the charges in that case, which are inapposite to your -- maybe that's the correct use of the term, to your actual experience. I apologize if it's not the correct use of that term, but also the sentencing, which was so inconsistent with the

gravity of what happened.

So let's turn to Congresswoman Frankel and talk about the gravity, because I think that's the most challenging thing that we're grappling with. We'd like to address the kinds of coercion that Ms. Morrow and her colleagues experienced.

HON. FRANKEL: Uh-huh, right.

DEAN ANDERSON: The first question is under your proposal, what is the difference between rape and sexual assault for using the position of authority, because it sounds like they're defined exactly the same way. You've simply inserted the same provision under rape and sexual assault.

HON. FRANKEL: Right, right. Well, I'm not like an expert in this, so I'm not really sure what the difference is between rape and sexual assault. We just took the Statute 120 code and made it, using the position of authority applicable to both provisions. But I don't know myself what the --

DEAN ANDERSON: So that's fair enough. I don't mean to --

(Simultaneous speaking.)

DEAN ANDERSON: I think for us, the challenge is there's no question that what Ms. Morrow and her colleagues experienced was a sexual offense of a serious nature, and for us the question is where is it most appropriately landing in the Statute? When rape, just and different criminal Statutes define these things in different ways. But the way the UCMJ defines rape, it's about the kind of force and coercion that is overpowering and physical most of the time here.

We're talking about threats of death, grievous bodily injury, which are terrible as is this kind of threat.

HON. FRANKEL: Right, right, right.

DEAN ANDERSON: But possibly of a different order. That's not to say not serious. Sexual assault here carries a maximum -- under the UCMJ, it carries a maximum of how many years?

I think that it's 30 years. So we're talking about something of a completely different order to maltreatment, adultery.

HON. FRANKEL: You're right.

DEAN ANDERSON: The failure to obey an order. So we're talking about an offense that can lead to a conviction. A sexual assault can lead to a conviction with a 30 year sentence. That's a tremendously grave -- I guess so I'm just wondering.

HON. FRANKEL: Okay. Well, I want to respond to that. First, I want to separate out the experience Ms. Morrow had from Megan, right. I mean what Ms. Morrow went through was terrible. She went through what I would call sexual harassment, and egregious because it's by her company commander, and she's got literally no way to escape.

I think you really have to understand the situation, which I think you describe very well of what happens when you get into a military situation. I mean it's not like she could get

into a car and -- I mean the mentality is not to do that, okay.

Now this situation with Megan, who was actually sexually assaulted or raped, I mean obviously it doesn't meet the definition here. So I'm saying, and I think what Megan has and what Elisha has said on behalf of Megan is this. There was no difference between having a gun put at her head as having an order by your commander, who wears you down and says, you know, submit to me.

I mean I think that is the real issue here, because for the victim, it's the same trauma and for the offender, think about it. He has taken his superior position to commit the same act as somebody who had a gun or someone with a drug. That's his drug. His drug of choice is his superior position. His gun is his superior position.

DEAN ANDERSON: And it's as effective, you're saying.

HON. FRANKEL: Yes. Obviously, yes it

is.

MS. MORROW: If I may absolutely. In that -- in that position, I mean the gun's almost a moot point, because when there's -- just like when you have a gun to your head, in that instance what's your other option? It's the same exact scenario, just with a different weapon, or like you say, a different drug. There's nothing else you can do.

HON. FRANKEL: I mean I guess you can argue she should have screamed, she should have fought, she should have -- no, no, no, wait. I'm just saying this. But what -- no, I'm really not saying that. Somebody might say that, but the point is this. His -- he had an effective weapon, and his weapon was his superior position.

That's why it was very outrageous, and you could understand why these young women -- and it's not just about them, because we know there's -- listen, more men get sexually assaulted in the military than women. But they felt there was -- there was injustice, you know, twice. Once by

this man and next by the judicial system.

DEAN ANDERSON: And that's why their testimony is so crucial to us, because we're trying to fix what the judicial system does in response to egregious behavior, egregious abuse of authority in this way.

HON. FRANKEL: But if I may -- but why is it that it is -- why would it have been worse for the man, this same fellow, who has obviously access to weapons, right. Why would it have been worse for him to pull out his gun and ask her to submit? It's exactly the same act, and that really -- the same thing happened to this victim, but he used his authority instead.

DEAN ANDERSON: So I think -- I think I certainly understand that perspective. I think intuitively, many people would think that if a weapon that threatens death is -- the presence of a weapon that threatens immediate death makes any situation more dangerous.

That's not to say that it wasn't as effective, in terms of leading to the sexual acts

that this offender wished to engage in. That's not to say that at all, and I don't -- I don't want to necessarily debate this at this point. I just want to -- I'm just trying to --

HON. FRANKEL: No, I think that's fair.

DEAN ANDERSON: I'm just trying to explore the question.

HON. FRANKEL: I think it's fair. But let's look at the definition of rape. It's not just -- it's using unlawful force against a person, that's one. I would say this is an unlawful force, all right. The next one is threatening someone subject to death, grievous bodily harm. So that's a separate section.

Or rendering that person unconscious. Then there's a fifth one, administering a drug to a person by force or threat. Again, a drug or intoxicant. So there are right now under the law five different acts that are used to define rape, and we're just, you know, respectfully suggesting well, you know, what about this? What about when

you're abusing your authority and you're effecting the same results?

CHAIR JONES: Just I may be able or I hope I'm a lawyer.

(Laughter.)

DEAN ANDERSON: I have to say that as a -- just a common sense, you know, take at this, what is the difference between rape and sexual assault, and the rape Statute, to me at least, seems totally focused on the use of physical power, whereas when you get to sexual assault, you have threatening or placing the other person in fear.

And just stated most broadly, I guess the fact that it's B instead of A and it's called sexual assault instead of rape, it is regarded as somewhat less offensive to people, just speaking, you know, from my reaction as a person.

And so, you know, I wonder if you were to accept that distinction which is in this Statute, and has been in it for a long time, whether it might be acceptable to include this

abuse of authority in B when we're talking about threat, particularly where the, if I'm right, the penalty is the same, because the harm is undoubtedly the same.

HON. FRANKEL: Yes. I wasn't really sure. Is the penalty --

DEAN ANDERSON: I think the maximum is 30 years.

HON. FRANKEL: --I don't really see any difference between the two really.

MS. FRIEL: In terms you'll understand as a defense attorney/former prosecutor, civilian Statutes do things in degrees.

HON. FRANKEL: Oh.

MS. FRIEL: If this was written like a civilian Statute, sexual assault would probably say rape in the second degree. They make first degree those things and rape, and then they use the word "rape" and people would feel like, and that is what you feel like, that you were raped and as Judge Jones pointed out, not using that word is offensive to people who feel,

understandably so, as raped.

I think what we're trying to get at is if this -- think of sexual assault as rape in the second degree, comes with a 30 year penalty, not a one year penalty where you serve eight months, but a 30 year penalty, if we added it there, what's your feeling about that?

HON. FRANKEL: Well what's the -- is the other one more than 30 years? Is that --

(Simultaneous speaking.)

LtCol HINES: Life and 30.

HON. FRANKEL: Okay. Well you know, here's the thing. You know, there is something -- again, why am I going back to my public defender days? I'll never figure that out.

DEAN ANDERSON: The good old young days.

HON. FRANKEL: One thing I thought, sometimes if you make a -- sometimes if you make something too severe, you know, it doesn't -- you don't prosecute it.

(Simultaneous speaking.)

HON. FRANKEL: --if you remember. I remember that. Look, here's the thing. I'm not here to -- I'm advocating, because I think there's an omission in the law, you know. Thirty years to me is a long time, and I really leave it to this Panel. I mean you're giving it probably a lot -- you're into the weeds a lot more than I was.

I was here to try to correct what I think is a big injustice. But I think this -- there's always pros and cons on everything. It sounds like you're being very deliberative and thoughtful. So you know, I'd just -- I don't have an absolute --

MS. FRIEL: How does this -- sorry. How do you feel about that? I can see you were about to say something. I would love to hear how you feel about it.

MS. MORROW: I mean I think that our issue in this instance was that in the case of rape or sexual assault, there was no provision for them to prosecute. So it's not so much the

word "rape" that is, you know, makes it feel, I guess, I don't even, you know, like justifying what we went through, for lack of a better word.

But the punishment. The punishment in this instance didn't fit the crime, and that was, you know, what was so unfair about it, is that there was no means to fit there. We're just basically looking for prosecutors to have a shot in cases like this. Right now they don't.

MS. FRIEL: It makes perfect sense.

HON. FRANKEL: I just wanted to -- oh, I'm sorry. Yes, I want to say something. What happened to her, I mean to Megan, is really horrible. I mean when you think about it, you know, young kids coming out of high school a lot of them; they have stars in their eyes.

They want to serve their country and they get into -- Megan will remember that experience, quite frankly, far longer than somebody who was drugged. So from the victim's point of view, it's horrendous.

CHAIR JONES: Ms. Holtzman.

HON. HOLTZMAN: Yes. I was going to ask you about this trial. Was he convicted of assaulting all four? I mean so your experience, there was no criminal prosecution for it?

MS. MORROW: He was charged with maltreatment on the case of all four of us. He was given a charge of adultery for Megan. So Megan specifically had the adultery charge and then the maltreatment, based around the verbal abuse that we endured, because of the circumstances of it, was considered maltreatment for all four of us.

HON. HOLTZMAN: I see, okay, because I'm thinking about whether when you have a predator, which you may have in the trainee situation, training or trainee situation, is that could aggravate the crime and elevate the penalty. Or two or more victims, something like that.

(Simultaneous speaking.)

MS. FRIEL: You know, that's something that your discussion has put into my mind.

MS. MORROW: Well, and what was so frustrating about him is you kind of felt like he used Tiffany and I to practice to get to Megan, if that makes any sense.

Because I mean verbatim word for word, he had lines that he used, and he used it and then, you know, he did this -- I mean they didn't want us to talk before the trial. So after the trial, we all got together and kind of compared notes, and word for word he was doing the exact same thing.

So you know, I know I just feel like had he not have been caught, then this would have gone on and on.

MS. FRIEL: So you think it started with you?

MS. MORROW: I think it was probably going on long before me.

MS. FRIEL: Okay.

MS. MORROW: I think that we were the first to come forward and the only ones that would speak. But I think there were probably a

great number more than us.

MS. FRIEL: And what rank did he hold?

MS. MORROW: He was -- when he went to trial, he was a chief petty officer. But at the time, he was an E-6 or he was an IT, I can't even remember at the time. He was an E-6.

MS. FRIEL: And he pled guilty, right?

MS. MORROW: He did. He pled guilty to the maltreatment and, you know.

HON. FRANKEL: The adultery.

MS. MORROW: He tried to get some kind of an upgrade from a bad conduct discharge. He wanted, I believe it would be an administrative discharge. You guys know far more about that than I would. But he even tried to get out of what punishment that he did get.

HON. HOLTZMAN: Congresswoman Frankel, just on your positional authority definition, sorry to ask a weedy question, what is positional authority? Because I'm not a military expert so --

HON. FRANKEL: Okay. So that I --

this was asked to me at the first Panel. Apparently there are certain situations where I was told it could maybe be a civilian and a military person, and it's not about the rank but it's about their position. I don't know. Is anybody here in the military that could --

MajGen WOODWARD: But they could be the same rank, but have a superior position over them.

HON. FRANKEL: Yes, I see.

HON. HOLTZMAN: So similar rank --

(Simultaneous speaking.)

HON. HOLTZMAN: --but a position of authority.

HON. FRANKEL: Right, right. One of you panelists brought that up in the questioning. That's why we changed that, because they gave an example of that.

HON. HOLTZMAN: I just want to say that I, to you Congresswoman Frankel, that I really appreciate your persistence, to make sure that this issue just doesn't get pushed under the

rug.

HON. FRANKEL: Yes, yes.

HON. HOLTZMAN: And to you Ms. Morrow, I just want to say thank you for sharing that experience, which requires enormous courage and -- because we have to address that and we have to make sure the Statute addresses that. And as the Chair mentioned, Judge Jones, we are grappling with this very question at this point.

MS. MORROW: Thank you.

HON. HOLTZMAN: So this is really helpful. Don't think you're just -- your words are going up to heaven. They're really coming into our ears and we're listening very carefully.

CHAIR JONES: Yes, General.

BGen SCHWENK: First off, thank you very much for being here, Congresswoman Frankel. I really appreciate it and your comments, and as Liz said, keeping this on the forefront. We do have to get a result. Ms. Morrow, on moral courage, you know, moral courage is something that we talk a lot about but we don't see a lot,

and it's nice to see it here today.

MS. MORROW: Thank you.

BGen SCHWENK: I want to emphasize how important physical presence is. It's one thing to read about it; it's another thing to talk to the person eye to eye. It's a powerful impact, and I appreciate the fact that you don't mind putting yourself out there and continuing to do it.

MS. MORROW: Thank you.

BGen SCHWENK: One of the issues that Congresswoman Frankel talked about was the issue of this proposed change goes to a situation you all faced, where it was coercive, you know. But the other side of the coin is positive, you know. Sleep with me and I'll make you a star kind of a thing.

And I -- and Congresswoman Frankel had some ideas on that, but we didn't have a chance to talk about it, and that's one of the things we talked about is suppose you or the other women were brought in to the company commander's office

to clean up or what have you and, he says you know, somebody's got to be the meritorious whatever, you know, E-2 out of boot camp and sleep with me and I'll make you a meritorious E-2.

So now he's said that. You're stuck cleaning his deck. He's not doing anything else, just that. You have any thoughts about what -- where that ranks on the pantheon of --

MS. MORROW: The context is still the same. You're still stuck there, and to me I would construe that statement as just as much of a threat as, you know, what happened in our instance, because in that case, you still have nowhere else to go. What am I going to say to an E-7 while I'm scrubbing his floor, beat it?

BGen SCHWENK: So even though he couches it in terms of a positive, a prize, you worry about the underlying negative of if I say no, what's going to happen?

MS. MORROW: Sure.

BGen SCHWENK: Okay. All right. The

other question I had was on the scope of where the military life. So we have being a civilian, if you're a recruit, we have -- who makes some kind of sexual, you know, sleep with me and I'll make you an E-1. Then we have boot camp. Then we have follow-on professional schools, and then we have, you know, on a Coast Guard cutter somewhere or a Coast Guard installation somewhere.

In all those places, there's somebody, except when you're a civilian, but you want to get into Coast Guard. So he has some power. But in all the others, there's superiors, you know, enlisted officers, whatever they may be, and they have some degree of control and authority over you and your future.

Do you see a difference at all in the situation from one to the other, or do you see them all as close enough?

MS. MORROW: I think it's difficult to say. All I can speak to is my own personal experience, which was what occurred in boot camp.

I will say, I don't know. Like I'm in police now, you know, and it's very paramilitary. You still have the option to walk away in certain instances, but I mean I don't know.

I mean on a ship you really don't. You still don't have an instance, an ability to walk away. You're still stuck. You know, with the recruiter, I guess it would depend on the individual and how they felt. You know again, we have to remember I was 22 when I went in, so and I had grown up kind of seeing my brother-in-law be a drill instructor at Paris Island.

So I already kind of knew the life and knew what I was getting into. But some of these kids, you know, that are dealing with their recruiter, they may not. I mean that's -- that's their ticket in, and some of these kids have nothing and that's their way to, you know, have a life and to get educated and to get away from awful situations.

So you know, I can't personally attest to what that would be like, and I'm not going to

try to put myself in that, you know, I can't put myself in that person's shoes. But I think, you know, any time you have an abuse of authority like that, that's bad news.

BGen SCHWENK: Thank you.

CHAIR JONES: Maggie, did you have a question?

MajGen WOODWARD: Yes, and let me add my thanks. I know everybody's said this, but after doing the investigation at Lackland and one of the things that really hampered our efforts was the inability to get victims, survivors to speak out, even long after, because it's very difficult. So I really do appreciate it, and it helps us form our opinions.

But I'm concerned with just looking at the language here we talk about with position of authority, because in my mind, and I'm the non-lawyer. Let me start with that, so this is the problem.

But does it really make prosecution more viable for the cases we're talking about, or

do you need to be able to prove that trainees don't have the means to consent or are not consenting, because if you look at this terminology and take it out of the initial training environment, let's say, or let's just take it into a squadron, for instance.

So I can have somebody in a position of authority, which means superior rank. So an E-6 superior to an E-4 or E-5, and if we don't have to show anything more than that person has, is in a position of authority, then has sex with that person subordinate to them, you still have to prove that there's some abuse of authority.

And in the case that you mentioned, clearly there was abuse of authority and that would be, in my mind, the same as threatening or placing that person in fear.

MS. MORROW: But there was -- I'm sorry. There was no explicit threat made by him. He just, you know, the threat was the environment and the inability to get out of it.

MajGen WOODWARD: Right. But if you

take that out of the initial training environment and you put that anywhere else in the military, and you -- you know, I just think we really have to carefully look at how this is worded, and put this -- take this out of the initial training, drill instructor environment, and you're opening -- you're either opening a can of worms, or you're saying the same thing, that it doesn't help you in the initial training environment.

HON. FRANKEL: Well, I think there's a difference -- I mean the phrase is using their position of authority. So it's not -- first of all, I would say -- I would not be for making it a crime just because someone had a higher rank, to have a sexual contact with a subordinate.

Maybe that's improper. I don't know. I wouldn't want to see somebody going to prison for that. But this -- if you use -- I mean maybe there's a better way of saying it. But this is about using your authority, using your position of authority to do something against somebody's will.

MajGen WOODWARD: Right. But doesn't that put the burden to prove how they used their position of authority? I mean I'm trying to get to if you're prosecuting this, and once again, I apologize because I'm not someone who would do this.

I'm someone who would sit on the jury, or someone who would send it to a court martial, and in my mind, with the wording that I see here, it would -- I would still have to prove how they used their authority to derive that -- basically put the person in fear. Which to me would be no different level burden of proof than what we have right now.

HON. FRANKEL: Well, none of these other subsections fit, would fit. In other words, what would the prosecutor prosecute now under? We're trying to say you're not threatening death, right? I mean you're not making them unconscious. You're not giving them a drug. But I think what we're hearing is that maybe it's more implicit than explicit.

It is you're told when you are in the military, it's just a different mindset. You are told to obey orders. That's basically -- well, the military guys could probably. I don't know who here is from --

MajGen WOODWARD: I'm a Major General --

HON. FRANKEL: Well you would know. When you tell people to -- you're not -- see, you're fooling us, because you're not wearing your rank. But I mean aren't -- well you know better than me. You're told to obey the orders. I mean that's what you're supposed to do. If everybody starts challenging orders in the military, you would have total chaos. I had this discussion with my son.

(Simultaneous speaking.)

MajGen WOODWARD: Actually, there's a very big difference, and we spend a lot of time teaching people about what is a legal order or not.

HON. FRANKEL: Yes.

BGen SCHWENK: I think maybe from a prosecutor's perspective, one of the things that Congresswoman Frankel's proposal tries to do is get away from all the concerns we have in the threatening section.

Rather than worrying about all the things that we're worrying about or we're going to try to clarify it in an executive order, she says when it comes to this kind of action, where it coerces or compels somebody by virtue of their military position, let's not even worry about all that stuff. Let's just write it out, make it clear, there it is. I think that's what she --

MajGen WOODWARD: Yes. Just my concern is just if I take this out of the initial training environment, and so what's the level of proving that somebody is using their position of authority, and using that throughout the entire spectrum of the military.

To me, that just seems problematic, and so we want to, you know, make it completely okay, you know, if you want to change it to an

initial training environment, then that's where you basically take away the ability of the recruits to consent or not consent, it seems to me.

HON. FRANKEL: Well I know for a victim, I think I understand. I think I understand what you're saying. I think you just have to -- you know, when we hear that there are thousands of sexual assaults in the military, and that most people are not coming forward, to me that's a big problem that we have to address.

On the other hand, let's just be -- I mean practical. I mean listen. There's going to be situations where there are consenting adults. I mean that's a military thing. I don't know. I just -- I hate to see a consensual, a real consensual activity result in somebody going to jail. That would be, I think, not a good thing either.

But if you're on a ship, to me any time -- if someone takes advantage of their position to sexually assault someone, I don't

really to me there doesn't seem to be a difference where it occurs. That to me is a crime. Now what you're saying is how do you prove it?

So I'm just going to tell you my feeling from the end result. It's bad. I don't care. If I was a victim, if I was on a ship or in a classroom, it would be bad.

MajGen WOODWARD: And ma'am, let me clarify. We're all trying to get to --

(Simultaneous speaking.)

HON. FRANKEL: No, I think you're asking a good question.

MajGen WOODWARD: --you know, that we use.

CHAIR JONES: Did someone have a question along this line?

PROF. SCHULHOFER: Yes.

CHAIR JONES: Jill, you go first. So I think the two of you are next.

MS. WINE-BANKS: Well first of all, I want to join everybody in thanking you both for

being here, and I read about your case in the materials that were provided to us, and it is, as the general said, better to hear you in person, and that I know for sure much of what you've said will affect language that I want to make sure goes into this explicit and implicit threats.

But also the belief that something will happen as opposed to fear, because if I read correctly the results of the case that you were involved in, in Megan's case she said she wasn't afraid, and that's what killed the prosecution.

But she might have been asked a question what did you think would happen if you said no? Had she been asked that question, she might have said my military career would have been affected, and that should be enough.

So we will be looking at all of these ways. So please be confident that you have not fallen on deaf ears. We are taking it seriously and we'll do what we can.

HON. FRANKEL: Oh okay, uh-huh.

MS. WINE-BANKS: And do think that if

we change the word, for example, that she had to be in fear to that she had to have a reasonable belief, that that would have allowed the prosecution to go forward based on the facts.

HON. FRANKEL: Well I'll just say -- listen, I'm not -- I don't have any sense of -- that this is the only way to take care of this problem. I thought I'd come in with a suggestion. But my job, I felt, was to bring this issue forward and let you hear a real story, and let your expertise take over.

(Simultaneous speaking.)

CHAIR JONES: And I just want to interject one comment, which is to say it's very important to signal, if not the Statute and in the executive order or maybe both, the fact that this type of conduct can be charged under 120, and that's I think what we're all grappling with here, because it's obviously been shied away.

Using 120 for abuse of authority has basically not been the go-to prosecutorial, you know, weapon. So that's exactly where we're at,

and seeing it written out, using their position of authority several times was a graphic way to show what I've been talking about.

Now I know Professor, you had a comment or a question?

PROF. SCHULHOFER: Yes, yes. Well, I also want to thank both of you very, very much for coming here and especially Ms. Morrow for your courage and very compelling way that you presented this issue.

I know it must be very difficult and painful for you even to be here. I can't imagine what it's been like to go through this many, many times, as I'm sure you have, and as I'm sure it's necessary for you to do. So thank you very much for that.

My concerns are quite similar actually to General Woodward's, and I think for the one non-lawyer in the room, she presented the lawyers and the prosecutor's precise problem with proof beyond a reasonable doubt, better than any lawyer or law professor could have done.

So my concern is not that your proposal might go too far. I'm worrying about whether it will really do enough to do the job for us, in a situation where the prosecutor is very aware of his responsibility, and where defense counsel is certainly going to zero in on the language that General Woodward mentioned, using.

Now it gets very technical, but defense counsel -- the words that I worry about are "using" and "compel or coerce." So in a situation where a defense counsel is going all the way to push back on this, do we need to worry in these situations of a recruit with training instructor or officer on a ship and maybe some of the others, to say well yes, they had a sexual relationship. But was he using his position of authority to make that happen, or did it happen in some other way?

Did he coerce or compel the subordinate, or was she in her own way, in some way party to this? So that's where some of us

have had on the table and been struggling with the idea of what is sometimes, I think, misnamed as a strict liability offense.

I think it's better thought of as per se prohibition, because if a superior officer knows that he's not permitted to have a sexual relationship with a subordinate, he knows that. If he does it, it's not a strict liability offense. He knows that he's committing a crime.

The question is whether either across the board, which I think none of us are willing to do, or whether there are discrete contexts in which we should say look, the dangers of this are so great and the countervailing justification for allowing people to do this are so limited, and somebody falls in love with their recruit. So wait eight weeks. I mean what's the big deal?

That's why I think some of us are struggling with the question of whether perhaps we should go further than this, and worrying that perhaps despite the fact that we feel the same motivation to solve the problem, but then we

worry don't we need to maybe take it another step further in order to really be sure that we did?

HON. FRANKEL: You know, who knew this was going to be so complicated? Let me just start by -- and thank you. I mean you're obviously very thoughtful. It's very nice. I mean it's great to hear that you've really been trying to plow through this.

First of all, I want to say this, and I know you will not allow the complexity of this keep you from doing something. I mean there was obviously some kind of -- it was an injustice there that we do not want to see repeated. This per se -- I know there's a lot of people who would agree that there should be a quote-unquote strict liability per se.

Again, you know, I hear the pros and cons of that. What you -- yes, I would say should it be prohibited let's say in a training situation? Let's say we say the answer to that is yes. But is the violation, do you consider that as egregious as a rape, a real rape, or

where you don't have a consenting adult? That's what I'm saying.

That gets very tricky, and again, do you put your victim in a much worse position of let's say it's truly a consensual situation, where she's now or he's going to lie under oath and put the victim in a bad spot.

So I'd say no. I mean is someone going to -- will somebody -- in other words, it's one thing if someone comes forward. What if they don't come forward because it is a consensual relationship, and somebody gets wind of it? That's another, right.

PROF. SCHULHOFER: If a proposal like this is on the table, I think it would have to be made very clear that the subordinate was not committing a crime, and we sometimes have that within prisons. We have that within prisons, where they say oh, the inmate is committing an infraction. We're not going to have that.

HON. FRANKEL: Right, right, exactly.

PROF. SCHULHOFER: And in a way, I'd

be interested in Ms. Morrow's thoughts about whether, in a training situation for example, is it possible for recruit to genuinely consent freely?

MS. MORROW: I do think so actually. You know, in that instance it was completely unwanted and, you know, say my husband had been my drill instructor. You know, you never know, you know. I can't speak to how people would, you know, think in that situation, if they maybe did meet the love of their life as their drill instructor.

Like she said, I mean there are instances where, you know, that could happen and, you know, did that person commit sexual assault or rape? Not really. You know, it's kind of unfair to maybe put that on, you know, and as you said, it might not be authorized, but -- and they've definitely, you know, done something they shouldn't have done. But I don't know that --

Again, it goes back. I don't know if the punishment will fit the crime in this

instance.

HON. FRANKEL: This is hard, because I know -- I heard Jackie Speier, and she was involved in that whole experience, investigation I think that the Major mentioned. I think she would absolutely say there should be a strict liability. I mean I've heard her talk about it.

So I don't think it's out of the question. I'd just say for me, I leave it to you. This is almost above my pay grade at this point really. This is --

PROF. SCHULHOFER: Well, you're the one who will decide.

HON. FRANKEL: But I do think this. I do think this. I do feel strongly that -- I think a 120 change would have to be, actually come back to Congress, right? I really do think Congress should rectify this. It's not that I have a problem with an executive order, and maybe it's a quicker way or something that could be done in the meantime, because we all know about Congress these days.

But this has been an area, sexual assault in the military actually has been an area where we've had some very good bipartisan work done, and I think at some point Congress should get a shot at correcting this situation, based on a recommendation that would come out of here. You know, maybe it's a two-step.

Maybe it's an executive order that can go into play a little quicker, and then a recommendation to Congress, so that we can actually correct this, what I think is something missing from the law here. Whether it's my proposal or a different way to do it. That's -- I leave it to you all.

PROF. SCHULHOFER: Just one follow-up question. Thank you both for that comment, and it certainly, you know, I think your reactions about that, even in a training environment maybe there can be consensual choices. I think that's important to know.

My other question is really on a somewhat different topic, and I hesitate to ask

it and you should not hesitate to not answer it.

HON. FRANKEL: Okay.

PROF. SCHULHOFER: But I think one concern that some of us have had, I can't speak for the whole committee, but I've heard it from many of my colleagues, is that if we work out a very detailed fix for many of these different provisions, and work hard on it for a year, many of our proposals will interrelate with one another, to try to create a comprehensive hold.

And many of us then think well if we present this to Congress, we know that Congress has the right and the obligation and the freedom to tinker with pieces of it. So we can't and shouldn't be able to present something to Congress with an all or nothing, you know. It's like a fast track Pacific trade agreement. We can't say it's just up or down and you can't touch it.

HON. FRANKEL: Yes, right, right. Yes, right.

PROF. SCHULHOFER: So one thing we

worry about, and maybe you could help us think about the process, is there some way that we could think about the vulnerability of proposals to amendments that can be made in committee or on the floor, that would kind of pull a thread unwittingly, but you know, that would make the thing unravel?

CHAIR JONES: Or wittingly.

HON. FRANKEL: Yes. Well, you know, I would guess that your -- where the pushback would come would probably -- not necessarily be from Congress, but would be from outside of Congress, you know. It would be military pushback. That's my guess. But the military people could answer that better than me.

I will tell you this. There was a lot of bipartisan concern and actually when I brought this issue forward, the folks that I dealt with, my colleagues who were in a position to say basically yea or nay, they were Republicans, but they basically said we want to turn this over to a panel.

I mean it was the Congress that created this mechanism. So I would hope that Congress would respect it, because where Congress -- they came to me, and in the end they turned out they were correct. They said this is much more complicated than you think, you know.

(Laughter.)

HON. FRANKEL: I was easy. I got up to give a story, and I said there's an injustice, and they said we agree with you at that point. Let's send it back for much more deliberation and reflection, and I have to say my colleagues were correct about that. So but is your -- so is your concern --

Well, with Congress, of course your concern is warranted. But you know, we could do something stupid anyway, right? I think that at least if you're going to spend all this time and you do have a corrective suggestion, then what I would say is we get a bipartisan group. Don't make this a Republican or a Democratic initiative.

I think, for example, we could use -- there is a Bipartisan Women's Caucus that I think would be very open to embracing what comes out of here.

MajGen WOODWARD: Or the Sexual Assault Caucus?

HON. FRANKEL: Yes. I guess is there -- yes. We have so many. We must have -- there are so many caucuses now. But yes, and I think both -- you know, and I think both men and women would be interested in this.

CHAIR JONES: Well thank you. Thank you for that advice. Did you have a question Lisa?

MS. FRIEL: Yes. I had another question for Ms. Morrow, because it came up about -- we're looking at what will make prosecution of what you're talking about -- the ability to do that under Article 120. We all agree that has to happen, and but we also brought up something about reporting, and the reporting is so low.

So my question is kind of about

reporting, because when we look at the Statute here. So as we said, there's rape that has certain kind of physical acts you have to do to accomplish it, and then there's sexual assault, where you can get 30 years.

And one of the things now under there is -- reads as threatening or placing another person in fear, and there's a definition of that, and one of the thoughts we have is expanding the definition. So not changing the Statute, but expanding the definition.

And my question to you is, I want to encourage reporting, if we can. So as a victim of the kinds of things you were a victim of and as Megan was a victim of, when you look at if somebody said to you, you know, let's figure out should we report this or not. Does it even fit in something serious?

When you hear the words threatening or placing another person in fear, does that resonate with you and say yes, see, it is a sexual assault and we're going to go report this?

Or is the fear, when you just hear that word, that makes you think it had to be fear of a physical injury, and so this doesn't cover it?

MS. MORROW: I mean if you're asking do I think it -- is it covered now in the language that's currently in use?

MS. FRIEL: Yes. If you read that, if you heard you have to be placed in fear for this to be that crime, would you read those words, placed in fear, as covering your situation or do we need to use different language, so that somebody who reads this goes this is clearly what happened to me, fits in the Statute and so I'm going to report it?

MS. MORROW: Well, so I mean I don't know -- I don't know if fear is the right word, because --

MS. FRIEL: That's what we want to hear.

MS. MORROW: Yes. I feel like just to, you know, a typical military person like me that would look at it, I would think, you know,

placed in fear just like that would be like --

MS. FRIEL: It's the wrong word.

MS. MORROW: Yes. I think I know what you --

(Simultaneous speaking.)

MS. FRIEL: I get it. Yes, I get it.

HON. FRANKEL: So what you're saying is in other words, you don't -- you're saying in fear with that. In other words, it doesn't have to be death or bodily harm, cannot be. But it would be fear of something else.

MS. FRIEL: Right, and my fear is that if all we do is expand the definition of threatening or placing someone in fear, which is basically later in the Statute, not the first thing a victim might look at to decide should they report, are we not going to be encouraging reporting?

You answered exactly my question. That was exactly -- or fear -- that you would look at this, any reasonable person looks at this, and you have made the bigger point,

especially in the military situation, and see the word as it's got to be fear of physical injury.

If we want people to look at that Statute and go yes, this is a sexual assault I should report, it needs its own section saying --

MS. MORROW: For what it's worth --

MS. FRIEL: --- something that's recognizable to you.

MS. MORROW: Yes. Your victims aren't flipping open the UCMJ to read it before they report. They're just -- I mean, and honestly we're not -- we had never looked at the UCMJ before we reported. We just realized that there was an issue, and we didn't care what it was called, we wanted it to stop.

And when we found out about Megan, which we didn't when we reported, we just had the harassment. In that case, you know, we wanted that to stop and then we found out about Megan.

But I mean the first time we opened the UCMJ for ourselves was when our Lieutenant Commander opened it and showed it to us, and said

this is why.

HON. FRANKEL: I want to ask a question, if I could. Had there been -- unfortunately, this company commander was also the sexual assault advisor or whatever. Would it have made a difference to have some -- a phone number or something that you could have called? I mean would that --

MS. MORROW: I think that's actually in place now, if I'm not mistaken, and I had reached out to the commander at Cape May, and he said that they had implemented some things like that now, which is good. I think that they have someone come in now and meet with the recruits periodically, if I'm not mistaken.

So yes, that absolutely would have helped, because the one person I contemplated talking to was our chaplain, but then I saw him in the hall kind of goofing off with the company commander.

So it was kind of, you know, oh. Like there was nowhere to turn, and you kind of know

how small a military or a Coast Guard installation is. They're very, very small and everyone knows each other, and that wasn't lost on us.

CHAIR JONES: Yes, Liz.

HON. HOLTZMAN: Congresswoman, I just wanted to follow up. In a way I'm going to ask the same question that the professor asked, because this -- it is -- 120, it's a really complicated Statute.

HON. FRANKEL: Yes.

HON. HOLTZMAN: And actually it was smart, if anybody said, you know, we have to think about it.

HON. FRANKEL: Yes exactly, it was.

HON. HOLTZMAN: Because the Statute has gone through three iterations in the last --

DEAN ANDERSON: Decade.

HON. HOLTZMAN: Yes, decade. Very short time. So it's extremely complicated to bring prosecutions, because it depends exactly on the date that something happened, and then you

have to prosecute under this Statute or that Statute. But even though it's gone through three iterations, it doesn't get better with age. This is not a good wine.

(Laughter.)

HON. HOLTZMAN: Trust me. And the more you read it, the more it creates problems, and part of our concern here is number one, is this Statute going to be understandable when a jury hears it, when the members hear it? I mean, are they going to say, oh, fear. Well, you know, she wasn't afraid.

HON. FRANKEL: Right, right.

HON. HOLTZMAN: Okay. So that's one issue. We also have another issue with bodily harm, which means any touching, not bodily. You don't have to cause any kind of harm. It just -- so we have that concern.

Then we have the concern about whether this conduct could even be reached. If you read all the definitions and stuff, whether it's even reached under this, because the language is so

inelegant, to use a diplomatic phrase.

And there are other issues here, and now, you know, we've been continually enjoined by, I would say, almost all of the military people who have appeared before us, don't tinker with the Statute again. But it's almost irresistible, because of the problems that we see, and we're concerned that if we do make a --

As you can see, people are spending a lot of time trying to really think through how to make it work and, you know, these are very smart people and law professors and people who are familiar with the military, and even a non-lawyer who's smarter than a lot of lawyers I know.

So we have the benefit of some very good thought here. So I just want to emphasize the point that the professor has made. My own view is that we come up with the best product that we possibly can and say yes, we understand. If we change the Statute, there are going to be these issues and there are going to be those issues. But we think that this is the best way

to do it, and then leave it to Congress.

But Congress will approach this, in my view, in a very fair and open-minded way. Am I right?

HON. FRANKEL: Yes, I think so, and you know you might -- I don't know if you have an opportunity, but maybe you could have some of the key Members of Congress come in. Do you have time to do that? I mean I think there are some obviously who are in a much more influential position than I am.

You can get maybe a couple of the chairs, maybe one of the chairs of the committees, and engage them in your conversation, because I think that might rally them, you know, to take up your changes.

HON. HOLTZMAN: I mean you have to understand -- actually you do already. I mean you have to, but Representative Frankel, this subcommittee, is just looking at 120. It has been looking at it since -- when did we start?

CHAIR JONES: April.

HON. HOLTZMAN: April.

HON. FRANKEL: I see that. I mean really, it's a good thing you don't have a bigger Panel, because it might get bigger, more complicated. I mean you have -- I will confess that I have heard a lot more things, ways than I have thought about. But I guess that's why you're getting paid the big bucks, right?

(Simultaneous speaking.)

HON. FRANKEL: I just hope that you can figure out some way to sort through this, you know, and so that -- listen, the object obviously is to prevent this from happening, not after the fact to have a good message and a good solid law, so that people know going in what's the right and the wrong.

CHAIR JONES: I can't thank you enough.

HON. FRANKEL: I can't thank you enough.

CHAIR JONES: This was a great session.

HON. FRANKEL: I really -- well whatever you decide, I will tell you this. I feel very good that there's a very thoughtful discussion going on here, and I really couldn't ask for more, and once you make your recommendations, I know we'll both try to do everything we can to bring them forward.

CHAIR JONES: We really appreciate that.

HON. FRANKEL: In a good, bipartisan way.

CHAIR JONES: Thank you so much.

HON. FRANKEL: I thank you all for your service.

CHAIR JONES: Thank you.

(Whereupon, the above-entitled matter went off the record at 11:31 a.m. and resumed at 12:55 p.m.)

CHAIR JONES: So we're going to re-open now our deliberations after our --- what I thought was a really terrific session with Congressman Frankel and Ms. Morrow. Dean

Anderson, I'm going to go back to you again and ask you, if you would, to give us a synopsis of what the presenters actually said in the morning, for those of us who missed it, in terms of how it bears on the issues, because while I got a lot out of reading your deliberations, I've been told by a number of Panel Members that a lot of your opinions were swayed by the presentations in the morning. So could you give us a little backdrop?

DEAN ANDERSON: Sure, and I would invite anybody else who was there -- because this is off the top of my head, I didn't prepare this portion.

My recollection is that the panel of prosecutors in general, I would say, were pretty comfortable with the panoply of options they had under Article 120 and 92 and 93. One of them --- each of them said that 92 and 93 are catch basins in a sense and can cover a lot of ground of misconduct including circumstances of abuse of authority and that each of them had pursued cases under those provisions.

One of the prosecutors was pretty adamant that those cases could be pursued under Article 120 as well and under a theory of not the threatening or placing another person in fear, which didn't have a lot of traction, except in the most extreme and obvious cases, but that he would pursue it under bodily harm as a non-consensual sexual act under bodily harm, under the bodily harm theory of a sexual assault.

So the prosecutors were also emphasizing what I think has become a mantra from -- although not coordinated, but a specific message that many of the military officers who work in this area have said to us, just a resistance to further changes in Article 120 because of the complexity of having three different versions over the course of the last 10 years. So the prosecutorial panel was not in favor of doing a lot of additional tinkering with the Statute.

The defense panel likewise, I think, on those core questions of feeling as if the

abuse of authority circumstances were adequately covered under -- nobody had a theory of bodily harm, but that they were adequately covered and that -- and there was some thought on both of those panels that there needs to be clarification of threatening or placing another person in fear, that that probably was not -- it was ambiguous, it needed to be clarified and that that would be a place, a location in which we may want to include more coercive abuse of authority under that rubric.

And I think that -- and then there were other panels, other presentations on sex offender registration and other things, but I think what -- we pressed the panelists hard. You know, we didn't -- we really tried to grapple with some of these core questions.

And then we had, I believe, a group of people who were in charge of training come and speak to us in the different Services and to talk about their experiences over the past few years in supervising large groups of trainees and

trainers and talk about their experience that this kind of thing has not happened often in recent memory and that -- this kind of thing meaning examples of abuse of authority or coercion in the trainer or trainee context doesn't happen that often. That was one of the upshots that came out of that --

MajGen WOODWARD: Let me clarify that. They don't see it from their view, i.e., it doesn't rise to the level of a court case.

DEAN ANDERSON: It doesn't -- I think that's fair, absolutely. Because we asked pretty specifically how many cases in the past, since you've assumed authority over this area.

And then we had a presentation on sex offender registration. So what moved us, what changed our opinions, I think, or what came out of this, was that we wanted to intervene in a nuanced way with the Statute. We didn't come to a final decision about whether or not we would change Article 120 or try to interpret Article 120 through an Executive Order. We figured that

that was a complicated question that would be -- at some cumulative point we would have to make a decision about if we're going to go in, let's go in and fix the whole thing, or let's not try to go in and let's try to do it at the margins through Executive Orders.

And because that seemed a larger question, we tabled it and really tried to identify that well, there was a sense that emerged from the panelists on all sides that there could be clarification and should be clarification of threatening or placing another person in fear, and that that may be a place where we wanted to strategically intervene, either through the revision of Article 120 or through Executive Orders.

So we tried to focus on, well, what would that language look like? And how does the 2012 version compare with the 2007 version, and what are the merits of the 2007 version, and did we lose something by the translation -- or not the translation, but the changes that happened in

2012? Because a number of the panelists, particularly, I believe, on the prosecutorial side, thought that there was some help that came from the 2007 version because of the examples that were given, although there was concern that it was interpreted as an exhaustive list as opposed to a set of examples of this kind of wrongful action.

So what I've tried to do here in terms of this draft that I promised would try to crystallize some of the issues. Obviously this draft that you have in front of you doesn't take into account any part of the discussion with the Congress Member and Ms. Morrow. That's an alternative direction we may want to go in, but this draft tries to pull together some of the language from 2007 and changes the language from 2007 in places where we thought that 2007 was either inadequate or too specific.

You'll --

HON. HOLTZMAN: Can I interrupt for one second?

DEAN ANDERSON: Sure.

HON. HOLTZMAN: Where is the 2007 language in our materials, please?

DEAN ANDERSON: Page 13.

LtCol HINES: It's on page 13, ma'am, of Tab 1. It sort of starts there in the middle of the page. Quote, threatening or placing that other person in fear, and then goes down to B.

HON. HOLTZMAN: Okay. Thank you.

DEAN ANDERSON: And that language is what became (7)(g), or (g)(7) --

HON. HOLTZMAN: (g)(7).

DEAN ANDERSON: --- (g)(7), in the 2012 version, right, which was very radically reduced.

So from the deliberations last month there was a sense that, well, maybe we should go back to some of the language from 2007. It might be fruitful. So I took the language from 2007 and then imported some of the ideas that emerged from our discussion.

Ideas, for instance, which include and are not limited to -- the language of not an

exhaustive list which precedes the examples. And I did it twice, which, you know, among other things, says it once and then is not limited to, says it twice, just to sort of completely underscore the notion -- yes, maybe I should -- just include inter alia, you know --

(Laughter.)

DEAN ANDERSON: -- just for a third time. But in any case, so that's one thing that we added here.

Another thing that we added here was changed reasonable fear to reasonable belief so that it was a way of softening a little bit the concerns around fear versus a belief that non-compliance would lead to a negative action.

And then the physical injury we agreed could go to either the victim or another person, and that the damage to the property could go to either the victim him- or herself or another person. And then the threat could be either expressed or implied. And then we didn't change one or two. Subsection 1, Subsection 2,

Subsection 3 we revised to include both the conditions of Service as well as affecting the military career. We took out positively or negatively.

And I took out the word military, based on the dialogue that we just had. I just want to -- full disclosure, took out the word military because of the notion that one could abuse a position of authority that was not military rank. You know, we just talked about that with the Congress Member. So I thought, okay, well, it's position, rank or authority of whatever variety, right? But that did not come from the deliberations then. It came from the deliberations just now, or the dialogue we had.

MajGen WOODWARD: It could also be a military member affecting a civilian, so that's the other thing I think about when I read this, affect the military career or conditions of Service. We could have a military officer use his or her position of authority to assault a civilian that works for them, but --

MS. FRIEL: If you took the word military out there, the second military, are there negative consequences to that, does anybody think? Because if you took that --

PARTICIPANT: To do what?

MS. FRIEL: If you took the word the way Michelle has it now where it says, affect the military career or conditions, and you've got a civilian who doesn't have a military career. They happen to have a career as a civilian in the military, but if you read this narrowly, they don't have a military career. If you took the word military out, it would cover your situation. Are there negatives in taking the word out?

MS. WINE-BANKS: Well, is it a crime, a military crime, for a military officer against a civilian, or would that be in civilian court?

MS. FRIEL: Oh, no, no, no. It's against the -- it still can be discipline.

LtCol HINES: The sentence of the victim of the victim doesn't matter.

MS. WINE-BANKS: Okay.

LtCol HINES: Military Servicemember, civilian.

MS. WINE-BANKS: So if a Servicemember rapes a woman in a bar in town --

LtCol HINES: Yes, ma'am.

MS. WINE-BANKS: -- it still wouldn't be a local crime?

LtCol HINES: Well, there might be concurrent jurisdiction, but, no, we could prosecute that --

(Simultaneous speaking.)

MajGen WOODWARD: But what I'm talking about is when somebody uses their authority for a civilian --

MS. WINE-BANKS: Right. No, I --

DEAN ANDERSON: So there's a maid service --

MajGen WOODWARD: -- department that works for them.

MS. WINE-BANKS: Right.

DEAN ANDERSON: -- that comes onto the military base and cleans the office of this

gentleman at night, right? And so the same thing happens, but with a civilian maid service, let's just say for instance.

So one thing we could do with that is to -- you could say, essentially that's an employment issue, that there would be a relationship between the two based on an employment -- that it would be an employer employee or a relationship.

I guess I'm trying to -- let me just back up before I go there and say, under what circumstances would we have an analogous situation other than employment? Are there other analogous circumstances in which one might have authority over a civilian that could be deployed and abused in this way? You see where I'm headed?

MajGen WOODWARD: But I think you cover that with position, rank or authority.

MS. WINE-BANKS: But on the affect side.

DEAN ANDERSON: To affect the --

MS. WINE-BANKS: The career or conditions of Service. And actually Service would then have to be changed, too.

DEAN ANDERSON: That's what I was saying. Service suggests Military Service.

MS. WINE-BANKS: Right.

DEAN ANDERSON: So it could -- conditions of employment.

MS. FRIEL: Let me just say one thing more -- sorry. Go ahead.

HON. HOLTZMAN: But there is a deeper problem here with the --

MS. WINE-BANKS: It's too specific.

HON. HOLTZMAN: -- which is it requires a threat. She said there was no threat.

MS. FRIEL: She felt an implicit threat due to the conditions.

HON. HOLTZMAN: Well, what was the -- I'm not sure that that's really true. What was the threat going to be? Something bad was going to happen.

MajGen WOODWARD: Right.

HON. HOLTZMAN: But would you have the threat that this would affect the military career? I mean, does it have to be -- that's what I'm concerned about. This requires --

(Simultaneous speaking.)

CHAIR JONES: You know, they expressed a problem of, if they bring it to anybody's attention, they may not get out of boot camp quickly enough. They may --

(Simultaneous speaking.)

MajGen WOODWARD: But how do we know that she isn't consenting. I mean, I'm serious. I'll tell you that I interviewed MTIs that -- in fact one of them that is now or was engaged when I interviewed him and I think now is married to one of his victims, to be honest with you. But he was sure that they all consented because they adored him. And so he is not implying a threat. He really thinks he's using his charm to --

CHAIR JONES: As opposed to his --

MajGen WOODWARD: He doesn't believe he's coercing --

CHAIR JONES: --- his uniform.

MajGen WOODWARD: -- right, and they may be perceiving a threat, but it is not necessarily sufficiently specific to meet the standard of affecting their military career or conditions of Service, or to be considered an implied threat. They believe it, but he doesn't imply it.

DEAN ANDERSON: So here's where we get exactly to this issue, is where we get to the core problem with not revising Article 120, because Article 120 has language that says threat, and it says fear. So those two core issues -- just to crystallize this and put it on the table, those two core issues, the challenge -- what we're doing here is working around that. We're trying to work around the word fear and we're trying to work around the word threat.

But if we think that threatening or placing another person in fear does not capture what happened, then I think we've got to ask ourselves if we want to revise Article 120 more

in the way -- and I think we don't necessarily want to do it based exactly at all on what we have submitted here, but at least it's a theory of, you know, abusing positions of authority to compel or induce compliance. That's a different theory than the threat or placing another person in fear.

And we don't get -- what we're trying to do, I think, with this that we just typed up from last time, is try to jimmy in this thing, which is the abuse of authority to compel compliance or to induce compliance, with the language of the Statute as it currently stands.

MajGen WOODWARD: Well, so can I ask something that --

MS. WINE-BANKS: Well, it does say course of conduct, so it's not just --

DEAN ANDERSON: Yes, I put that in on the basis -- I put that in.

MS. WINE-BANKS: Yes. Oh, you added -- okay. That's a good add.

DEAN ANDERSON: I added that.

MS. WINE-BANKS: It's a good add.

MajGen WOODWARD: But can I ask a question that's separate from the language, and that's -- it's literally the concept that I need to get my head around, and that's the issue that -- let's say it's a he/she. It's just easier for me to separate it by saying the he is the drill instructor and the she is the trainee.

So where he really is not threatening her and believes that just by asking her to do something that it is by his own, you know, charisma that's making it happen rather than his position of power -- so he in essence is really not abusing his power. He is just --

PROF. SCHULHOFER: In his eyes.

MajGen WOODWARD: Yes. But she is threatened by his position and his authority. So I guess, you know, you have to ask the question, is that really abuse of authority on his part, because he doesn't recognize that she is doing it from her belief --

(Simultaneous speaking.)

PARTICIPANT: That's a jury question.

MS. FRIEL: But, no, I think it is because we're making a decision, a -- I don't know how to say it, but, a societal decision that whatever he thinks in his mind, it is an abuse of power because of everything we've heard about the relationship.

And to me it's no different than the married man that used to come in, you know, the immigrant, into my office and go this is my wife and basically I'm allowed to do anything I can to her. In his mind, he could. We said no as a society. We said you can't. You can't rape your wife. We're telling them, and you're going to tell them in training, we have now decided by adding some kind of abuse of authority. I don't care what you think, that this is consensual. It's inherently coercive and inherently --

(Simultaneous speaking.)

MajGen WOODWARD: Well, then we should just say that there's no consent. Then I really think you should take out the consent. I mean --

MS. FRIEL: And just go to --

(Simultaneous speaking.)

MajGen WOODWARD: -- and just go to that extreme.

PROF. SCHULHOFER: No, I -- yes, I think Maggie is raising a different point. Your guy saying he doesn't know that it's illegal to beat the hell out of his wife -- and I think all of our officers know that it's illegal to have sex without the person's consent. His problem is he doesn't think she's not consenting.

MajGen WOODWARD: Right.

PROF. SCHULHOFER: And that's just a -- he's not in any doubt about what the social norm is, but he thinks she's willing.

MS. FRIEL: But how is that different than in civilian law? We have a number of areas, statutory lack of consent, right, where factually someone is consenting. A 16-year-old is consenting factually like that, but we have said that person can't consent because they need added protections. So --

(Simultaneous speaking.)

PROF. SCHULHOFER: This is the --

MajGen WOODWARD: But then I have to go to the -- yes, I mean, if we're going to do that --

(Simultaneous speaking.)

PROF. SCHULHOFER: This is the debate we've been having, and I'm probably as sympathetic as anybody here to the strict liability or per se illegality idea, that's why I asked, is it conceivable that somebody would consent voluntarily? And I was kind of surprised by the answer, but I have to take the answer.

I'm still drawn toward the per se idea, but if we feel that that's a bridge too far, and if we feel that there should be some requirement of coercion or -- then it's the issue that Maggie was putting, that if we're not taking the per se illegality, then there has to be something in the facts that shows coercion factually.

And I had the same worry that Liz

Holtzman did, because when I listened to her story -- and I'm thinking, you know, suppose I'm the prosecutor and I have that on the record. I didn't hear in her story any threat. I wasn't going to say to her, oh, you were never threatened. She felt coerced. She felt coerced, but what she kept saying on the record was I felt I had no choice.

So what was the threat? There was no specific threat. And so that makes this -- I mean, a jury should be persuaded, but it makes it tricky. It makes it --

DEAN ANDERSON: At least under this language --

PROF. SCHULHOFER: Yes, it makes this language --

DEAN ANDERSON: -- it's very tricky because this language says threat, and it says fear.

PROF. SCHULHOFER: Yes, this --

DEAN ANDERSON: That's what --

(Simultaneous speaking.)

PROF. SCHULHOFER: -- this language makes it hard to get to a place that should not be hard to get to.

MS. KEPROS: Well, and like what we heard this morning in response to your question, we heard from the panelists last month, time and time again, there are consensual relationships among people in these dynamic situations. It's not necessarily the stereotype I think we're imaging when we're worried about the drill instructor going after the recruit. Sometimes the recruit is older. Sometimes that person is more mature. Sometimes that is the person who's pursuing a romantic relationship. And so, I get nervous about anything in that liability universe for that reason.

PROF. SCHULHOFER: And what threw me for a loop was when he said that several of the young women in the recruit company compete with each other to see who can get the instructor in bed first. Who knew, but, you know, that -- I mean, if that's what's going on, that's hard to

see that as a crime on his part.

HON. HOLTZMAN: But isn't there -- but the instructor -- it's a military crime, not 120, for the instructor to have those relationships. Isn't that true?

MS. KEPROS: Yes. Every branch of Service has regulations that prohibit it, and they're all subject to prosecution under Article 92 just for violating an order above and beyond everything else.

MajGen WOODWARD: Right, but then you just get the 92, which is --

MS. KEPROS: Right.

MajGen WOODWARD: -- what he got.

MS. KEPROS: Right.

MajGen WOODWARD: But you can see that the survivor is frustrated because it means we're not serious about --

MS. KEPROS: Well, and her experience was inconsistent with what we heard from some of the prosecutors about their ability to already bring these crimes under Article 120. I think

you could have prosecuted at least the Megan story under the bodily harm Statute because it was not a voluntary kind of consent.

CHAIR JONES: I honestly -- I'm getting into your persuasion here. I think the bodily harm theory works better.

MS. KEPROS: Yes, I think it --

CHAIR JONES: Because it's about consent.

MS. KEPROS: It has to be a free will thing. Remember that? Voluntary, free will. It has to be the kind of consent that you have the ability to actually give, and you don't if you're in this power and control dynamic where you are subject to the mandate or the will of this trainer or whatever that position is called in each branch.

HON. HOLTZMAN: Well, another approach aside from the bodily harm is, to take the situation of abuse of authority, make that per se, except allow a defense of consent. You just have -- so it would be her language here, using

their position of authority except where the victim consents.

So, you have the possibility of showing that in fact, the victim consented. You couldn't bring that prosecution if in fact the victim consented.

MS. KEPROS: What do you do then with some of the facts as they were described from the Coast Guard situation where there is in the legal opinions -- or, I don't know what these things are called, the Tab 4 and 5 things -- where they say, she said it was consensual. She just said she didn't feel like she had a choice, and the pressure kept mounting, and in her brain she's going to say I consented.

And as a defense attorney I think I'd be able to cross-examine her and get her to say, I consented. I consented. So if you inject that word, I think you might run into sort of a disconnect between how a layperson understands and uses that word and what the law is trying to get at.

CHAIR JONES: So she can say yes because she doesn't want to say no --

MS. KEPROS: Yes.

CHAIR JONES: -- or because she's afraid to.

MS. KEPROS: Or feel afraid to.

CHAIR JONES: Right. Right.

BGen SCHWENK: Well, maybe the place to address it is in the definition of consent when we get around to Issue No. 1. Because remember, on Issue No. 5 we all decided that whether we do it in a two-step or a one-step process, the bodily harm issue, we all decided that somewhere in this Statute we're going to recommend there be a straight non-consensual sex crime. Nothing more is needed. So the issue then becomes sex -- I mean, consent.

Well, if the issue then becomes consent for that, now you have a sexual assault crime. It's non-consensual sex. And now we can write something when we write the comments to amend the consent definition to talk about in

boot camp or in a situation where there's this relationship. You consider all the circumstances and you may determine that those circumstances such make a freely given consent not freely given.

MS. WINE-BANKS: Maybe you add it to the part that does define capacity to consent, and one of the elements of capacity is the relationship of authority between the parties and whether that eliminates the capacity of consent in the same way that alcohol or drugs might eliminate the capacity.

DEAN ANDERSON: It makes it a strict liability offense, which I thought we didn't want to do.

MS. WINE-BANKS: No, no.

BGen SCHWENK: Well, it doesn't if --

MS. WINE-BANKS: No, it's just one of the facts that you would consider.

BGen SCHWENK: -- it wasn't a freely given -- you're back to consent again, and the defense can put on their defense that there was a

freely given consent. Here's all the facts that occurred and why I conclude it's freely given consent. And the Government can argue, no, here's all the facts it wasn't freely given. It's another consent case. And, but we've given some guidance that tries to make it easier for -- maybe not easier, but clearer for the Government in making its argument.

HON. HOLTZMAN: And the other possibility would be a presumption that there's no consent in these circumstances.

PROF. SCHULHOFER: But it could be overcome.

HON. HOLTZMAN: But it could be overcome.

DEAN ANDERSON: But what is the circumstances? One of the things that we've tried to do --

HON. HOLTZMAN: Maybe you want to limit it to boot camp or --

(Simultaneous speaking.)

DEAN ANDERSON: Yes, but see that's

what we've tried to avoid.

HON. HOLTZMAN: You can make a presumption. You can say that it's presumed that if there is a trainer or a trainee; define it as you want, and whatever circumstances, that there is no freely given consent. But it can be rebutted. In other words, Dear John writes the victim. It was I loved -- thank you very -- I love you. It was a wonderful night, blah, blah, blah.

MajGen WOODWARD: So you reverse the burden of proof in that case? Is that what --

HON. HOLTZMAN: Correct.

MajGen WOODWARD: Okay.

HON. HOLTZMAN: Not that you reverse the burden of proof. You keep the burden of proof, but you presume that when there's a trainer or trainee situation there's no consent. But there could be consent, and you're allowed to defend. It would be allowed to show that there's consent.

MS. KEPROS: That's a weird area of constitutional law. Yes, presumptions in criminal cases. I think we would need to dig into that.

MS. FRIEL: They had a rebuttal presumption in one of the older versions that got overturned, right?

MS. KEPROS: I think that caused some of the 2012 --

(Simultaneous speaking.)

MS. FRIEL: Oh, is that it? Okay.

(Laughter.)

MS. FRIEL: I just wanted to mention --

(Simultaneous speaking.)

MS. FRIEL: -- to think about one thing as we craft this. With the exception of Maggie, we keep saying -- we got a bunch of lawyers in the room thinking like lawyers and law professors and things like that with presumptions and definitions of consent, and I want us to get back to the idea of both, one, we don't have the

most experienced prosecutors and defense attorneys to -- the Statute speaks to jurors and it's going to speak to victims. And when you start saying we're going to change the definition of consent, that's a little more sophisticated. That defined it in there and used language like that.

And even when we -- we just came to this idea of changing the definition of threatening or placing another person in fear, we all agreed that -- and we heard fear means to people physical injury. If we want to do something about the situation and we want it to be clear and we want victims to understand we are covering them if they're -- however we phrase it, there's an abuse of this position of power and authority, and we want the jurors to get it -- the jurors, if they hear at first blush when they hear the crime read to them, okay, this is possibly fitting in there and we're going to look for facts, but there's clearly a subsection that's talking about this, then we really should

discuss the idea of putting the subsection in, however we read it, and making it about this and not trying to --

DEAN ANDERSON: In one --

(Simultaneous speaking.)

MS. FRIEL: Yes, and not trying to play with the threatening or placing in fear or consent.

PROF. SCHULHOFER: I'm afraid what I'm going to say is just going to make it even more confusing, but I find myself being pulled in two completely opposite directions depending on what image comes to my mind.

So one image is I hear the things that people are saying. I look at the language and I think it's not tight enough. A defense attorney is going to find a way to get around that. It's not going to guarantee the result or is not even going to make likely the result that we want to assure, which is to make sure that people don't get away with stuff in those situations. That pushes me one way ultimately toward a per se

rule.

On the other hand, I think this is a sex offense. It has all the baggage that goes with it. I start hearing the voices of the prosecutors who say we can get this without calling it a sex offense, without triggering registration and all the other consequences. We are ourselves as prosecutors see people come before us and we think they're going to be convicted, they're going to be discharged, but we don't want to make them a pariah for the rest of their entire lives.

And so, that way of thinking makes you think loopholes are good. In other words -- not, but if 120 winds up being narrow than it ideally should be, then that's not so bad because there's something else -- it's deliberately narrow because we want these things to be prohibited and dealt with in a less -- in a more flexible and less harsh manner.

And so that's -- so I go both those ways. I don't want any loopholes in this on the

one hand. And that was my first reaction. If we had more flexibility in sentencing and we weren't worried about collateral consequences, I wouldn't hesitate to plug every loophole I could think of.

But then conversely, what they were telling us was keep it narrow and let us deal with it another way.

DEAN ANDERSON: So the only thing I would say to that, Stephen, is that the description -- Ms. Morrow's description of this offender, he's a sex offender and he deserves the consequences. I think the consequences are too draconian culturally, legally across the board, but to the -- but that's a question we all need to answer.

PROF. SCHULHOFER: Well, no, he --

DEAN ANDERSON: But he --

PROF. SCHULHOFER: I don't want to be the devil's advocate --

DEAN ANDERSON: But he's using --

PROF. SCHULHOFER: -- and that was the devil.

DEAN ANDERSON: -- his authority to obtain sex from multiple people and he --

PROF. SCHULHOFER: Well, no, he only had sex with one person.

DEAN ANDERSON: He's obtaining sexualized interactions and contact.

MS. WINE-BANKS: She thought there was probably more.

PROF. SCHULHOFER: Well, I mean, I don't want to be the devil's advocate; let's go off the record here for a minute, figuratively speaking, but looking as a defense attorney he would invite these -- he would order these women to come to his quarters. His approaches to them were gradual over a period of time. He didn't -- it's not like the classic case that I think of where he orders somebody to his office and says take off your pants. As she described it, he had her -- and I feel so uncomfortable saying this, but he had her come, clean up. He would get closer to her. Then stand more closely than she felt comfortable --

MajGen WOODWARD: Well, what predator --

DEAN ANDERSON: This is what they do.

MajGen WOODWARD: Ninety-nine percent of predators do it this way.

PROF. SCHULHOFER: Yes, but it's sexual harassment.

MajGen WOODWARD: No, this is their build up. They're testing the victim because --

PROF. SCHULHOFER: Yes.

DEAN ANDERSON: -- to see whether or not they object.

MajGen WOODWARD: Right, because they don't -- they want the victim that's not going to, right --

PROF. SCHULHOFER: Right.

MajGen WOODWARD: -- so that they can get away with it.

DEAN ANDERSON: Right, and --

(Simultaneous speaking.)

MS. FRIEL: -- sexual harassment until there was the contact.

MajGen WOODWARD: Until there was contact.

MS. FRIEL: So that was sexual harassment. Megan was a --

(Simultaneous speaking.)

PROF. SCHULHOFER: That was --

MS. FRIEL: -- but didn't charge it. And I think we're trying to make sure Megan's case can be charged as a sexual offense.

MajGen WOODWARD: But you're saying that this is not a sexual predator and I'm saying that this is exactly what a sexual predator does.

MS. KEPROS: Except it's also what a young man does who is courting someone.

MajGen WOODWARD: No, not -- I'm sorry.

MS. KEPROS: Yes, it is. Yes, it is. They get to know someone, they start spending more time together, they --

CHAIR JONES: Yes, but they don't start with the overlay of authority that permits them to --

MS. KEPROS: I don't disagree. I'm just saying --

(Simultaneous speaking.)

MS. KEPROS: I'm just saying I see the tension here. I don't think you can draw conclusions that necessarily every time somebody engages in flirtatious, manipulative or even downright disgusting behavior that therefore that means they're a, quote, "sex offender," whatever that is. Because even though it's the same bad behavior that is happening when someone is offending sexually, it is a socialized behavior of how people get to know each other in social discourse. And again, it's not necessarily the way that I think it should be. I'm just -- I think we got to be honest about it.

Go to a fraternity party. You think somebody's not going to talk to somebody, offer them a drink? You think somebody's not going to hang out with someone, spend some time together? It doesn't have the overlay of authority, but that is the only thing that makes this situation

different. Otherwise, we wouldn't criminalize this behavior at all.

MS. FRIEL: Well, it is a big thing and it's also --

MS. KEPROS: It is a big thing.

MS. FRIEL: -- it's a culpability big thing, too. He knew what he was doing. When he was using his power and rank to pick the blonde, blue-eyed girls every class to come in and do these jobs, he knew exactly what he was doing by putting them in that position. You know what it's much more akin to, the professor or the teacher that tells you to come in and do something and you feel kind of like you have to and -- both by age and position, and then you get sexually harassed. So I don't think you can say it's normal behavior. And we're dealing with this situation. We're not dealing with the general world. We're dealing with people in positions of power.

MS. KEPROS: I just think you have scenarios where people, maybe wrongly, can

persuade themselves that what they're doing is okay, that is something the person wants and it is something they like. I'm not saying that's true and I'm not saying that's fair or that it shouldn't be criminal.

MS. FRIEL: And that's the point.

MS. KEPROS: I just think you've got to -- you can't just leap to certain conclusions about somebody's mental state or motives.

CHAIR JONES: But we're talking about charging something here. We're not talking about what a jury's going to find. He can say what he wants to say and the woman can say -- or the --

MS. KEPROS: Absolutely.

CHAIR JONES: Right.

MS. KEPROS: The leap I guess I'm trying to avoid us making is saying this behavior means X, when the reality of any prosecution, of any trial is going to be a lot more complicated than that. And that's something that we need to be sensitive to because the situations are not always going to be as black and white.

We heard a very persuasive case today for a scenario that sounds nightmarish to me. I can't believe these women were placed in this position. As an American I'm ashamed. I can't believe we've done this to these people who have put their lives at risk. But I just think not every case is going to play out that way. And so, those are where we're struggling in what's often going to be a lot more of a gray space.

DEAN ANDERSON: So, I agree with what you're saying. Actually I agree with -- I love this conversation. There's a lot of interesting things.

PROF. SCHULHOFER: But when you said he was predator --

DEAN ANDERSON: No, no. What I said, assuming everything we heard is true, the piece of it that matters to me is the piece that's different between sexual flirtation and the use of one's authority to say you're the one who's the mouse in the house, or whatever the phrase was.

PARTICIPANT: House mouse.

DEAN ANDERSON: House mouse. Right. You come and clean my floor after hours, after taps. Right? It's that use of authority repeatedly that made that a different scenario for me. That's factually going to be different in every circumstance. Those are the kinds of facts though that I think make the difference about the use and abuse of one's authority in a context to obtain sex.

PROF. SCHULHOFER: But I'm sorry to interrupt. This is a question I asked Colonel Hines during the break. Was it aberrational behavior for that company commander to designate a person to come clean his office after taps? Is that aberrational? Is seems aberrational to me, but I --

LtCol HINES: It wouldn't be, professor. I think it would be pretty common across the Services that you might have a group, that an instructor will call a group of recruits in. Three or four people are going to come in

and clean their office or clean the head, or the bathroom, or some other place. I think it would be kind of weird for a male drill instructor to be calling a single female in, that I think anyone familiar with the training environment -- if you heard that fact, a light would go off, like this is strange. That's just unprofessional. And what else is going on here? So if it was one on one, I would say it is aberrational.

MS. FRIEL: So if what we write is about looking at facts and circumstances, right, one of those lists of the kinds of things you should consider, this would come up, this would exactly come up, that it is not just they met and they went out and they were flirting outside, because this is unusual and it followed an order to be somewhere alone with him as opposed to standing outside on the field after drill or something.

DEAN ANDERSON: I think I would resist an impulse to articulate a set of factors for a

lot of the same reasons why a list of --

MS. FRIEL: Becomes exhaustive, yes.

DEAN ANDERSON: -- factors becomes exhaustive rather than possibilities. And I think I still come back to but I'm open to being persuaded otherwise -- I still come back to the idea of using one's position, abusing one's position, using one's position to obtain compliance to sex. And I don't know that that's exactly the language. We've talked about other language, to compel or induce compliance, using/abusing their position of authority to compel or include compliance, something like that.

Because what that gets to -- first of all, it doesn't say, well, this only happens during training, which lasts 12 weeks in this military, in this branch, and 6 weeks over here, and it includes post-basic training and -- do you know what I mean? It doesn't get into any of those details. It just says the abuse of one's position to obtain compliance to sexual

interactions. And it focuses on this question of, well, how did the person deploy their authority to obtain access, isolate, demean, do a constellation of things that indicate that they are using their authority, not let's go out to have drinks. And that's inappropriate, but it's a way that we're flirting and I want to have sex with you. Do you know what I mean? It's not that. It's use of the authority to obtain access.

MS. KEPROS: Why couldn't that be addressed in terms of how we define incapable of consenting?

DEAN ANDERSON: Because my resistance to that has to do with the resistance to the notion that -- of strict liability or per se. I think that there can be circumstances that are consensual. And if we say that certain circumstances are non-consensual when there is what, a disparity in rank, it's basic training, it's the training after basic training, which -- what's the name of that training? But anyway,

tech training, after basic training. Right? And it's just so many specifics that create a group of strict liability offenses.

I'd rather -- the truth is that someone who has total control over a recruit or a person in boot camp has more authority to coerce compliance than someone does who's just someone who outranks someone else. And so their ability to coerce compliance by deploying their authority is less. And I think you get to it by -- again, I could be wrong about this, but my intuition is that it's not about consent, but it's about using -- focusing on the mind of the offender, it's about them trying to deploy their authority and the opportunities that it brings them in order to have access, in order to induce compliance to sex.

MS. FRIEL: And then you'd be in favor of using some language like that and making it (E), right? It's not a new --

DEAN ANDERSON: Well, the more we're talking about threats and fear --

MS. FRIEL: That's the way I'm starting to really lean. Stop trying to tinker with the word "fear" and "threatening and fear," and make it its own subsection, new crime going forward. Stuff that happened before the effective date of this Statute they're going to have to cobble into --

DEAN ANDERSON: But the harm --

(Simultaneous speaking.)

MS. FRIEL: -- fear or bodily harm or they're going to get stuck with 92. But at least going forward we've got something that's blatantly obvious this is what you should be going under. And good for jurors, too --

(Simultaneous speaking.)

MS. FRIEL: But remember, we still need to make it workable --

HON. HOLTZMAN: Wait, I'm not sure I understand the proposal. Can you just stop for one second so I can understand? Are you proposing to us the (E) that Congresswoman Frankel suggested? Is that really your proposal

now? So do away with fooling around with trying to explain threat and just working on a new (E) for sexual assault, or for rape?

DEAN ANDERSON: So this evolving in my own mind; I'll put that out there, as I think that it is in all of ours. If we look at Congresswoman Frankel's proposal, I would jettison the (6) under rape. I was not persuaded that that -- so that just as a preliminary matter I think that conflates rape and sexual assault. There's no reason to do that. This is more analogous to the provisions under sexual assault than it is rape.

So under (E) she said "using their position of authority." I think that's a little bit broad and I would actually change it to "abusing their position of authority to compel or induce compliance." And that makes it really clear that it's about abusing authority to obtain compliance or to compel somebody into compliance for the sex, the sexual act. So it would be "any person subject to this chapter who commits a

sexual act upon another person by abusing their position of authority to compel or induce compliance."

Now, that's a different way of approaching this than trying to redefine "threatening or placing another person in fear," which I think intuitively all of us think -- well, not even intuitively. The victim in front of us said there was not fear in that way, there was not threat in that way, in the traditional way that we think of threats and fear.

MS. FRIEL: One of the real benefits is even if we redefine it outside of traditional and we have this whole thing we drafted, the first thing the juror is going to hear is it's under the section about fear and they're going to -- remaining with them is going to be that's fear of physical injury no matter what long definition they hear later or what bench --

(Simultaneous speaking.)

DEAN ANDERSON: Yes, victim's on the stand. Were you in fear?

MS. FRIEL: And the minute they go no, because they think like her, it was physical injury, you're going to be losing cases that we think we should cover. So that's a real positive for doing it the way you just stated.

PROF. SCHULHOFER: I think it's good. I like the abusing idea because it gives you a caption for bringing in the nature of the conduct. And was it aberrational? Would it set off alarm bells?

DEAN ANDERSON: Were they trying to isolate? Yes.

PROF. SCHULHOFER: And the case law, civilian case law on coercion, one of the classic elements is isolating the victim. And it's not a formal element, but one of the things they always look for is a kind of predatory behavior that targets an individual and tries to maneuver her into an isolated setting. But it's a good rubric for a very open-ended possibility of bringing in those kinds of circumstances.

MS. FRIEL: And would we add a

subsection like this to -- a sexual contact crime to -- I guess to the lesser of the two, the abuse of sexual contact? That was an odd thing I think was just an oversight in this draft, because she had it in that -- in her first draft, right?

BGen SCHWENK: Would we then add a definition of what abusing the position of authority means?

CHAIR JONES: We could. We could avoid it.

BGen SCHWENK: Because otherwise, a year from now --

CHAIR JONES: We'll leave it open-ended.

(Simultaneous speaking.)

CHAIR JONES: I think we leave it. We leave it.

MS. FRIEL: Well we had defined it--

LtCol HINES: The question that I was going to posit being would you--

CHAIR JONES: I'm sorry Glen, I can't hear you.

LtCol HINES: The question I was plotting in my mind was if you recommended a new sub E for abusing a position authority, would you in any way tie that to consent and say if you find that they abused their position of authority to compel or coerce, then what you've basically said is there was no freely given agreement, you know, under the notion--because the defense is still going to raise consent.

DEAN ANDERSON: Well I think--

LtCol HINES: And so maybe just the follow on issue to think about, if you want to tie that new one to consent or not.

(Simultaneous speaking.)

DEAN ANDERSON: To compel or induce compliance actually makes it more, also specific because it forces not just I'm abusing my authority here and there, but I'm abusing my authority, you know, to do this, to compel compliance, the sexual act. So it's narrower.

CHAIR JONES: And I like induced as opposed to coerced because I think that we get

back to finding a better way to get at force. Now I, just to throw this out there, you can use your position -- I think you don't even need abusing, but you can just say using your position of authority to compel or induce. I mean, there's no added burden, I mean there's no objective. He orders her to come and be the house mouse; that's not an abuse of authority. It's only a use of authority in order to compel and induce. There's lots of things he can lawfully order with the intent to do that, so I'm just not sure abusing -- I don't know, somebody might in their head oh well, this has to be an order he is not supposed to issue. Maybe I'm thinking this out too--

MS. FRIEL: No, I think that's good, and it goes to the -- it's because by using the word abusing, we already started to think do we have to define what that means because of -- abusing we don't, we just use using instead.

PROF. SCHULHOFER: Well --

MS. KEPROS: Well what if you do order

her to be the house mouse, and that's a reasonable thing to do.

CHAIR JONES: And I'm just saying, the orders all the way along are not per se abuses of anything --

(Simultaneous speaking.)

MS. KEPROS: You do it to compel her --

CHAIR JONES: And then it becomes an abuse, but it also becomes a 120 --

PROF. SCHULHOFER: I'm not sure there's a real difference between them in the way we're thinking, but I instinctively kind of prefer abusing because it's a signal to the kind of thing that Lieutenant Colonel Hines was mentioning, where there's something about the conduct that sets off alarm bells. And this was -- we were -- I was trying to fill this out in my mind, because I have no idea how -- what a house mouse is. And if it's perfectly normal to have three or four people come in and say you know, you do the bathroom and you do this room, and

they're all working there together at the same time, that's a use of authority, and it doesn't raise any questions. Or even rotating each night a different person comes in, but what was the abuse was targeting a particular individual and making her come every time. And so that, it seems to me it creates a good opening for talking about whether what he was doing was aberrational.

HON. HOLTZMAN: Well to me, it doesn't matter whether it's aberrational because I don't really want to have this extra burden of proof to say well, you know, suppose he calls her in as the house mouse, and then at that point when she's there says, you know, take your clothes off.

PROFESSOR SCHULHOLFER: Well that's an unlawful order, isn't it?

HON. HOLTZMAN: No -- yes, but is this a 120? Do we have when he's -- I mean, is the calling her in as the house mouse the trigger to the prosecution under 120? And you can't -- you won't be able to use that trigger unless it's in

itself is an abuse. Well, maybe calling in someone as a house mouse is not an abuse. So where -- I mean the problem is you have to show that the triggering conduct itself is an abuse; I'm not sure you want to add that extra burden. That's all I'm saying, and I think it will create another burden. I mean, the use of authority to induce or to compel certain actions seems to me to be pretty broad, and I don't want to have the extra burden of showing, you know, this is not, you know, this is an abuse of authority.

PROF. SCHULHOFER: What I keep thinking about here is one of Henry Kissinger's most famous statements, that power is the ultimate --

CHAIR JONES: That's not fair, Professor Schulhofer. Going to Kissinger now.

PROF. SCHULHOFER: Kissinger would be convicted under this, because he said power is the ultimate aphrodisiac. That's what I'm thinking --

HON. HOLTZMAN: He should be --

PROF. SCHULHOFER: He should be convicted --

HON. HOLTZMAN: -- convicted of a few things, but anyway, not this.

PROF. SCHULHOFER: And that's why I would prefer the per se rule. But if we are deciding that we want to target aberrational, predatory conduct, then I think there's some value in creating more of an obstacle for prosecutors, making it a little bit harder to get a 120 rather than the alternatives.

LtCol HINES: I would just state if I could, Ms. Holtzman raised a really good point, and it goes back to what Laurie said. So I think you can talk about these various factual iterations, you know, until the cows come home about what you're going to put in a Statute, but I think any prosecutor would tell you, and I myself have prosecuted cases where I was showing a jury several things that an instructor or a recruiter did that were normal, you know. You can order a recruit to come to your office, you

can order the recruit to do this or that, but what I was saying was yes, going back to the predator notion, he was doing all of this for an inappropriate reason. He was doing it because he was a predator, and he was trying to isolate this recruit or whoever. And so you're pointing out, ma'am, things that might ordinarily be lawful, but the defendant is using them, you know, to complete his crime.

HON. HOLTZMAN: And that's why it might not be an abuse. And for example, suppose he says to her -- suppose you have two lawful acts: he calls her in as house mouse, and then he says and I'm going to make you -- give you this promotion or give you whatever this -- increase in rank --

MajGen WOODWARD: Meritorious--

HON. HOLTZMAN: -- whatever it is, right. That's lawful. And then he says, and now let's have sex.

MajGen WOODWARD: So he's abusing his power.

HON. HOLTZMAN: When? What point?

MajGen WOOODWARD: Because he's using it to compel her --

(Simultaneous speaking.)

HON. HOLTZMAN: But what I'm saying is if you need the abuse when he said to her be my house mouse, it's not an abuse. And when he said to her, I'm giving you this promotion, it's not an abuse.

MS. FRIEL: But when he ties it to have sex with me, that's when it becomes an abuse.

MajGen WOODWARD: So are you saying all you need is the to compel, that's all--

HON. HOLTZMAN: Basically, you have the authority to compel, as opposed to abusing your authority, because I'm just worried that you might not get abuse in these circumstances.

MS. WINE-BANKS: I think that using -- you raise a very good point.

CHAIR JONES: The abusing only happens if he uses it to compel, and that's the

conclusion you want the jury to find.

HON. HOLTZMAN: Yes, they shouldn't have to--

(Simultaneous speaking.)

HON. HOLTZMAN: I mean I'm totally agreeing, in other words, with Judge Jones.

MS. WINE-BANKS: Is there a difference between using their position of authority and the way you drafted it, Michelle, in the first one was using their position, rank or authority? I don't know if it makes a difference, just asking.

CHAIR JONES: Congresswoman Frankel's language is looking better and better I think.

BGen SCHWENK: People are going to ask what position of authority means; that's what they're going to ask. Every one of our issues is there was a Statute that had this language, and the JPP gave us a thing, what does this mean; what does that mean? So if we're going to use that term, then I suggest we define it.

MS. WINE-BANKS: Well, do you think position, rank or authority would cover all

situations and that that's clearer language than just position of authority?

HON. HOLTZMAN: Well maybe you don't need position of authority. Using their authority. Why do you need position of authority?

CHAIR JONES: Yes, we already know we're talking about Military personnel.

MS. WINE-BANKS: Well if we take it outside of the training situation, where it's -- it isn't the same thing. Does their -- someone's rank could be very influential in doing something, but it really is question of -- I think Liz has said it right, if you order someone to be your house mouse, that's a legitimate use of authority. If you order them to come in after Taps, that can be a legitimate use; if you order them to clean on their hands and knees, odd but maybe it's still not -- but if you're doing it for the purpose of putting them in a position where you will end up being able to have sex, maybe that's the bad thing. But I think what Ms.

Morrow was saying was it was the -- yes, he used his authority to get her alone, which enabled him to do what he wanted to do, but it was really the circumstances of their position that made her feel compelled to do what he ordered her to do; that he wasn't really using his authority, it was the whole system. I have to take orders; he orders me to this; I do it. So--

CHAIR JONES: But he was the actor who took advantage and --

MS. WINE-BANKS: Yes, right.

CHAIR JONES: -- and used his authority to do this crime.

MS. WINE-BANKS: Right.

DEAN ANDERSON: So the language using their position of authority came from Congresswoman Frankel, and the prior 2007, threatening or placing another person in fear, conceptualized this differently: military position, rank or authority. So it used those three, position, rank or authority. And that is -- they each imply something slightly different,

and you could imagine circumstances in which each one of them may be operational, but not the other two. And I do think that we could say using your position, rank or authority; it would mirror language that has been in Article 120 before. It covers -- it's a little more comprehensive, but it's not outrageous, it doesn't overreach, but it would say using their position, rank or authority to compel or induce compliance, and the abuse itself is using the position, rank or authority to compel or induce compliance; you don't need to add -- I think there is --

CHAIR JONES: The word abusive.

MS. WINE-BANKS: I think there's at least majority sense on that.

MS. FRIEL: And if it's helpful, I just googled the definition of authority, and it kind of fit perfectly here. Authority is defined as the power to give orders or make decisions; the power or right to direct or control someone or something. You know, that's what we're thinking of here, and that's exactly what these

people have, so that's the common definition of the word in Merriam-Webster, which is just what we want it to be.

MS. KEPROS: I'm just trying to think if there's anything in that that is overbroad in terms of that it would cover scenarios -- and like I need probably help from people who are in the military to figure out how this works. But you know, I'm just trying to think, okay, so what if you would get access to someone by virtue of your command. If you have sex with them, is that a crime?

CHAIR JONES: Say that again?

MS. WINE-BANKS: Non-consensual.

MajGen WOODWARD: No, but it says using your authority--

MS. KEPROS: You use your authority to put them in your -- you know, reach.

MajGen WOODWARD: No, it says to compel them to have sex. I mean, we can't forget that it's not 120 unless you actually have --

MS. KEPROS: A sexual act.

MS. WINE-BANKS: If I'm a commander and I say I want you in my unit. I've seen you perform; you're terrific. I want you in my unit. That's using my authority to get you in my purview--

MS. KEPROS: Right, but that's not--

MS. WINE-BANKS: -- but it's not the same thing as using my authority to compel you.

PROFESSOR SCHULHOLFER: That's all fine, and I don't have a big problem with use versus abuse. I think when you couple it with to, you know, use to compel, that is an abuse. The possible curve ball here, and I don't know how much practical importance it would have, but the problem is compel or induce because someone could use their authority to look really good, and induce somebody to be impressed by them and to consent. I don't think this would come up very much, but that's the kind of thing, somebody could use their authority to make everybody in the unit run laps and do pushups, with the idea that somehow that's going to impress some -- one

of the recruits with a great, you know, what a powerful Kissinger he is, and induce compliance.

CHAIR JONES: Why do you need the word induce? I mean, doesn't compel capture everything that we're talking about, or --

PROF. SCHULHOFER: If you take out induce? Yes, that helps narrow it, certainly.

HON. HOLTZMAN: So the -- but I thought that one of the concerns that existed was the quote unquote bribe concern, you know, where you're offering the promotion, where you're offering --

MS. WINE-BANKS: So that's where the induce is versus the compel? So if someone says--

HON. HOLTZMAN: So it would get the positive and the negative that was in the prior language.

MS. WINE-BANKS: Well, but I think we -- when we discussed it, we felt that inducing through a positive thing that you're not entitled to does not constitute rape or sexual assault;

that if I say to you have sex with me, and I will reward you with a weekend pass, I will reward you with a promotion, that's something you can say no, I didn't deserve that promotion, and so no, I don't want to take it, and I won't have sex with you. That was a different circumstance than I will punish you if you don't do this; then you have no choice.

MS. FRIEL: And that's where our head was last time, and then we just heard that she heard them both the same way, that a recruit -- and I don't know if she speaks for how many other recruits, but to her when we asked her that, she said, I hear it the same way, you know, you're offering me something, but I still can't say no.

BGen SCHWENK: There is an unstated, implicit negative disguised by your positive.

PROF. SCHULHOFER: That's the first inside the velvet glove.

DEAN ANDERSON: So on Stephen's hypothetical--

PROF. SCHULHOFER: Michelle, could I

just say one thing responsive to this, because I think Liz brought up a different section. We were talking about the express or implied threat, and we were talking about using the threat through use or abuse of authority to affect the military career or conditions of Service. That's one way we're addressing the problem, and then we were talking about the fact that that doesn't really deal with the situation of someone who's in authority that doesn't expressly or impliedly threaten any particular consequence. So then we have a separate subsection to deal with that. So I think we have two arrows in our quiver here, and so I think that may answer your concern, that we don't get to it--

HON. HOLTZMAN: I thought we were--I thought that the (E) was a substitute for this, or no?

PROF. SCHULHOFER: I didn't see it that way; I thought it's in addition--

DEAN ANDERSON: I think that they're--my sense--and this is a decision for the body--

but my sense was that in any universe, whether we add (E) or not, threatening or placing another person in fear needs further -- it is ambiguous, and it needs further clarification. Whether or not we clarify it quite the same way that we came to last time, given our dialogue here about solving the problem of abuse of authority fairly cleanly with (E), we still think that there are circumstances in which threats happen that we want to include some of these other things. Now how these two work together -- so I didn't see them as mutually exclusive.

HON. HOLTZMAN: But they might be because the problem I see is that this threatening or placing another person in fear, there's so many problems in that paragraph, that if we just -- it seems to me, the ambiguity at least that we know about, maybe I'm completely wrong, but the ambiguity has to do with the abuse of authority let's call it. And so if we address the abuse of authority in some other way, do we have to clean up this threatening or placing

another person in fear?

MS. FRIEL: And stated another way, right, the question might I think, if I understand it right, you're asking is if the only problem we solve in that subsection was in this context, and we have to think back to the all the witnesses, and we should ask you guys, but if that was the only place they needed that expansive definition, then we don't need to do it. But there may have been other places, and I don't know and I don't remember.

DEAN ANDERSON: Stephen will remember.

PROF. SCHULHOFER: I think from what you were saying, that the new subsection (E) could take care of this in more general terms, but I think with this provision, the threat provision would still be needed for peer-to-peer threats.

HON. HOLTZMAN: Oh okay.

PROF. SCHULHOFER: Right? I mean --

HON. HOLTZMAN: Right, okay. That's why I said if that was the only context, the

power imbalance, then --

PROF. SCHULHOFER: A peer can threaten to reveal something, to threaten your career--

CHAIR JONES: So I think I'm reversing on (E) a little bit, but in this context, every one of these, (A) through (E) basically says commits a sexual act upon another person by, and then it says threatening to put them in fear, causing bodily harm, making a fraudulent representation, inducing a belief, but it doesn't say to compel or induce compliance after each one of these.

MS. FRIEL: But that's not where we're -- that's not where we would put the (E) that we're talking about. The (E) we're talking about --

CHAIR JONES: Oh, I thought we were getting into the sexual assault.

MS. FRIEL: Oh I'm sorry. I'm sorry.

CHAIR JONES: And I'm just saying--

DEAN ANDERSON: So the reason we don't?

CHAIR JONES: Yes, I mean I'm sort of one of these people that like symmetry --

DEAN ANDERSON: I completely agree. I completely agree. So here's why we don't.

CHAIR JONES: We want the term abusing after all. But anyway, go ahead.

DEAN ANDERSON: Let me just -- let me throw this out as a reason. So what Judge Jones is talking about is this to compel or induce compliance adds a kind of specificity to the gerund using that we don't replicate in (A) through (D). The reason I believe we don't replicate it in (A) is that threatening or placing another person in fear is itself abusive; causing bodily harm is abusive; making a fraudulent representation, likewise; inducing a belief that is a lie, likewise; and using position, rank or authority is fine unless it's used to compel or induce compliance to the sexual act.

CHAIR JONES: So I prefer that to making it all right by simply turning (E) into

abusing their position of authority, cutting that off. Do you see what I mean? Commits a sexual act upon another by abusing their position of authority.

DEAN ANDERSON: So then we get into the problems, I think --

CHAIR JONES: I'm happy if nobody cares. I was just pointing out the --

DEAN ANDERSON: The lack of symmetry.

CHAIR JONES: -- the slight distinction there.

HON. HOLTZMAN: Well I think -- my own view is that I think Dean Anderson explained it very well; I'm persuaded by that. Because this is a neutral act, using their position of authority.

CHAIR JONES: Exactly.

HON. HOLTZMAN: So you have to further define it, whereas all those other things are not neutral acts.

CHAIR JONES: On their face --

HON. HOLTZMAN: Yes.

DEAN ANDERSON: Moreover, we decided I think as a subcommittee that we want to be able to identify ostensibly neutral acts of appropriate use of authority, but that they are deployed to obtain sexual interactions makes them -- we want to identify that, and we don't want to make it -- we don't want to get into the down the rabbit hole, well, but that wasn't an abuse of the authority to ask the person to be the house mouse or whatever the term is.

CHAIR JONES: Okay, I'm happy. I was right the first time.

DEAN ANDERSON: Okay.

BGen SCHWENK: So how does this work with, you know, I'll make you a meritorious E-2 if you agree to sleep with me? So I've used my position of authority to make a recommendation for E-2 to induce you to commit a sexual act; you say I'm all for it. Let's do it; I've wanted to sleep with you anyway. And so we do, and so is that a crime under this?

DEAN ANDERSON: Well consent is a

defense to any of these.

PROF. SCHULHOFER: Is it?

BGen SCHWENK: Well, where does it say that?

DEAN ANDERSON: I thought that we --

BGen SCHWENK: No, we said -- I thought we said mistake of fact was a defense, and consent was an attack on the Government's proof for those crimes under 120 where consent is an issue, but some of the crimes under 120, consent is not an issue.

MajGen WOODWARD: But freely giving consent is what you're getting at, so if she consents under those conditions, then that's not freely given because he induced her, right, versus -- you're the lawyers, can we just get back to freely given consent. There's a difference.

(Simultaneous speaking.)

MS. KEPROS: I'm really uncomfortable with how you just used induced, you know, because again, I feel like induced can be a -- well, it

can be of course effectively, or it can be, you know --

DEAN ANDERSON: That's a good idea.

MS. KEPROS: -- right, it can be a good idea. It can just be --

PROF. SCHULHOFER: In Jim's example.

MS. KEPROS: -- right, a desirous thing, right, like Jim just explained.

MS. FRIEL: So what if we lose -- let's go back to the first way we had the language, if you go back to compel, coerce words like that. If you lose the word induce, are we losing something that we want --

BGen SCHWENK: Well, we still have --

MS. FRIEL: -- making it impossible to cover something we want?

BGen SCHWENK: No, we still have our straight non-consent recommendation, remember? Notwithstanding the fact we know Congress didn't like that, that other meeting two months ago in New York City, and we all seemed to agree, we need to get that in there. So that's the base

level crime. So we still have that to always fall back on. These other ones, because then the issue is consent, you know. It was induced; were they like Ms. Morrow here, who didn't -- can say well I agreed, but it wasn't freely given because I was a recruit, and he was the company commander, and I didn't feel like I had any choice. I tried every excuse I could think of, and that was the end of the line, so -- you're not her, but the other lady, you know, and so I agreed. Well that's clearly -- you can argue that's not freely given consent. We have the baseline offense, we don't have to worry about threatening, we don't have to worry about using their position, we can go to the baseline crime. So there's always that, you know. What we're doing it seems to me, now that we've decided to put the -- if we still have -- to put the baseline crime in, these are just more specific ones to make it easier for the prosecution to focus on the bad conduct that caused it to become a crime to begin with.

MS. KEPROS: Right, because that's where they can already prosecute it as bodily harm, because it's already there.

BGen SCHWENK: Yes, we're killing bodily harm. Remember that recommendation?

MS. KEPROS: No, I know. I'm just saying, as it currently exists.

BGen SCHWENK: Right, yes. Right.

MS. KEPROS: When you say the baseline crime, our suggestion, and I think we have consensus on this, is that that is somehow going to become a crime that says non-consensual sexual act.

BGen SCHWENK: Right. Period. Right. So we always have that. So this is --

HON. HOLTZMAN: But I just wanted to point out that the definition of consent precludes consent under threat or fear or under the circumstances described, okay, of (B)(1). So that basically, (A), (B)(1)(a), (c) or (d) don't -- I mean you can't consent to those facts.

BGen SCHWENK: If we take them out,

right? We've taken the issue out.

HON. HOLTZMAN: No, not we, the Statute.

BGen SCHWENK: I mean Congress. Congress has taken the issue out.

HON. HOLTZMAN: Has already, yes. So I mean the question is also then whether we have to amend that section to include (E) if we add (E). Probably we would want to do that, and then -- so then the question we have is whether we want to use the word induce, and what's the objection to using induce there?

MS. KEPROS: Because it might be that the person is led to want to have sexual contact by that person's, you know, effective leadership or other motivation that they've given the party that they're engaged with.

HON. HOLTZMAN: But that's not the inducement. I thought the inducement was going to mean, or to me it mean not my wonderful charisma, but that I've given you a promotion, I've given you some gift, I've given you some

money, I've given you some --

MS. KEPROS: You know, General Woodward mentioned some event that she was at this week, where there were opportunities for cadets to have their photos taken with four stars, okay. Their rank provides some inducement in and of itself, aside from any --

HON. HOLTZMAN: For a photo.

(Off mic comments.)

BGen SCHWENK: I think the question is if we leave inducement in there, and it's a true consensual sexual relationship or activity, do we really want to make that a sexual assault? And see to me, if it's purely a look, I'll make you an E-2 if you want, but you've got to have sex with me, and I say man, I've been in love with her since the day that we began, now she's just everything I'd ever want in a woman, and I never thought I'd get this opportunity. Let's go. And so we do; why is that a sexual assault? In my mind, I wonder why it's a sexual assault. If there's -- so I think that's why --

DEAN ANDERSON: So does the victim complain in that circumstance?

PROF. SCHULHOFER: Yes, after she gets dumped.

BGen SCHWENK: Right, she complains afterwards, or one of the other persons complains.

MajGen WOODWARD: Can you capture the -- I guess what you're trying to do is capture the negative inducements, and I guess my point is can't you really capture those inducements that are -- that compel somebody to have sex by saying compel?

BGen SCHWENK: Well then we ought to just use compel.

MajGen WOODWARD: That's what I'm saying.

PROF. SCHULHOFER: So we could drop -- we could drop induce.

HON. HOLTZMAN: Well, the other possibility is to allow consent when you have an inducement.

BGen SCHWENK: Right, which then goes to the baseline crime of non-consensual sex.

HON. HOLTZMAN: No, because if you change this (8)(B) -- no, what is this -- yes (8)(B) where it says where a person cannot consent, the last sentence of (8)(B). It says , a person cannot consent under threat or fear under the circumstances described in (C) or (D), or under circumstances described in (C) or (D) of subsection (b)(1). So that means you can't consent to (A); you can't consent to (B) -- I mean, you can't consent to (A); you can't consent to (C); you can't consent to (D), so if we make (E) -- if we add -- if we could somehow add just the you can't consent to the compulsion part of the use of authority, then you could use -- then consent could be a defense. I don't know how you do that.

MS. FRIEL: So you're saying if you added a line, for instance, there in the definition of consent, which is I think what Glen was saying, that when whatever the words, when

one gives in basically, to an act of sex because they were compelled by the rank, position of authority, et cetera, that's not consent under the Statute.

HON. HOLTZMAN: Well we'd have to do something about the consent. If we added an (E), we'd have to decide whether we wanted to make consent -- preclude consent as a --

MS. FRIEL: Right, that's what I'm saying, by adding a sentence specifically saying --

HON. HOLTZMAN: Well not even a sentence; you just need to add --

MS. FRIEL: Well, the subsection.

HON. HOLTZMAN: Right.

MS. WINE-BANKS: If you eliminate consent in that circumstance, then you have created a strict liability.

HON. HOLTZMAN: Well, it had created a strict liability with all these other things, too. No, just based on rank though, we decided that it is possible to consent. So if you say

you cannot consent in that circumstance, then you have eliminated consent and made it --

MS. WINE-BANKS: Right, well that's the question.

HON. HOLTZMAN: Okay, so I withdraw my comment; just say we should consider how we want to deal with that.

DEAN ANDERSON: Agreed, and I, as the person who suggested this (E), I am -- I want to just ask if anyone's passionate about including "or induce", because it sounds like there are reasonable people around the table who are willing to give up or induce, and I think -- and I'm inclined to agree with them, but I want to hear if there is anybody who thinks or induce is necessary to facilitate the kinds -- for us to counter the kinds of behavior.

MS. WINE-BANKS: What does the dictionary say about compel or induce? What would we lose --

DEAN ANDERSON: That's what I want to crystallize.

MS. FRIEL: And while we're looking in the dictionary, we think about it I think factually with the Megan case; I think that's helpful to us, right? That would we lose the Megan case -- I think she felt compelled. I think if you had asked her in layman's terms did you feel compelled based on this, this and this circumstances, she would have answered yes.

DEAN ANDERSON: So the question is not -- but the question on the Statute is not what's in her mind; the question by this Statute is, is he deploying his authority, rank -- his position, rank or authority to compel, and I think the answer --

MS. FRIEL: And he can beat this case by saying I didn't compel her.

DEAN ANDERSON: Exactly, that's the circumstance. She may have felt compelled, but I didn't do anything --

(Simultaneous speaking.)

DEAN ANDERSON: But the induce problem is not going to -- it doesn't solve -- the

language of induced is not applicable to that circumstance. The defendant is always going to say -- but the defendant is always going to be able to say I did not use my position to compel; I used my position because I wanted my floors cleaned, and she was hot, and whatever, and she was attracted to me, whatever. That's always going to be the dialogue, and that's appropriate; those are the factual disputes.

HON. HOLTZMAN: But this is a different factual dispute. This dispute is not -- is just simply I didn't compel her. I never said, I didn't threaten her; I didn't force her. I just said you know. I'm giving you this promotion; maybe the whole conversation is recorded, so you don't have a threat, you don't have anything explicit, and all you have is this inducement. And she's going to say well, I felt threatened, and the jury's going to say that's not reasonable, or --

DEAN ANDERSON: So what does the word compel mean?

MS. FRIEL: I'm sorry, I thought you wanted induce. So let me read induce -- you want me to read induce and then --

(Simultaneous speaking.)

MS. FRIEL: So induce is to cause someone or something to do something; to move by persuasion or influence. So you've got your persuasion situation. Now let me do compel for you. But what I'm also thinking while we're doing this is some of our issue is if we want to add an (E), maybe we write it a little differently. It's not about what he's thinking he's doing, that he's compelling it; what we're all saying, it's the circumstances that are compelling it. It's her subjective belief based on reasonableness because of these circumstances. Now how we get to --

DEAN ANDERSON: So how about this. We get rid of compel, we get rid of induce, and we say using your position, rank or authority to obtain compliance.

MS. WINE-BANKS: I think we're in the

same position with that language, and I was just trying to write down language. I haven't quite got it yet, but I think --

DEAN ANDERSON: Obtain is neutral.

MS. WINE-BANKS: -- I think Lisa's got the right idea, is that we're trying to get to a thing where the sexual act is committed by the creation of the impression or by circumstances that let the victim believe there is no option, by circumstances of the defendant's rank, position or authority that make the -- create the impression that or make the -- create a reasonable belief in the victim that there is no option, something like that.

MajGen WOODWARD: What I'm hearing is you're taking away the responsibility for us to say that the person with authority is intentionally doing it, right? And I think that for me to be feel comfortable to say that's a sexual assault, is I need to feel that that person in authority intentionally compelled that compliance. I don't want it to be circumstance

that they thought someone was consenting, but that person was in fear, and they didn't know, but they're still sexually assaulted.

DEAN ANDERSON: So then my question of mens rea, though.

MS. FRIEL: But the intention -- then we better be careful about the word, because well Maggie, when you just said intentionally compel, so here's compel: to force someone to do something; to cause to do by overwhelming pressure. They go to the dictionary, and you're going to lose that case. If we're going to keep his mens rea, we better not -- we better make it broader than just the word compel.

PROF. SCHULHOFER: Are those the only definitions?

MS. FRIEL: I'm just reading -- I can keep -- to bribe or urge forcefully or irresistibly. It's clearly built into compel is some element of really forcing somebody to do something; we're talking about a circumstantial situation because of what these kinds of

circumstances are, and that's what we want to analyze, and I think we are back to, you know, her subjective belief and was it reasonable based on all the circumstances that she had to go along with this, you know. How do you put that in legal terms? She felt she had to go along with it.

MS. KEPROS: The circumstance is the rank or that authority that is causing the compulsion. And that's why I don't -- I'm not as concerned that you're not capturing the circumstance, because that is the circumstance, and that is necessarily going to be present if you're applying the language that we've been talking about. If it is using the rank or the position to compel, it isn't about some other kind of force or pressure; that is the force or pressure. So I think that does the trick; I'm not understanding what isn't captured in that.

DEAN ANDERSON: So to the extent that compel implies -- and I just looked up compel in a thesaurus; it's going to be fun to read this

transcript for someone who reads the transcript. But it is about -- the definition is force to act, and then the synonyms are bulldoze, coerce, constrain, crack down, dragoon, et cetera. And I think to the extent that compel implies a specific intent to apply overwhelming force, it may be slightly too strong. I was looking for something one step down from that, because the rest of these crimes under sexual assault are not specific intent crimes. You know, they don't require the specific mens rea; they require mens rea to -- a general mens rea to threaten the person and put them in fear. But we're actually making this slightly harder if we use the word compel, which implies coerce and overwhelming authority. Now the out is induce, but induce may be too broad an out if induce allows for positive circumstances in which there's willingness on the part of the -- or consent for lack of a better term.

But what if we said -- I want to go back to this and just flesh this out -- using

their position, rank or authority to obtain compliance. What that does is it creates a nexus between the use of the authority and compliance to the sexual act. It doesn't imply a very strong specific intent to overpower, but it also is not a big out that induce is. I'm trying to -- inartfully, but I'm trying to come up with something between coerce or compel on the one hand, and induce on the other hand because there's resistance to each for different reasons by members of the subcommittee.

PROF. SCHULHOFER: I'm going back to the discussion we had last time about the difference between bribery and extortion.

DEAN ANDERSON: Okay.

PROF. SCHULHOFER: And I lost that discussion, and I'm happy to put it aside and move on. I thought that bribery was, you know, making an offer of promotion, was just about as bad when you do that from a position of authority, and I thought that should be prohibited; many people felt otherwise. But --

and so fine, we move on. But going to induce is sort of reopening that issue and coming back to where I was. So you know, I think people should decide --

DEAN ANDERSON: Well, that's why I liked compel and induce, because they were two variations. They were bribery and extortion.

PROF. SCHULHOFER: But it's -- the one -- I was comfortable with bribery because it was really tied to a specific author, you know. I will do this for you if you do that for me. I was comfortable with that, and it didn't feel too open-ended, but having rejected my position there, now you guys, you folks are suggesting something that's even more open-ended because just an unspecific use of authority to induce compliance is that same kind of idea, but much more broadly stated.

MS. WINE-BANKS: That's why induce is challenging. I think obtain is a more neutral word, but I think in terms of this particular thing, the defense that the authority figure is

going to use will be same whether the word is compel, induce or obtain, and that is I didn't do it for that reason; I just had this -- this is my position; I gave a legal order to come to my office to clean it after hours; there's nothing about that that proves that I did it for this purpose. So we may be cutting too tight what we're trying to accomplish in capturing how the circumstance of authority leads to people saying yes when they don't mean yes.

PROF. SCHULHOFER: Regardless of whether you use induce or obtain, doesn't it capture the bribery situation and criminalize it?

(Simultaneous speaking.)

PROF. SCHULHOFER: And I know you folks didn't want to do that.

MS. WINE-BANKS: Yes, that's also true.

MajGen WOODWARD: I do. I was with you.

BGen SCHWENK: Until we heard her say that she doesn't -- Ms. Morrow said she doesn't

see bribery as any different than threatening.

DEAN ANDERSON: Than extortion.

BGen SCHWENK: It's the unexpressed other half of the equation, and so to her you can say I'll make you a star, and she sees it as and if you say no, your life is over as you know it, even though it's unexpressed. So that sort of led me to think well maybe you can go after both in the military context or some context.

MS. WINE-BANKS: Well, but the facts that you would prove would be her reasonable belief that he meant A and B, not just that he was going to reward her, but he was going to reward her or else he was going to do something bad.

MajGen WOODWARD: Which is why she's fearful of it, yes.

MS. WINE-BANKS: Right, so I'm not too worried about capturing a bribe that she said no. I don't -- so if we used -- at the last meeting, we were talking about the policeman who stops you and says have sex with me, or I will give you

this ticket for speeding because you were going 80 miles an hour, and you were going 80 miles an hour. You deserve the ticket; you're getting a benefit, so you can say no, give me the ticket; I deserve it; give it to me. You're not losing anything by that.

PROF. SCHULHOFER: But he's still using his position at the party to obtain compliance, so he's convicted under this even though he couldn't have been convicted under the bribery thing. So which way do you folks want to go?

MS. KEPROS: You know, one other thing just to highlight on that sort of bribery conversation. We did get written comments from Major Payne, who is one of the more experienced prosecutors that we've heard from a couple of times, and also does appellate work. And she specifically was concerned about that positive inducement kind of situation. She did not feel like that was equivalent, and specifically, she expressed concern -- it's Tab 3 in the materials

for today -- about a quid pro quo. And she said that's different, and I do not feel like I should be prosecuting somebody in these quid pro quo scenarios as a sex offender; it's not the same.

MajGen WOODWARD: Unless they have that belief that she talked about, and then you should be able to convict somebody not based on quid pro quo, but based on the fear of what would happen if she said no.

MS. KEPROS: Exactly. That's why I think if we try to somehow include situations that are the positive inducement, we're making a mistake, because what Jill just said is I think right. It's the or else, it's the fear that might attach to that, it's that implicit kind of threat that may be present, and that's certainly what the witness acknowledged, that's certainly the concern that I think a lot of people have brought up.

CHAIR JONES: So the end result is compulsion; you don't need the word inducement. You might have been induced, but you felt

compelled.

MS. KEPROS: That's -- I think that's the way we should be analyzing it, because you can be induced, and it isn't the same kind of nefarious behavior that we're concerned about. It's the fact that somebody uses an inducement to make you feel compelled that's the problem.

MS. FRIEL: And it goes back to though having to word it in a way that it's about what she felt, right? Subjective, and then you analyze it, was what she felt reasonable? Not what he intended to compel.

(Simultaneous speaking.)

MajGen WOODWARD: Laurie, I would ask you how -- what do you define or what do you change to make sure that you're addressing that belief, that fear aspect for the victim that says okay, if I don't do this --

MS. FRIEL: Reasonableness.

MajGen WOODWARD: -- you know, how do you put that in the language so that that -- a jury looks at it and understands that that's part

of their decision tree?

MS. KEPROS: I think you can -- I guess I don't see that as necessarily a problem in the language that we already even have, to be honest, because it is a fear that is, you know, at the heart of that. It's that, or else; that's something somebody is concerned about. I understand that concerns that have been raised, and I don't necessarily disagree with them about well people think fear is a physical threat of some sort. So I really don't have an objection that I, you know, to the extent I've thought about this, to language such as reasonable belief. But I just -- I think the point still needs to be that pressure -- I'm okay with the word compel, I think it gets at that I think in a pretty thoughtful way to be honest, because it makes the impetus for the action important, and that's something we really like in criminal law. That's why we require an actus rea and a mens rea. We do care about that the person is at risk of going to prison for a long time for engaging

in this conduct meant to do it, and that they were malicious or you know, had the bad intent to try to carry out the harmful conduct.

LtCol HINES: Judge Jones --

PROF. SCHULHOFER: Holding a practitioner responsible; the victim felt she had no choice, but he didn't realize it.

(Simultaneous speaking.)

DEAN ANDERSON: Yes, but this is about the general intent to use the authority, position or rank to compel. It can't be that that captures that circumstance. The defendant will always be able to say --

PROF. SCHULHOFER: But in saying obtained --

DEAN ANDERSON: Oh that's fair. That's fair.

PROF. SCHULHOFER: That's my concern.

DEAN ANDERSON: Yes. I don't like compel, I think it's too specific; obtain is pretty bland, and I'm willing to give up induce, but I think we may be left with compel. I don't

know of a better alternative.

MajGen WOODWARD: Is there a place you can insert the reasonable belief piece, then? That's what I'm trying to fit in, because a reasonable belief in the fear piece or wherever, but we haven't equated the reasonable belief with the compelling, and how do you tie those, how do you tie that in so that it --

PROF. SCHULHOFER: The traditional way to do it would be not to -- and it's maybe too fine a distinction, but I think asking whether her beliefs were reasonable really takes it too far away from his possible awareness or his culpability, so at the lowest level, you would ask whether he should have been aware that she felt she had no choice or that she felt compelled, that it should have been --

MajGen WOODWARD: And is that a reasonable belief?

PROF. SCHULHOFER: Yes, but preferably you would really say that he was aware, because otherwise you're still convicting him of

negligence, which is -- this is a pretty serious offense.

DEAN SCHENCK: I know I missed the beginning of the deliberation. I'm just wondering what conduct specifically we're trying to address that's not already covered under the threatening or placing the other person in fear?

DEAN ANDERSON: So a circumstance that we heard testimony about today was a circumstance in which someone commands their person who's in basic training to come and to clean the office, to isolate them, and then engages in a kind of grooming behavior to become physically proximate to them, and then engages in a request for a sexual favor as part of the detail that the person is engaged in in cleaning the room. And the concern is that that victim did not feel fear for physical, did not -- there was no expressed or implied threat, except -- it was just the use of authority to obtain sexual access and a sexual act. And so that's what we're trying to get at that's not covered or arguably not covered, and

Congresswoman Frankel was very adamant that there was a hole in the Statute for exactly that kind of behavior.

MS. WINE-BANKS: So what if we use language -- this is not articulate, but where the position of the actor creates a reasonable belief that there's no option. I'm not sure what the "that" is, but again, we're putting the -- we're putting it in the victim's mind, which I think is more important than having it be the defendant's intention, because it's just too easy as a prosecutor, it would be too easy to lose that case and have the defendant say that wasn't my intent, I'm sorry, I'm a commanding officer, and that's how it is.

DEAN SCHENCK: So I'm going to -- that's true, and the way you're phrasing it with abusing the position of authority to compel really puts -- I mean, we've got to decide what we want to do. Do we want to make it his abusing his authority, or the authority causing a reasonable belief on the part of the victim? We

just have to figure that out, plus the other thing is, is it going to objective view of the victim, or are we just going to -- or is it going to be a subjective, you see what I mean? Because some of the complaints about the Statute are the focus is on the victim, and it doesn't take into account the eggshell skull area of the victim, you know, like the victim was previously abused, the enlisted women who come in, who run away, who were abused from their homes come. That's not a reasonable objective standard, that's the victim who's previously been abused; that's the subjective version of what's occurring. You see what I mean? So I think we as a group need to figure out what is our focus, they're abusing to compel, or this person felt compelled, and is this person's standard a reasonable standard, or is it this person just felt compelled? I mean, I'm flexible as far as -- I just -- I don't mean to take off, but --

PROF. SCHULHOFER: I think Lisa may disagree because I know you feel very much that

we should focus on the feelings of the victim. But I think there is a general sense that at least that the victim's fear had -- the victim's expectations or situation sense has to be reasonable.

MS. FRIEL: No, I think so.

PROF. SCHULHOFER: I think that's a floor. But I still worry about a situation where you're saying that the jury might think the victim thought I had no choice; it was an offer. He meets her in the PX and he says hey, I'm not ordering you to come back to my office and clean the floor; I'm inviting you if you want to come back to my office after Taps and have some brandy with me. And she might think I really had no choice; I couldn't say no. And a jury might think that she was reasonable, and I might think he shouldn't have made that offer to a subordinate ever, and he's doing something against orders and wrong. But when you're talking about a 30-year prison sentence, I don't think we should take out of the picture the

question of whether he was aware that his behavior was perceived as coercive.

(Simultaneous speaking.)

MS. WINE-BANKS: Inviting her back for a brandy is not a crime. Inviting her back for brandy and then having sex is a crime.

MS. FRIEL: No, but the question is what level crime?

PROFESSOR SCHULHOLFER: She didn't think she had --

MS. FRIEL: -- a 30-year sentence, sex offense, a sex offender--

PROF. SCHULHOFER: Yes, exactly. She felt -- I could view the testimony that we heard today that she felt she had no choice.

MajGen WOODWARD: You're all thinking of the -- this is not, this doesn't split basic training from anything else, so if you're going to write it as it is, you also have to think in terms of the captain that has a lieutenant working for him and does the same thing, and if she says yes, are you really going to convict

that captain of sexual assault?

DEAN SCHENCK: Right, the squad leader who's 18 and the member of the squad who's a year younger.

MajGen WOODWARD: So what about that. What if we tried this --

PROF. SCHULHOFER: Just to answer Maggie's question, isn't the danger that the lieutenant testifies that she really had no choice, felt she had no choice and the jury believes that her -- that her belief was reasonable? You would be convicting the captain, right? And I think your --

CHAIR JONES: You're trying to talk about all of this, ignoring the fact patterns. There are going to be fact patterns where it will be an abuse of authority, but not just because he invited her back for brandy. We're going to hear more.

MajGen WOODWARD: You'll have to prove that.

CHAIR JONES: You'll have to prove --

MajGen WOODWARD: You'll have to prove that he compelled. See, I'm just saying I think there -- it has to be strong enough that if we say you have to prove it, that he compelled, or --

(Simultaneous speaking.)

MS. FRIEL: Then the (E), which requires -- the (E) comes off of the word by, right. Commits it by doing something. So what if instead of that, we make a subsection, what would it be, (4), so we don't have to use -- yes, it would be (4), we don't have to use the word by, and so it read commits a sexual act upon another person by using their position, rank or authority to establish or exploit circumstances that make another person reasonably feel compelled to engage in the sex act. You've got the reasonable -- then I don't have a problem with compel. You reasonably feel you were forced because he set up or exploited the circumstances by rank or authority.

MajGen WOODWARD: And then you're

putting in the reasonable --

MS. FRIEL: Then I cover a number of things when I say that.

PROF. SCHULHOFER: Doesn't it raise a --

(Simultaneous speaking.)

MS. FRIEL: Okay, so it'll start, because it'll be a sub (4), so under (B), it's any person subject to chapter who, it would be sub (4), okay, commits a sexual act upon another person then by using --

(Simultaneous speaking.)

MS. FRIEL: I'm sorry. so we could do it either way. Okay. So by using their position, rank or authority to establish or exploit circumstances that make another person reasonably feel compelled to engage in the sexual act.

MajGen WOODWARD: Reasonably feel compelled, it makes sense to me. I mean that is --

MS. FRIEL: And it's not him having to

do something with mens rea; he either established those circumstances, or he exploited them, because you could exploit your rank. How would that work?

DEAN ANDERSON: I guess I'm just not sure why we want to add an element to the offense that has to do with her mental state. This just says using your position, rank or authority to compel compliance. It's all focused on his mental state and his intents to compel. It's a high level, which I have complicated feelings about, but I think it's legitimate.

If someone has -- I'm going to use my authority in order to compel compliance to a sexual act.

MS. FRIEL: Because I think we're going to lose if he sits on the stand and says I didn't do that to compel, that is, to force. I didn't do it to do that; I took advantage, I made her the house mouse and everything, but I never meant to force her. And our whole issue with her is--

(Simultaneous speaking.)

PROF. SCHULHOFER: This is why Judge Jones was saying, there's going to be a lot of other evidence, and the jury doesn't have to fall for his story.

MS. WINE-BANKS: They don't have to, but I think as a prosecutor, I would say that's a defense lawyer's dream come true.

(Simultaneous speaking.)

DEAN ANDERSON: Well, so the problem has to do with the word compel. So we had a --

PROF. SCHULHOFER: No, it's the "to."

DEAN ANDERSON: Which to? Where?

PROF. SCHULHOFER: T-O.

MS. WINE-BANKS: It depends on the meaning of--

(Simultaneous speaking.)

MS. FRIEL: Did he do it to compel, or did he set up circumstances that made her feel compelled?

PROF. SCHULHOFER: It's, in order to.

MS. FRIEL: Right. If you put, in

order to, so he gets out of it by saying that's not why I did that. I took advantage of the situation, but I didn't do it to do that; whereas the way I phrased it, he set up those circumstances, and she reasonably felt like she had to give in to this.

PROF. SCHULHOFER: I think this is where I come back to Judge Jones's point and what we've heard from so many other witnesses. All of these cases involves lots of other facts, and if he wants to say oh, I had no idea, and then you say well, how come you did this, and how come you did that, and how come she kept saying no and no and no, and you kept insisting? Those facts are present; the jury is going to say no, that was -- you know, his defense is baloney, that was culpable. But if the jury can't be persuaded that he was a predator, then I don't think we should be --

DEAN ANDERSON: Who compels people --

PROF. SCHULHOFER: -- I don't think we should be in 120.

HON. HOLTZMAN: Can we take a break?

CHAIR JONES: Yes. Ten minutes or so.

(Whereupon, the above-entitled matter went off the record at 2:39 p.m. and resumed at 3:08 p.m.)

CHAIR JONES: This is a radical suggestion, but I would like to go off this for a moment just to hear what Jim was talking about before which is fundamentally changing bodily harm. Wasn't that -- and consent, for how that fits in with consent.

BGen SCHWENK: Yes, I was just trying to refer back to two months ago when one of the issues, I think it's 5, was what do we do about bodily harm?

And so, the proposal was get rid of bodily harm. And the reason we made that proposal is because Liz offered us $20.00 on the Working Group. We're cheap and so, what can I say?

CHAIR JONES: I do whatever Jan tells me.

BGen SCHWENK: So, we get rid of bodily harm and then we propose that we then have two replacements, one physical harm and one straight nonconsent.

And then, I think Maggie and a number of other people said, well, why, you know, segregate those two? Why not just do away with the physical harm and put in place of bodily harm the nonconsent?

So, everybody agreed there ought to be a straight traditional nonconsent crime for the first time in a long time.

The question was where? And so, all I was saying today was if that remains the position whether you do it as a two thing or a one thing, there's going to be a nonconsent crime, then this situation with the person who abuses his authority can be subsumed under that.

And, when you're going to look about the issue of consent, you could go to the consent definition which would be -- end up in the Judge's Guide. And, in there, you could say like

it does now, you know, oral or physical resistance is not required.

CHAIR JONES: Right.

BGen SCHWENK: And submission in the face of fear, blah, blah, in the face of a -- you know, a military authority, that of a superior is not consent. And so, you'd be getting at it from a different way.

I talked to Lisa for a minute about that, and she said, well, you know, one way to look at that is it doesn't address this issue directly. You know, you have a nonconsent Statute which doesn't address it directly and then, buried in three paragraphs, or by the time we're four paragraphs, whatever it is of the consent definition is the sentence about submission and whatever other thing we want to write.

And so, trying to grapple with an (E) raises the issue front and center and makes it easy for prosecutors if we do a good job to pull it out and use it directly, even though you could

use it through the nonconsent.

And as such, I was just saying that was an alternative we should remember.

CHAIR JONES: Right. I'm trying to think of how to organize this to go forward so we can -- because we've all thought, I think, that we would try to decide what we'd do with certain pieces and then look at the whole thing overall.

It would help me to have the Statute in front of me large, like on the wall or something so I can always -- PowerPoints for each section, you know, so we could actually always look at what we're talking about.

What are you two grinning about?

(Simultaneous speaking.)

CHAIR JONES: And then we ask for something else, right.

BGen SCHWENK: Yes, and I was going to say, Glen, being a Marine, he doesn't do computers. But, if you get him some butcher block paper, he'll tape it all up here.

CHAIR JONES: Well, anyway, leaving

that aside, does it make sense to see the -- for you and your Working Group, I assume, came up with this or just you, that's fine, too, to circulate what the Statute would look like with your changes with respect to bodily harm?

BGen SCHWENK: If we look at the read ahead materials --

CHAIR JONES: Yes?

BGen SCHWENK: -- and go to Tab 1, Page 6.

CHAIR JONES: Read ahead for today?

BGen SCHWENK: Read ahead for today.

CHAIR JONES: Right.

BGen SCHWENK: And then, Tab 1, Page 6.

CHAIR JONES: Are you going to embarrass me now --

BGen SCHWENK: No.

CHAIR JONES: -- because it's already here?

BGen SCHWENK: Okay. And so, this was the proposal that was Liz's Working Group, and

Laurie and I were on it.

And so, Proposal 1 was, as you can see, it had two bullets, one, get rid of bodily harm.

CHAIR JONES: Right.

BGen SCHWENK: And, the second one was replace it with this longer thing about offensive touching of another however slight.

And that was just to take care of the bodily harm issues without any danger -- I mean no one really liked that including our Working Group.

CHAIR JONES: Okay.

BGen SCHWENK: Proposal 2 is the one we really focused on and the first bullet there, get rid of bodily harm. Page 6.

And, the second one was, the nonconsensual as a replacement filler, and then we added another one with just the straight nonconsensual.

And, as I was saying, there was discussion that said, why bother with the second

bullet? Let's just go directly to the third bullet. So, we do the first bullet and the third bullet.

And, that way, we'd have a straightforward, basic crime of nonconsensual sexual act on another person, and we wouldn't have to mess with the definition of bodily harm because it'd be deleted from the Statute and would never cause us problems in the future.

And, the reason our Working Group proposed the middle bullet, the nonconsensual physical harm, was just to distinguish a straight nonconsensual sexual act without any physical harm from one where there was some physical harm but not enough physical harm to jet you up to the rape level.

And that's, you know, we can argue about that or discuss that and come to something. But, that's where we were on that. I think.

Comments? Somebody clarify.

MajGen WOODWARD: So, the importance of having the physical harm still in there is to

delineate it as a more serious crime?

BGen SCHWENK: Something -- and, your concern was that it makes it look like the basic crime is somehow really a lower -- I mean it's not even, relatively speaking, not just the rape one, but even to the sexual assault ones with physical harm, and from the perspective of the victim, they are just as severe and just as significant, and we didn't really need it.

I think other people thought not only that, but also, it made it simpler just to have the nonconsensual sexual act and then, if there was physical harm, that would be a matter that Members would consider or the Judge would consider when it came time for sentencing if there was a conviction.

MajGen WOODWARD: So, now it's this proposal without the middle one here?

BGen SCHWENK: No, no, they're both on the table. I mean I just briefed both, you know. So, one is what the Working Group said, do all three of these bullets, and then the only

discussion of doing something different was do the first and the third.

So, we need to resolve that. I think that's why it says unresolved because, at the end of our discussion, we had two camps. I don't think there was a third camp, but if there is, please speak from your third camp.

But, I think those were the two camps, and we need to -- you know how I am, have a vote and the minority people can decide because we talked about it a lot at that meeting. And the minority people can decide whether they want to write a rebuttal or talk to us at the next meeting.

Yes?

LtCol HINES: So, what I hear you saying is if you adopted 120(b)(4) which would be a new theory under (b) where we just have 1, 2 and 3, so 4 would go there.

But, you would -- and so, that would, I think what I hear you saying is, that would cover everything.

Say you have a situation like Ms. Morrow's situation, and the Government comes in and says, well, we didn't have the threats and we didn't have the fear, but you could still get at it with your new sub 4.

BGen SCHWENK: Then it becomes just a consensual thing.

LtCol HINES: Right.

BGen SCHWENK: And the Government can argue --

LtCol HINES: Kind of a catchall.

BGen SCHWENK: -- hey, we're talking about a boot in boot camp with a boss and, sure, there was no physical resistance, what did you expect? You know? And besides, look at the instruction. It says the Judge will instruct you, you know. You don't need that. There was no oral resistance. The Judge will instruct you. You don't need that.

And then we could amend the submission one to include this kind of an offense, and it would say, and sure, there was submission, but

the Judge will instruct you no consent on that.

So, where is the consent? There isn't any. She testified there was no consent. She felt she was at the end of her rope, and there was no freely given agreement. Is that the consent?

HON. HOLTZMAN: Can I ask a question? If it's (b), this would be a new 4 under sub (b)?

BGen SCHWENK: Mm-hm.

HON. HOLTZMAN: So, that would be 30 years imprisonment as a sentence?

BGen SCHWENK: Right, for the basic act.

PROF. SCHULHOFER: Well, one of the things we discussed in our Working Group as an advantage of breaking it out as a separate subsection was that in the specifications or whatever you call them, that delineate the punishments that the maximum for (b)(4) --

BGen SCHWENK: Could be different.

PROF. SCHULHOFER: -- would be lower. Could be, and I think it was our consensus it

should be lower.

BGen SCHWENK: Should be lower, correct. Thank you for reminding me.

PROF. SCHULHOFER: Yes.

BGen SCHWENK: I'd conveniently forgotten.

PROF. SCHULHOFER: No, this loomed large to me because it's taken me a long time to get my mind around the idea because even rape does not specify what the punishment is.

And, on the face of this, it doesn't indicate, you know, what the difference is between rape and sexual assault in terms of punishment. You have to go to that separate --

What -- I'm sorry -- what is this?

BGen SCHWENK: Manual for Courts-Martial.

PROF. SCHULHOFER: What is the term for this?

LtCol HINES: It's in the -- the punishments are in the Manual for Courts-Martial.

PROF. SCHULHOFER: Okay, thank you.

BGen SCHWENK: It's the branches of Government working together.

PROF. SCHULHOFER: Yes.

BGen SCHWENK: Seamlessly.

PROF. SCHULHOFER: All one harmonious --

CHAIR JONES: Was this presented last week or is this -- did this -- did the Working Group ever have a chance to present this earlier?

BGen SCHWENK: We did discuss it two months ago, we discussed it. And we ended up with the Working Group briefing the three bullets under Proposal 2.

CHAIR JONES: Right.

BGen SCHWENK: And then there being concerns expressed that, why do we need the second bullet; let's just go with the first and third. And after some fairly lengthy discussion, nobody had convinced anybody else and so, we went on to something else.

PROF. SCHULHOFER: Could I -- I'm sorry -- I was in the Working Group, but I was

not at that discussion at that meeting, as far as I remember.

I'm wondering if you do --

BGen SCHWENK: No, you missed the meeting.

PROF. SCHULHOFER: Yes.

BGen SCHWENK: You were on vacation.

PROF. SCHULHOFER: I was, I was. My loss, but your gain.

If you delete (g)(3) -- oh, (g)(3) is the definition of bodily harm.

So then, but, (b)(1)(B) would still be there?

BGen SCHWENK: No, that -- the third bullet becomes (b)(1)(B).

PROF. SCHULHOFER: The way -- the first -- under Proposal 2, is that what we're looking at?

BGen SCHWENK: Yes, but --

PROF. SCHULHOFER: The first bullet is to delete the definition of bodily harm. The second bullet --

BGen SCHWENK: Right.

PROF. SCHULHOFER: -- is you saying we don't need.

BGen SCHWENK: Okay, the second bullet under the Working Group proposal that you signed up for on vacation --

PROF. SCHULHOFER: Yes, right.

BGen SCHWENK: -- was delete the bodily harm definition; change (b)(1)(B) to this nonconsensual physical harm.

PROF. SCHULHOFER: Right.

BGen SCHWENK: And then, add (b)(4), the basic nonconsensual sexual act.

The other position was, do the first bullet, delete the definition of bodily harm and kill it, and then, on 120(b)(1)(B), put in the -- we'd have to change the language to make it fit -- the nonconsensual act so that the nonconsensual physical harm disappears, and you have the nonconsensual sexual act.

PROF. SCHULHOFER: And not have the third bullet point?

BGen SCHWENK: Right, it get subsumed into the second. It replaces the second.

HON. HOLTZMAN: Wait. Our first proposal was that we take out this causing bodily harm to another person. Got that?

And we insert, instead of that, the causing --

BGen SCHWENK: An offensive touching of another.

HON. HOLTZMAN: -- an offensive -- it would take the language of 3, the definitional language of 3, and we insert it instead of the word bodily harm.

So, sexual assault (b)(1)(B) would read, any person subject to this chapter who commits a sexual act upon another person by causing any offensive touching of another, no matter how slight, including any nonconsensual sexual act or nonconsensual sexual conduct. That would be nonconsensual sexual act.

So, basically, it would take bodily harm -- the language bodily harm and just

jettison it. Okay?

PROF. SCHULHOFER: That's Proposal 1?

BGen SCHWENK: Right.

HON. HOLTZMAN: That's Proposal 1.

PROF. SCHULHOFER: Right.

HON. HOLTZMAN: You'd also have to change something on sexual contact, but, you know, that's easy to conform it.

PROF. SCHULHOFER: What I didn't -- yes, I'm sorry.

HON. HOLTZMAN: Point number two, well, that was the quick and political result, I mean proposal.

More seriously, the second proposal, the alternative proposal was to make two changes.

One was to create a separate nonconsensual sexual act crime and the second would be to create, instead of the bodily harm, so that you would have something that was a little bit -- that was between a rape and a nonconsensual sexual act, there was some physical harm to create a physical harm instead of a

bodily harm Statute and it wouldn't have the nonconsent.

PROF. SCHULHOFER: Right.

HON. HOLTZMAN: Okay.

PROF. SCHULHOFER: So, that's the second bullet point under Proposal 2.

HON. HOLTZMAN: Yes.

PROF. SCHULHOFER: What I didn't understand was, and maybe I misheard, that some people were saying we didn't need the second bullet point.

HON. HOLTZMAN: Right.

PROF. SCHULHOFER: That, if we could adopt Proposal 2 without the middle bullet point --

HON. HOLTZMAN: Correct.

PROF. SCHULHOFER: But then, how would (b)(1)(B) read?

HON. HOLTZMAN: There wouldn't be a (b)(1)(B).

BGen SCHWENK: We didn't --

PROF. SCHULHOFER: It would be

deleted?

HON. HOLTZMAN: Yes.

PROF. SCHULHOFER: It would delete --

BGen SCHWENK: I think some of you wanted to keep it in there. Well, whatever. Whether it went there --

PROF. SCHULHOFER: I mean that's what -- I just didn't understand what the proposal was.

BGen SCHWENK: We never got that far to decide whether --

HON. HOLTZMAN: Well, it was my understanding, though--

BGen SCHWENK: -- it'd be (b)(1)(B) or (b)(4).

HON. HOLTZMAN: Right. My understanding was since you're taking out the bodily harm, it wouldn't be there anymore. So, you wouldn't have a bodily harm provision in (b), under sexual assault. You would have rape; you would have all the other three items. You'd have the other aspects of sexual assault, and then

you'd have another nonconsensual sexual crime. That would be it.

That was my understanding, maybe I'm misunderstanding.

PROF. SCHULHOFER: So, instead of completely deleting the middle bullet point, you would say the middle bullet point would be to simply to delete the entirety of (b)(1)(B).

BGen SCHWENK: (b)(1)(B).

CHAIR JONES: Don't we need (b)(1)(B) because it's a lesser physical harm than what's in (a)? Or am I missing something entirely?

HON. HOLTZMAN: What they thought was -- there were people who said we shouldn't have a lesser physical harm because that somehow suggests that that's lesser. We don't have something that seems lesser. So, we'll just have two levels, rape and nonconsensual sexual act.

CHAIR JONES: Okay.

HON. HOLTZMAN: That was my understanding of what some people were saying. Is that fair?

BGen SCHWENK: I think that's right. I think they were saying the current Statute has got two; let's stay with two. But we're going to take the bodily harm one and just make it the nonconsensual.

HON. HOLTZMAN: Well, my view is that it is a good idea to have something that does suggest some kind of physical harm in connection with the sexual act. So, you know, but maybe I'm just -- this is my view.

PROF. SCHULHOFER: I agree with you.

MS. FRIEL: It's one of the things we talked about is if we did the three levels where rape is grievous, you know, bodily harm, and if we made then sexual assault be just some physical harm we talked about, with some injury, you know, but less than grievous.

And then, a third level was this nonconsent. It meant what you were saying is if I create the smallest slight bruise or scratch or something that would be physical harm, somehow we're recognizing that is more serious than just

nonconsensual sex.

And, some of our discussion was they're really pretty similar whether you leave some minor injury on someone or you just make them have sex with you, you compel them in some way, we shouldn't have --

HON. HOLTZMAN: No, let's say you have a knife, and you cut somebody up, but it's not grievous bodily harm?

MS. FRIEL: You would fit right in nonconsensual here the way we did it.

HON. HOLTZMAN: I understand it would fit in nonconsensual. My view is that there ought to be something that acknowledges that level of physical assault that's above just simply the nonconsensual sex such as would happen with, you know, an inducement or the abuse of rank or so forth.

MS. WINE-BANKS: Here's the problem I had was the definition which becomes the language instead of the definition is an offensive touching. So, I go like that, and she's

offended, that's a touching with no bodily harm, however slight, but including a nonconsensual sexual act, so you have nonconsensual sexual act -- that's actually hard to say -- twice.

You have it as the next --

HON. HOLTZMAN: Well, that wasn't our proposal. Our proposal -- that's not our proposal.

PROF. SCHULHOFER: That's Proposal 1.

HON. HOLTZMAN: Proposal 1 is just to take the definition -- right now, you have the term bodily harm. We think bodily harm is very confusing since it can be just --

MS. WINE-BANKS: Okay.

HON. HOLTZMAN: So, we take the word bodily harm out and we just use the definition in place of bodily harm.

MS. WINE-BANKS: Right.

HON. HOLTZMAN: Okay. That was our least -- that was our --

MS. WINE-BANKS: Right.

HON. HOLTZMAN: -- less desirable

objective.

MS. WINE-BANKS: Okay, all right.

HON. HOLTZMAN: Our real proposal was separate out, take the bodily harm, and make it physical harm, and have a separate nonconsensual sex --

MS. WINE-BANKS: Okay. I get it.

HON. HOLTZMAN: Okay. So, those are the two things.

MS. FRIEL: But, that's a lesser crime?

HON. HOLTZMAN: Yes.

MS. FRIEL: Right. So, it wouldn't be sexual assault?

HON. HOLTZMAN: Correct.

MS. FRIEL: We would be creating a whole --

HON. HOLTZMAN: Right, you'd be creating --

MS. FRIEL: -- other crime?

HON. HOLTZMAN: Correct.

BGen SCHWENK: All right. We made it

as a sexual assault, but we put it in a different number, as Steve said, so that -- Stephen said -- so that --

HON. HOLTZMAN: Yes, it could be, right.

BGen SCHWENK: So that we could -- the president could come along and say, it's only worth X years instead of 30 years.

HON. HOLTZMAN: So, right, it could be four or it could be, I don't know (C), and then you just change the number. I don't, you know, I don't -- I'm not --

PROF. SCHULHOFER: There'd be less renumbering.

BGen SCHWENK: Based on the Coast Guard case, he could get one year.

MS. FRIEL: Right. But, I guess my point, two weeks ago and, again, just to think about it philosophically, in a word where we're saying that people don't have to resist, and we're really trying to get away from this idea of resistance and physical injury makes the crime, I

don't know that pure nonconsent should be that level down.

It's not in a lot of civilian Statutes. Most civilian Statutes don't require physical injury for you to prove their baseline nonconsensual crime.

PROF. SCHULHOFER: I would say as a general philosophical matter, since now that we have a Dean instead of Professor Anderson, so I think I'm the only -- am I only the professor here? The other academics are all Deans, so I guess I'm the one-star general.

So, as a general philosophical matter, when you're talking about criminal conduct that can be punished with anything from probation up to life imprisonment, it's a very wide range. It's generally a good idea to try to break that up into several tranches.

And, just two tranches, just as a starting position, seems like that would be too crude when you're talking about such a wide range all the way up to life.

So, as an instinct, it seems to make sense to be thinking in terms of more than just two categories.

In New York, for example, you have rape in the first degree, second degree, rape in the third degree is nonconsensual. So, rape by physical compulsion would be rape in the first degree.

But, whether we follow that model or not, the new Subsection 4 would cover a case like this where the victim says no, and the perpetrator disregards her no. It's a classic no means no case. No physical harm other than simply the fact that he disregards the no.

So, that should be a less serious category than something where physical harm has been inflicted. I think that was the impetus of our Working Group to try to break it out and to cabin some of the potential reach of these very severe sanctions.

MS. FRIEL: My point is, and that makes perfect sense to me. I have more trouble

not with the idea of three tiers, but that middle tier that little more serious thing has to do with kind of minor injuries.

I'm going to tell you that the minor injuries you see all the time, because you usually don't see injury in a sexual assault case because people are afraid for various reasons. So, there's hardly ever any injury, and what you generally see are fairly minor injuries.

You know, bruises, marks like this, scratches, some very minor things, and I think the person who has a couple of bruises and scratches is not feeling all that different than the person who didn't have those, you know, those couple minor injuries. They're fairly evenly crimes in terms of what's happening to this person. That's all.

HON. HOLTZMAN: Yes, but what happens if you have grievous bodily injury is very serious, and what happens if you have grievous -- if you have serious physical injury that's not grievous, and that's not just a bruise? I mean

if someone has a knife and uses it.

The grievous bodily injury means serious bodily injury, includes fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs and other severe bodily injuries.

Well, there could be serious injuries that are less than grievous, and why do we just want to ignore those? Because there are a few cases, I mean, if the professor's right, I don't remember the New York rape Statute anymore, it's been a lot of years since I looked at it, but New York State has three grades.

MS. FRIEL: But, what I'm saying is not based on physical injury. That's why I'm saying I don't have a problem with three different grades.

HON. HOLTZMAN: But, the three grades --

MS. FRIEL: They're not based on physical injury.

HON. HOLTZMAN: But, in New York

State, aren't they based on the level of injury?

PROF. SCHULHOFER: Yes, yes, they are.

HON. HOLTZMAN: So -- but that's exactly --

MS. FRIEL: What's on the level of injury?

PROF. SCHULHOFER: Well, rape in the third degree is just nonconsent penetration --

MS. FRIEL: Right and --

PROF. SCHULHOFER: -- when the victim is --

MS. FRIEL: -- rape second is statutory and mental incapacity and mentally -- what are we changing.

PROF. SCHULHOFER: Something --

MS. FRIEL: Right.

PROF. SCHULHOFER: -- very similar to that.

MS. FRIEL: And then mentally disabled, so that's not based on injury. And first degree is based on either forcible --

PROF. SCHULHOFER: Forcible.

MS. FRIEL: -- compulsion, physically helpless or you're under 13 years old.

So, the gradations do not have to do with the level of physical injury. I was just bringing up two weeks ago and now that, politically, to write a Statute that has to do with gradations of injury in the sexual assault area is going to be a little dicey because everybody's trying to get away from the fact that the crime is not about that physical injury, it's about the offense of just having to have sex with somebody you didn't want to have sex with.

CHAIR JONES: So, do I have this right?

HON. HOLTZMAN: Well then, we shouldn't have bodily -- then we shouldn't have grievous bodily injury either. Why would we want that? Because that's really irrelevant to the crime.

MS. FRIEL: If I already wrote this Statute, I wouldn't have that up there.

HON. HOLTZMAN: Okay, but it is there.

MS. FRIEL: I agree with you.

HON. HOLTZMAN: Okay.

MS. FRIEL: I don't think we should have Statutes based on the level of injury in this area.

HON. HOLTZMAN: Okay, but, well, I happen to disagree because I do think that the level of injury is -- there is a basic level of injury which is the outrage of person's -- with the violation of the person's autonomy and independence, no question. But, there are also other acts that can accompany that.

But, I just -- my concern -- I don't really have a deep concern about this, but I think we do away with everything aside from grievous bodily harm, you know, maybe we're missing something here.

PROF. SCHULHOFER: I think the definition of grievous bodily harm that you were reading before sheds some light on this because it says what it does include. These, you know, damage to internal organs, torn members.

And then it says it does not include minor injuries such as a black eye or a bloody nose.

It seems to me that if a person obtained submission, not within the terms of Subsection (a), threatening or placing the other person in fear. If the person gives the young woman a bloody nose and a black eye, he's never threatened her with anything. He's never put her in fear, just, bingo. Oh, I shouldn't do that with my hand.

You know, gives her a black eye and a bloody nose. That's a more serious case in my mind than just -- I shouldn't say just, but that's a more serious case than disregarding a no.

If she says no, he can punch her in the face, or if she says no, he can just go ahead and do what he does.

And, I guess, what I do care deeply about is the importance of grading tiers that cabin the potential punishment that people face.

That's how do we do it? There are a lot of different ways to slice that pie.

But, I do think it's very important to have some limitations on what kinds of conduct, you know, subject you to life imprisonment or 30 years.

MS. FRIEL: I think the one other thing you have to recognize if you make your tiers that way, and you put now physical harm or injury as sexual assault, and we create this other crime, you're taking what was a lot of just nonconsensual things.

Because the way bodily harm is defined, it covered both things.

You're taking them and moving them down a level. A lot of things that we're --

MajGen WOODWARD: If I had a nickel for every survivor I talked to that said, God, I wish he'd given me a bloody eye or broken my nose. I swear to God.

MS. FRIEL: Then it's obvious --

MajGen WOODWARD: I've heard I don't

know how many times because then people -- yes, people would think this was serious. They do.

If you're looking from the victim's perspective, they would rather have some injury than no injury.

HON. HOLTZMAN: But, bodily harm doesn't include the -- you can't -- well --

MS. FRIEL: It includes any offensive touching.

HON. HOLTZMAN: Yes, of course, right.

MS. FRIEL: It includes both, basically. We just don't like the words because it's not clear but if we split it out, we're actually taking a lot of what would have been covered by bodily harm in sexual assault, and we're moving it down a whole level.

PROF. SCHULHOFER: In those cases, General, was that because they felt people didn't accept the fact that it was criminal because they couldn't show physical injury?

MajGen WOODWARD: Right.

PROF. SCHULHOFER: So, we would --

MajGen WOODWARD: It wasn't as significant because they weren't physically injured.

MS. FRIEL: It wasn't real.

PROF. SCHULHOFER: Yes, but we would be addressing that in part by this separate subsection that would explicitly --

MajGen WOODWARD: Right, but you are acknowledging the fact that it's the lesser thing. You know? Oh, yes, we know you were injured but --

MS. FRIEL: You weren't punched in the eye. You didn't have --

MajGen WOODWARD: -- you didn't have a black eye.

MS. FRIEL: -- any injuries, therefore, it's not as serious as --

HON. HOLTZMAN: The problem that we see right now is that by saying bodily harm, you may be encouraging jurors to acquit when there is no physical injury of any kind.

MS. FRIEL: We're not --

HON. HOLTZMAN: So, that's --

MS. FRIEL: We're not talking about leaving in the bodily harm.

HON. HOLTZMAN: Right.

MS. FRIEL: We agree; take out those words.

HON. HOLTZMAN: Okay.

MS. FRIEL: And you could use the definition or change the words there.

HON. HOLTZMAN: Right.

MS. FRIEL: Totally agree we want to get rid of bodily harm, those words.

PROF. SCHULHOFER: So, would you be comfortable if we took out physical harm as a category in (b)(1)?

CHAIR JONES: Yes, I think that's exactly what --

PROF. SCHULHOFER: Completely out?

CHAIR JONES: Yes.

PROF. SCHULHOFER: So, I would be okay with that. I would have thought people would want to have that. I would have thought that

people would want to see that the black eye and the bloody nose was an aggravater. But, if people don't agree, you know, I'm okay with --

MajGen WOODWARD: No, and you could always charge assault with it, right, if you wanted to amp it up with anything else.

LtCol HINES: It would be an aggravater if you had that evidence. It wouldn't necessarily be a theory of liability; it would be a sentencing aggravater that the Government would put on during the case, but then they reemphasize it to the Judge or the jury, look, she was physically injured as well, so you should give him 30 as opposed to, you know, something around five or ten years.

So, they would still hear that, but --

MS. FRIEL: But, you would have to prove it for sexual assault.

LtCol HINES: Right, you would have to prove that to make your case for sexual assault.

PROF. SCHULHOFER: Well, to be up front about this, though, if we have Subsection 4

for nonconsensual, and the motivation for doing that is to have a cap that's lower than 30, then you couldn't use the black eye as a reason to -- you haven't proved up anything beyond Subsection 4. So, that's going to have a cap.

MajGen WOODWARD: Right. But, you're telling me that my sentence, my cap, for raping or for sexually assaulting you if I don't physically injure you is less significant than if I give you a black eye.

Which, if you talk to the survivors, would be very frustrated to sit there and say, well, your sexual assault is not as significant because you don't have the black eye, so it's worthy of a much smaller sentence.

PROF. SCHULHOFER: No, I can agree with that. I mean I'm comfortable with that as long as we have three tiers, and we're going to have to propose some sort of a cap for the lowest tier.

And, I'm comfortable not having as an aggravator the black eye, not having as a form of

statutory aggravator. I'm perfectly comfortable with that.

MS. FRIEL: But recognize that right now, this classic nonconsensual thing, however we word it, it's bodily harm. That's how they've been charging it. That's the definition of it.

So, are we saying that we actually want to take what has been covered as a serious sexual assault and move it down? We've got to be cognizant that that's what you're talking about doing unless the other thing to do is to go back to the simple first proposal, remove the words bodily harm, take the definition that was there that is clearly showing you it's just nonconsensual and call it a day with that.

BGen SCHWENK: I don't think we'd admit that we were moving it down. I think in selling it to the Hill, we'd say we're taking it out of (b)(1) because of the confusion over the term bodily harm and segregating it as (b)(4), so it's still under (b), it's still sexual assault; it's just instead of three categories of sexual

assault, there's four, (b)(1), (2), (3) and now (b)(4).

MS. FRIEL: So, it's really not different tiered crimes, it's --

BGen SCHWENK: But, it allows the President to then come along later and --

MajGen WOODWARD: And, there aren't different sentencing --

BGen SCHWENK: -- do a lesser punishment.

MajGen WOODWARD: -- limits or sentencing maximums for (1), (2) and (3) right now, are there?

LtCol HINES: Well, ma'am, it's for 120(a) rape, the max is life. For 120(b) sexual assault, it's 30 years. For 120(c) aggravated sexual contact is 20.

MS. FRIEL: But not within sexual --

LtCol HINES: But, not with them, right.

MS. FRIEL: What was wrong -- I just don't remember the discussion; you guys have much

better memories -- two weeks ago when we talked about your Proposal 1, the simple one, what did we think was wrong with just removing the bodily harm words and using the definition?

MS. KEPROS: So, I reviewed the 100 pages of transcript from our July meeting on this issue. Because I did not remember either.

The conversation had to do with the circularity of the bodily harm definition, and this is the same issue that Jill just brought up which is, if you say you commit the bodily harm by --

BGen SCHWENK: By the bodily harm.

MS. KEPROS: Right, you commit the sex assault by the sex assault, it's unclear if there needs to be additional conduct.

And so, that was the circularity issue. And that's actually how, in the conversation, it moves to what is on the table now, which is don't worry about the Proposal 2 middle bullet, but have something that captures the baseline nonconsensual sex assault.

CHAIR JONES: Got it.

So, under one proposal, we would delete bodily harm definition and then we would --

HON. HOLTZMAN: No, we wouldn't delete the definition, we would delete the statement saying causing bodily harm to that other person, (b)(1)(B) and instead of the (b)(1)(B), we would say, what is the language, causing any offensive touching of another.

MS. WINE-BANKS: Replace the words bodily harm with what --

CHAIR JONES: Right, well, we wouldn't need a definition of bodily harm if we take bodily harm out.

PROF. SCHULHOFER: That's Proposal 1.

HON. HOLTZMAN: That's Proposal 1.

MS. WINE-BANKS: But then, what would offensive touching be?

HON. HOLTZMAN: It's not defined now.

MS. WINE-BANKS: No, I know, but --

PROF. SCHULHOFER: Yes, but that's one

reason why --

HON. HOLTZMAN: Any offensive touching of another however slight including any nonconsensual sexual act or nonconsensual sexual contact.

BGen SCHWENK: All the problems with the current definition remain. The only thing we've succeeded in doing is killing the term bodily harm.

CHAIR JONES: Right.

PROF. SCHULHOFER: That -- your question, the inability to answer your question --

BGen SCHWENK: Which is why nobody really supported the proposal.

PROF. SCHULHOFER: Right, because we couldn't answer that.

BGen SCHWENK: No one's in love with Proposal 1, but it was a quick, short fix.

MS. KEPROS: Proposal 2 eliminates that phrase offensive touch.

BGen SCHWENK: And the circularity.

MS. KEPROS: And the circularity.

DEAN ANDERSON: Does offensive touch -- are we losing anything by that? Does offensive touch mean anything other than nonconsensual touching?

MS. KEPROS: Just to --

MS. WINE-BANKS: I mean sex is going to be a nonconsensual touching at the very least.

MajGen WOODWARD: Do we have to define sexual act then when you have nonconsensual sexual act?

(Simultaneous speaking.)

PROF. SCHULHOFER: Are we at a point where we could take a general straw poll on whether people prefer to work with one or with two?

MS. WINE-BANKS: You mean Proposal 1 or Proposal 2?

PROF. SCHULHOFER: Yes.

BGen SCHWENK: Proposal 2, just to discard one if that's what we're going to ask.

PROF. SCHULHOFER: And then we could

start polishing one or the other.

DEAN SCHENCK: I think one isn't even worth doing. It's already defined in the document.

DEAN ANDERSON: There seems to be a general --

(Simultaneous speaking.)

DEAN SCHENCK: One to me is what the lawyers are supposed to do in the first place. Look at the definitions.

HON. HOLTZMAN: No, but the problem is that if members of the jury hear bodily harm, they're going to be -- they could be confused. That's the never.

DEAN SCHENCK: Right, but I think in the instructions, they read them the definitions, correct? So, they get that definition.

(Simultaneous speaking.)

MS. WINE-BANKS: But, if you're sitting through the trial and hearing it as this is what he's charged with is bodily harm and they're already formed their opinions before it

gets to the instructions, so it's bad. I think it was unanimous to get rid of number one.

CHAIR JONES: Do we all agree committing a nonconsensual sexual act upon another person should be in 120(b)? Right?

MS. WINE-BANKS: Yes.

CHAIR JONES: Okay. So --

MS. WINE-BANKS: Wait, wait.

BGen SCHWENK: The third bullet on your Proposal 2.

MS. WINE-BANKS: And add them to 4?

PROF. SCHULHOFER: Add 120(b)(4).

HON. HOLTZMAN: Okay, that's adding that language?

MS. WINE-BANKS: Yes.

CHAIR JONES: All right.

HON. HOLTZMAN: And where would that go?

CHAIR JONES: It'd be a sub 4, right, (b) sub 4, little (b) sub 4.

MS. WINE-BANKS: Where you've suggested.

BGen SCHWENK: I think everybody likes the first and the third bullet in Proposal 2. The discussion is the second bullet.

CHAIR JONES: Whether we want the second bullet or not? Right. And, we didn't have it before, so I don't know why we need it now. I mean this is really --

MS. WINE-BANKS: Because I think everybody thought that what the current language of bodily harm really was getting at was physical harm, but it was so convoluted in its definition and so circular, that you couldn't --

MajGen WOODWARD: But, they've been convicting people using bodily harm as the mere sexual --

CHAIR JONES: The mere touch, however slight.

(Simultaneous speaking.)

MajGen WOODWARD: So, in essence, we haven't had it necessary for how long, and nobody complained about it? So, I guess I don't see why we add physical harm in there.

CHAIR JONES: Yes, I think -- I like 2 with the middle deleted. I'm still trying to figure out how this works in the Statute, though.

So, sexual assault, (b)(1), right?

BGen SCHWENK: (b)(1) remains, (b)(1)(A) remains.

CHAIR JONES: Well, hold on. (b)(1) -- oh, I'm sorry, yes, (b)(1)(A) remains, threatening or placing in fear.

BGen SCHWENK: And (b)(1)(B) is deleted.

CHAIR JONES: Completely?

BGen SCHWENK: Completely.

DEAN ANDERSON: So C becomes B and --

BGen SCHWENK: And then C becomes B and B becomes C, right.

CHAIR JONES: Okay.

BGen SCHWENK: And then we add a 4 at the bottom.

CHAIR JONES: And the fourth one is actually then --

PARTICIPANT: It's going to be the

abuse of power.

HON. HOLTZMAN: Commits a nonsexual --

CHAIR JONES: Right, I'm just -- it's one -- but it's actually 120(b). It's actually 120 --

PROF. SCHULHOFER: 120(b)(4).

HON. HOLTZMAN: Yes, but that's -- oh, (b)(4), okay. Right, I got it. Okay.

CHAIR JONES: Okay and there is no 4, so we add it there as a 4.

DEAN ANDERSON: There's general agreement in the room for that?

LtCol HINES: Sorry, explain again bullet two. What do we do with bullet two?

(Simultaneous speaking.)

LtCol HINES: Bullet two under Proposal 2, so there's three bullets.

PARTICIPANT: I think people don't want it.

LtCol HINES: Okay, so, we're not doing that?

MS. FRIEL: Yes, we don't want that.

LtCol HINES: So, there's general consensus that everyone agrees with bullet one and bullet three?

MS. FRIEL: Yes.

LtCol HINES: Okay, got it.

MS. FRIEL: And that would then end up in getting rid of that in the Statute and renumbering -- relettering those.

BGen SCHWENK: Right. The second bullet would say delete this and renumber the other two.

HON. HOLTZMAN: I'm just going to state my problem with this.

If this is being presented as a (b)(4), in order to allow the president to impose a lesser sentence, what happens in those cases where you do have the instance that I'm proposing, where you do have more serious physical injury that does not amount to grievous bodily harm? How does the sentencing get raised for that?

MajGen WOODWARD: They all have the

same minimum sentence, right?

HON. HOLTZMAN: No, no, well, here's my predicate. Maggie, here's what I'm saying.

The reason, in part, to put this as (b)(4) is because the maximum sentence was thought to be too high for just a simple nonconsensual sexual act.

So, the President, bear with me, if, if, if, this is all hypothetical, if there is a lower sentence for the (b)(4), I don't know that he'll do that, but if he does, then you have no capability of getting a higher sentence when there is physical or bodily harm in excess that doesn't amount to grievous bodily harm. And, that's worth more than ten years. Are you following me or not?

LtCol HINES: It sounds to me, ma'am, like if this is what the Subcommittee is going to recommend --

HON. HOLTZMAN: No, they don't -- I don't know what --

PROF. SCHULHOFER: You think they're

saying that it's not worse? That if she has a black eye or a bloody nose that's not worse than just the nonconsensual? That's what they were saying.

HON. HOLTZMAN: Okay, but I'm not talking bloody -- I'm talking about a bloody nose. I'm talking about somebody takes a knife and cuts you up, slices you, what are you going to do with that?

MS. FRIEL: But your predicate is that part of our proposal would be to make the sentencing for this 4 different than the sentencing for 1 through 3.

HON. HOLTZMAN: Right, that's what I thought.

MS. FRIEL: I don't think that any of us said that.

HON. HOLTZMAN: Well --

(Simultaneous speaking.)

PROF. SCHULHOFER: Yes, I certainly said that. I tried to say that as forcefully as I could.

MajGen WOODWARD: May I ask a question and I was told there was a minimum or maximum sentence for 1, there's a maximum sentence for 2 and there's a maximum sentence for 3. That means everything in 2 is the same. Right now, everything --

(Simultaneous speaking.)

MajGen WOODWARD: So, your proposal is to change that?

LtCol HINES: Yes, ma'am. If you look on --

PROF. SCHULHOFER: Only the President can change that. What I would recommend that this --

MajGen WOODWARD: No, no, I'm talking about nonconsensual sexual contact, close to the maximum.

PROF. SCHULHOFER: I could maybe give a little history here because I understand, and I completely sympathize with the reaction of people who think that it's deprecating the seriousness of some of this conduct to lower the sentence for

it, to say, you know, it used to be this, and now you're lowering it. You're reacting to it less seriously.

This was the same conversation that the American Law Institute had in the 1950s when rape was punishable by death or life imprisonment.

And the American Law Institute said at that time, this has become counterproductive for the effective enforcement of rape because when people know that, and they associate the crime with very serious punishment, they're looking for very serious, aberrational, brutal behavior.

It creates resistance on the part of prosecutors to charge it, on the part of -- and the prosecutors certainly know what the sentences are, on the part of the juries to convict and so on.

So, the Model Penal Code proposed a number of tiers, and the effect of that was to deprecate the seriousness of some of this conduct that was not at the most brutal extreme.

And, you know, many people reacted against that, but it was understood, I think, within the profession as a very victim-friendly, constructive approach, not to say to a victim, we don't take your harm so seriously, but to say that some situations are very much worse, and in order to effectively prosecute and get convictions for people like yourself, we have to recognize that there are different degrees of evil in the world.

So, that was what animated the MPC, and that's what animated my thinking that there should be three tiers when you're talking about the range up to life imprisonment.

It's less important to me how you slice it up, but that the Subsection 4, we should make a strong recommendation to the president that Subsections 1 and 2 or 1, 2 and 3 could be up to 30 but that the other one should have a lower cap in the interest of the effective enforcement and effective interest of victims everywhere.

MS. FRIEL: But, that's a big change from where we are now.

PROF. SCHULHOFER: Yes, it is.

MS. FRIEL: Because subsection -- right -- Subsection 4, the way we're going to write it is just another way of talking about bodily harm. So, what we're saying in there to the President is, what you've encompassed in bodily harm for the last number of years, we don't think that a lot of that, not all of it, just pure nonconsensual without your kind of injury should --

PROF. SCHULHOFER: Except that it wasn't --

MajGen WOODWARD: If you slip me a -- if you get me drunk and then have sex with me when I can't consent and that's significantly worse than if I freeze up and you have sex with me, and I can't say no?

I mean --

MS. KEPROS: That's the current law. What you just said, it is significantly worse.

The first scenario is rape. That's a life sentence. The second scenario is sex assault, that's a 30 year cap. There is a distinction of exactly these two.

MajGen WOODWARD: Well, who is incapable of consenting due to impairment by any drug, intoxicant or similar substance, that's in 2, that's in B sexual assault.

MS. KEPROS: Look at (a)(5).

PROF. SCHULHOFER: (a)(5).

MS. KEPROS: I've administered drugs to you.

MajGen WOODWARD: Okay, I'm sorry, I'm sorry, I tried to correct myself when I said you are drunk, and I take advantage of that.

PROF. SCHULHOFER: I'm sorry, what was the question?

MajGen WOODWARD: So, you think it's significantly more -- is worthy of a higher sentence if I take advantage of you being drunk and have -- and sexually assault you versus I commit a sexual act on you without consent, i.e.,

you freeze up. I don't have to hit you, I don't have to cause any physical harm, but I sexually assault you, that is worthy of a lower punishment?

HON. HOLTZMAN: No, they both would be the same. I did this under the Statute. Because the only time you can -- the only time it's rape, Laurie, is when you administer the alcohol.

MajGen WOODWARD: Okay, well, let me make sure that first would be rape. And, I apologize, under sexual assault (b)(1), (2), (3) and (4), I keep hearing two different things, so I'm just saying this because I need to understand.

HON. HOLTZMAN: Because we're looking at --

MajGen WOODWARD: Are we proposing different sentencing guidelines for 1, 2, 3 and 4 or the same one for 1, 2, 3 and 4?

BGen SCHWENK: Professor Schulhofer is proposing a different one for 4 than for -- there'd be one for 1, 2 and 3, 30 years and then

it would be something lower for --

MajGen WOODWARD: So, that's my point, you just said it. So, now you're really confusing me because you just said well, there's no difference.

So, if we take what you just said that you're proposing different sentencing guidelines for those three, then you are saying you are proposing a significant sentence if I take advantage of you being drunk and sexually assault you than if I have sex with you when you freeze up and I don't have to hit you to have nonconsensual sex with you.

PROF. SCHULHOFER: I think there are a -- you're going to object I'm not giving you a straight answer and you would be right.

MajGen WOODWARD: Oh my God.

PROF. SCHULHOFER: So, here goes.

First of all, I think Lisa was stressing that you're taking something that's punished now at the 30 year level and moving it down. That's technically true, but not so clear.

Because I think one thing we've learned is that the way purely -- the way nonconsensual without anything else is currently treated is the subject of great confusion and has not easily been prosecuted.

So, even though it's technically covered at the 30-year level, it's not prosecuted in a very straightforward way and it has not been easily encompassed and easily reached.

So, you can say we're downgrading it by doing this or you can say we're upgrading it because we're taking things that were not fully effectively prosecuted before and being quite clear that this is a crime, very much like what the MPC did back in the 1950s when they said, you know, you are not technically covering all this waterfront with the death penalty. But, in reality, it's not being prosecuted.

So, we're much better off being quite specific about saying this is the crime and it's going to have a different cap. So, that's --

MajGen WOODWARD: So, the answer to my

question, you are saying the cap, though, with all that, that's your -- what you just gave me is your justification for it.

But, to answer the question I asked is, it does have a different cap, meaning it is more significant because a cap -- a higher cap means a more significant crime, is that correct?

PROF. SCHULHOFER: There are two reasons why my answer is convoluted. Because, first, the question of penetration when the person freezes and doesn't say no is not currently punished by any of these things and it's something that Michelle and I have been fighting tooth and nail --

MajGen WOODWARD: Yes, it is.

CHAIR JONES: Of course it is, it's under (b) causing bodily harm, the current causing bodily harm.

MajGen WOODWARD: And the offense is such --

PROF. SCHULHOFER: Well, no, if you look at the definition of -- believe me, I'm on

your side on this. We've been fighting this battle but this is the question of what you sometimes see in the media, the resistance to the idea that consent has to be a yes and that silence doesn't equal consent.

MajGen WOODWARD: We're past that in the military in the UCMJ. So, I really object to --

PROF. SCHULHOFER: Are we?

MajGen WOODWARD: Yes.

PROF. SCHULHOFER: I'm glad to hear it.

MS. KEPROS: I don't think that's accurate because your Code contemplates mistake of fact as an affirmative defense. So, if the Servicemember does not believe the person has rejected their sexual advances, it is not a crime.

MajGen WOODWARD: But, that's not proving or that's not saying that somebody froze and couldn't say. So, that's proving that there's a mistake of fact versus saying that --

DEAN SCHENCK: That's the affirmative defense, it's not what the Government's proving. It's the accused taking the stand saying I had --

MajGen WOODWARD: That's different than saying it's not --

MS. KEPROS: Well, say you had a --

DEAN ANDERSON: Can I just ask a current order?

CHAIR JONES: In reality, aren't we -- in a minute.

PROF. SCHULHOFER: Could I clarify General Woodward's point?

I think your question would be harder for me if you just said not the freeze up situation, which I agree should be punished, but that she said no and it was disregarded.

And, your challenge to me is that I'm saying -- I'm downgrading the serious of that crime. Right, would that be fair?

MajGen WOODWARD: Yes, you can use any applicable thing that has --

MS. WINE-BANKS: So, are you talking

about jury nullification is why it's not getting prosecuted? I was --

DEAN ANDERSON: Well, this is what I want to understand in the military because I certainly understand what happens in civilian courts, both historically and how that's evolved over times in terms of the nonconsensual sex, someone says no and begins to cry, someone proceeds to penetrate them anyway.

And, there's been a real change in nonmilitary reaction to that over time and I think, in the larger society, over the past 20 to 30 years.

I think my question this dialogue brings up for me is, in the military, is that nonconsensual sex routinely prosecuted under (b)(1)(ii) or is it difficult to proceed under (b)(1)(ii) and we might clarify that by highlighting it in a separate provision?

LtCol HINES: Dean, I think a lot of the prosecutors, Lieutenant Colonel Pickands was one, who said that the freeze up case or the case

that we have a lot in the military with the passed out victim who doesn't remember much, if anything, but she remembers being penetrated or she wakes up the next morning or you have an eyewitness. They, that's the way they charge it and that's the only way they can get at that now is by charging it as a (b)(1)(B) causing bodily harm.

Now, it is an unintended consequence, I think, like everyone, but it was a positive unintended consequence. And, I think most of those prosecutors said that they liked having that because it helped them capture some of these cases that they couldn't prosecute somewhere else.

DEAN ANDERSON: So, in the civilian world, the argument for pulling that out and highlighting it was failure to prosecute. If that's not a problem in the military, then maybe there's not a need to pull that out and to make an argument that it should be given a lesser sentence.

BGen SCHWENK: Right. I think Professor Schulhofer said there are two main reasons, the prosecutors wouldn't charge and juries did jury nullification.

Well, in the military, in my experience, I defer more recently to Glen or Maria, but, my experience is that we don't have that situation in the military and the reason is because all the prosecutors are used to tremendously high maximum punishments and the vast majority of their cases are never going to get within a stone's throw of maximum punishment.

CHAIR JONES: That's why it's zero.

BGen SCHWENK: So, it's not all that relevant, they just charge the offense and then go for it. And the jurors, the few jurors who, on the merits, will actually know what the maximum punish is, which most won't, but those who do also know they have complete discretion to give zero to whatever the maximum is.

So there's no reason for jury nullification because, you know, if it's one of

those cases where it's really hard to convict but you decide, okay, guilty, then you get the sentencing and the sentence falls down the cliff because they make it up at the back end. You know?

So, we don't -- my experience is that's not a problem, either one of those is not a problem in the military.

DEAN ANDERSON: I agree with the General. It's a bifurcated process, findings, completely separate and then sentencing complete trial again. I mean victim taking the stand, you know what I mean? And the maximum punishment read to the Panel and there is the punishment of no punishment.

HON. HOLTZMAN: I don't know that we've had enough testimony before this Panel to know whether there is a jury nullification issue. You may be right, I'm not saying there is or there isn't, that's why --

I mean, I'm not necessarily buying Professor Schulhofer's argument that this should

have a lower sentence because I'm not sure that we have the evidence that that's necessary from a point of view of the inability to get convictions or the -- or is that --

I mean because juries are nullifying it or prosecutors aren't bringing those cases of the initial concern, so I'm agnostic about that. I don't know that we can really reach a conclusion.

PROF. SCHULHOFER: But, picking up on your explanation, though, then it would seem that having a cap lower than 30 would not really be a change in practice because juries are not giving 30-year sentences for this kind of conduct, so you would not be --

HON. HOLTZMAN: Is that so?

DEAN ANDERSON: And, therefore, prosecutors are not deterred from bringing the cases forward.

(Simultaneous speaking.)

PROF. SCHULHOFER: So, is that your experience? They're getting six months or nine

months? So then, this wouldn't be pushing down sentences from they can be.

CHAIR JONES: Yes, but I think we're getting way off track trying to figure out what the sentencing --

PARTICIPANT: Specifically list them as a different sentencing cap then that says something about the difference in the crimes which I think I have a real problem with.

DEAN SCHENCK: And, what is the point if they aren't getting the maximum anyway?

CHAIR JONES: Yes, what's point of saying you'll now get 20 for this instead of 30 and --

(Simultaneous speaking.)

CHAIR JONES -- you know, I mean ten years more --

DEAN SCHENCK: Then we would have to hear testimony about all sorts of different sentencing sections in sentencing.

BGen SCHWENK: Why don't have Glen go to the criminal law chiefs who are already on JSC

or where ever he goes to and ask them whether there's been a problem either with decisions to prosecute or jury nullification because of the maximum punishment for (b)(1)(B).

DEAN SCHENCK: I think sex offender registration is the thing that's getting jury nullification.

BGen SCHWENK: Then we can get --

(Simultaneous speaking.)

BGen SCHWENK: -- and see where that leads us.

DEAN SCHENCK: I mean you've got a he said, she said, they're both drunk, he wakes up, he has sex and then he testifies that I really thought it was consensual and then he's a registered sex offender, those Panel Members, especially the males, are not going to want to convict.

LtCol HINES: I can tell you the way it works at trial, sir, is when you -- during the voir dire process when you bring your Panel in, the Judge tells them, he's already done the

calculation based on what's on the charge sheet and tells them as a part of making sure that they can do their duties and follow instructions.

If convicted of all of these offenses, the maximum punishment would be X. The minimum punishment could be no punishment. Are you able to consider any punishment in that full range from zero to life?

And they all -- it's sort of begs the question, but they all say yes because they haven't heard anything yet. But, that's the thing they have to say to be able to be on the Panel. Yes, I can follow -- I can consider the full range, but they're not going to know what they're going to do until they've heard that evidence and then, as Dean Schenck says, you have a sentencing hearing, completely litigated sentencing hearing in front of that same Panel where the victim can come back and get on the stand and talk about the injuries she sustained.

So, let's say she was cut or she was bruised and it happened a year ago, the

prosecutor's out there handing her the photographs that were taken at medical with the black eye and this all goes in front of the fact finder.

And then, at the end, the prosecutor is saying, not only did you convict, but look at the injuries she sustained or medical bills or whatever she has, and give him 30 years or give him 25 years or whatever that is.

And then, the defense comes in and does the same thing.

So, they have all of that evidence to consider, it's just, I've never seen, sir, I can go back and ask, but I don't think anyone's going to say there's a jury nullification problem because they don't really know what the statutory maximums are, they only know what the Judge has told them about the full range of punishment.

PROF. SCHULHOFER: That's only in the civilian system, that jury nullification that's been the problem.

LtCol HINES: Well, I think when you

have, especially in the federal system where you've got mandatory minimums, that could be an issue because people are like, well, okay, if they're going to go to -- if we convict them and they're automatically going to get at least 30 years, now maybe I don't want to do that to this defendant and maybe I'm going to get jury nullification.

CHAIR JONES: Is there some reason why Article 120 -- our proposed Article 120(b)(4) commits a nonconsensual sexual act upon another person can't become B?

In other words, we're getting rid of the definition of bodily harm and, if you look at bodily harm, it seems to be an act, a sexual act that there's no consent for.

So, I mean maybe that's the easiest thing to do here.

PROF. SCHULHOFER: Well, one advantage of the structure of a separate Subsection 4 is it would make it easier for the president, if he decided he wanted to, based on convening another

Panel with different Members to investigate sentencing practices, he might or might not decide, we don't -- we may not need to decide that now, we could be recommending a structure that makes it easy for the president to make sentencing to sections if he so chooses.

CHAIR JONES: Yes, personally, yes, personally, I'm not -- I really don't -- care, is the wrong word, but I'm not concerned about life versus 20 because they're all zero to.

And, in the federal system, before you -- and state systems -- before you had all these mandatory minimums, everybody understood that zero meant zero and, you know, in the worst possible case, you gave them 30 or 20 and that's what juries are for.

So, I think it's a slippery slope if we're going to say this is, you know, nonconsensual sexual act perpetrated without consent is a serious crime and it belongs with all the rest of these, that would be my opinion.

And, I don't think we should start, at

least not now, worrying about whether at some point someone might want to make it a lesser crime. And I think that would be politically very difficult anyway in the future.

MS. FRIEL: And my recollection is that the only reason we didn't put it in B is because it started getting redundant and we had trouble using the language because one starts commits a sexual act upon another person by --

BGen SCHWENK: Yes, you have to say --

MS. FRIEL: -- committing a nonconsensual sexual act.

CHAIR JONES: And so, B could become without consent.

MS. FRIEL: So, you'd have the commits a sexual act upon another person, but the word by is up there.

BGen SCHWENK: Yes, you'd say by acting without the consent of the other person.

MS. FRIEL: There, you could do it like that.

BGen SCHWENK: You'd have to say it

like that, acting without the consent of the other person.

CHAIR JONES: Well, somehow -- but, I think we ought to tuck it in there and not make a separate --

MS. WINE-BANKS: But, we also -- I think what Glen just said is that the physical harm part needs to be there because that's what they are currently using to prosecute the cases. Isn't that what you just said, Glen?

LtCol HINES: Well, just the cases where there's a victim who has very little recollection of what happened.

MS. WINE-BANKS: Right, yes, bodily harm. I mean, yes, that's --

LtCol HINES: But --

(Simultaneous speaking.)

MS. WINE-BANKS: So, you want to leave bodily harm there and add 4 or do you want to eliminate the word bodily harm to something else --

LtCol HINES: No, I'm just saying you

can change that language if you want. What I'm just saying is just be careful of the unintended consequence of removing something that would -- and we can go back and we can --

MS. WINE-BANKS: Promote the alternative that they're using well now for a certain kind of case.

MS. FRIEL: That would say, for leaving the bodily harm there and adding the 4 instead.

MS. WINE-BANKS: Well, bodily harm was defined as --

BGen SCHWENK: Offensive.

MS. WINE-BANKS: -- offensive touching. So that's -- it just get confusing then.

LtCol HINES: Well, I think you could --

MS. WINE-BANKS: If you take away the bodily harm and just leave in offensive touching it seems to be something people understand better.

DEAN SCHENCK: It's going to say nonconsensual sexual act is going to say commits a sexual act upon blah, blah, blah by committing a nonconsensual act upon.

HON. HOLTZMAN: Well, we have a solution to that in the proceeding, he just mentioned it. General Schwenk just mentioned --

MS. KEPROS: Acting without the consent of the other person.

BGen SCHWENK: Yes, I mean something like that.

(Simultaneous speaking.)

LtCol HINES: I was going to say if you adopt the new 120(b)(4) that would alleviate the concerns of those prosecutors.

BGen SCHWENK: Right.

LtCol HINES: You're giving them the same theory, you're just changing --

BGen SCHWENK: A simpler form.

LtCol HINES: -- changing the terminology and then you get rid of the bodily harm that people have a problem with.

BGen SCHWENK: Right, it's simpler, it's more direct and they know exactly what the issues is.

LtCol HINES: Right, they can charge the same -- a nonconsensual act.

MS. FRIEL: But why is it better in 4 than as part of what was just asked or it doesn't matter whether we make it (b) or we make it 4, you don't care?

BGen SCHWENK: The issue doesn't matter.

MS. FRIEL: Okay.

PROF. SCHULHOFER: If you try to put it into 4, I'm sorry, (1)(B), the (1) is commits a sexual act upon another person by committing a nonconsensual act. It doesn't read --

(Simultaneous speaking.)

MS. FRIEL: I think without the consent of the other person.

BGen SCHWENK: Commits a sexual act upon another person by acting without the consent of that person.

HON. HOLTZMAN: Or without obtaining the consent of the other person.

BGen SCHWENK: Without obtaining the consent.

PROF. SCHULHOFER: And, is that --

BGen SCHWENK: Well, by.

PROF. SCHULHOFER: -- by --

BGen SCHWENK: By without -- is that the by problem?

(Simultaneous speaking.)

BGen SCHWENK: You've got to have your --

PROF. SCHULHOFER: Could somebody just write this down? I'm --

(Simultaneous speaking.)

PROF. SCHULHOFER: So, you're writing it? Glen's writing?

MS. FRIED: But, aren't we leaving bodily harm in, though?

BGen SCHWENK: No, no, too confusing.

LtCol HINES: Commits a sexual act upon another person by, new Sub (b), acting

without the consent of the other person?

BGen SCHWENK: That's our strong end to where we started.

HON. HOLTZMAN: Or, without obtaining or without having the consent of the other person, without the consent.

BGen SCHWENK: By.

HON. HOLTZMAN: Oh, by.

BGen SCHWENK: By without. That by has killed us on everything that we want to say.

PROF. SCHULHOFER: Glen, could you read it again?

LtCol HINES: So, the new (b)(1)(B) would read this -- well, reading it all the way through, any person subject to this chapter who commits a sexual act upon another person by acting without the consent of the other person is guilty of sexual assault. And it would still be a 30-year maximum.

And, if the Government wanted to bring on evidence of injuries, they would be able to do that.

BGen SCHWENK: Right, matters in aggravation.

LtCol HINES: Matters in aggravation.

BGen SCHWENK: And the members or the Judge can factor in accordingly.

LtCol HINES: So, that's the proposal. Is that the proposal?

DEAN ANDERSON: General consensus, I think, on the proposal or at least --

MS. WINE-BANKS: Does it require that it be stated here that there are aggravating circumstances like physical injury?

LtCol HINES: No, ma'am, the way this would play out is, it doesn't have to. So, that's how you would charge it.

The specification would be substantially as I said it. You mentioned, obviously, the accused and the victim.

Now, if you wanted to as a prosecutor but you wanted your jury to see all that bad stuff, you could put that in there. I never like to do that because then I thought that I had to

prove all of that.

So, I would go with a bare bones specification and then you put all those facts on anyway during your findings. You're going to get your victim to talk about going to the hospital, the injuries she sustained. You're going to call the nurse, the doctor, all of that. So, they're going to hear all of that.

But, then you get to repeat it again if he's convicted. So, you don't have to articulate it in the charge, but you're going to show that to the Judge or the jury because you -- that's what you're going to use to argue for a higher sentence or for the 30 years as opposed to something below that.

MS. FRIED: There's a provision in the Rules for Courts Martial for sentencing purposes that specifically addresses evidence of aggravation.

MS. WINE-BANKS: Okay, that's what I was asking, thank you.

LtCol HINES: Shorter, better answer.

PROF. SCHULHOFER: I'm probably the only holdout on this. I would prefer the structure where it was Subsection 4. I think it's much clearer.

And, I do think this may be just can't release myself from the civilian framework, but it seems to me that acting without the affirmative consent of someone is not only the situations that General Woodward described, but many situations of miscommunication between people. And, those are serious crimes.

But, to me, I don't think it's this -- I think it's at a different level than when an individual threatens or places someone in fear. I think that's quite different.

And, we certainly, when I was arguing for an affirmative consent standard with many of our witnesses, we got a lot of push back from them and they didn't think it should be criminal at all. Many of the military defense attorneys, one in particular, a Marine Corps JAG defender who was very, very forceful on this point in the

New York City courtroom where we heard the witnesses, I apologize, I don't remember her name, but I have a vivid picture of her testimony.

CHAIR JONES: Me, too, I know who you mean.

PROF. SCHULHOFER: She was very forceful. So, our witnesses strongly objected to any criminal punishment or any criminalization of that kind of scenario at all and I don't.

But, I do think that it's at a different level from the person who actually threatens someone to place them in fear or fraudulently misrepresents that the act serves a professional purpose like a doctor, something like that, that's at a different level of egregiousness to me than miscommunication between people or two parties who are intoxicated and not paying enough attention to each other's wishes.

MS. WINE-BANKS: If its only miscommunication, isn't that a mistake of fact? That wouldn't be a conviction?

PROF. SCHULHOFER: Not necessarily. Certainly I think Lisa certainly has stressed that, you know, if he should have been aware, then he's guilty.

MajGen WOODWARD: But, isn't that part of -- see, that's what's driving me crazy about that is there's no difference in the three right now, so why --

BGen SCHWENK: We're not going to resolve --

MajGen WOODWARD: -- are we even talking about it being of a higher emphasis --

CHAIR JONES: Can we --

(Simultaneous speaking.)

CHAIR JONES: -- that we're going to get rid of the definition of bodily harm and we're going to simply have a crime here which is the commission of a nonconsensual sexual act upon another person.

And, I'm not so opposed to putting it somewhere else where it may read better. I just don't agree that we should move it out so that

for some reason later it could get some treatment from the president.

I'd like to put it in here where ever it fits. Is there a sense of everyone -- from everyone that if we moved it into to 2 where they're actually talking about, you know, consciousness and consents and the rest of it?

I mean, do people think that once you go from (b)(1) to (b)(2) all of a sudden they're lesser? They're all the same penalty.

PROF. SCHULHOFER: It fits better in 2. I agree with you.

CHAIR JONES: I think that's right. So, I think what we should --

PARTICIPANT: How? How? How would it fit in 2?

MS. WINE-BANKS: As long as it's clear and we don't have to then deal with the strange language because of the by.

But, 1, 2, 3 and 4 would all be the same. So, what difference does it make if it's 4 or if it's the (1)(b)? (b)(1)(B)?

CHAIR JONES: Right, but I'm just saying, why don't we agree we're going to do this? Get rid of bodily harm and figure out where we want to put essentially nonconsensual -- a nonconsensual act and, at least we know that's what we're doing going forward as we look at some of these other sections.

Everybody agree? Okay.

So, does anyone have an idea about where logically we should go now or should we go back to what we were discussing before?

BGen SCHWENK: With the limited time we have left, one of my thoughts is, if we use the read ahead that they gave us and they have some they think have been resolved.

CHAIR JONES: Okay, well, we --

BGen SCHWENK: And if we go to the ones that they think that, you know, Glen and crew think have been resolved and confirm them.

CHAIR JONES: Did they pay you before you came in?

BGen SCHWENK: No. And we confirm

their resolve then we can take them off the table.

CHAIR JONES: Okay. And, some of them, I think we can be reasonably certain they're not, you know, interrelated with our larger issues.

MS. WINE-BANKS: One other, we spent a lot of time talking about the position of authority and how to deal with that. And, there was the new proposal from Lisa that I don't think we ever talked about.

And, maybe before we forget what that whole discussion was, we should resolve that one.

CHAIR JONES: Well, you know, if we have totally nonconsensual sex, now that we're not calling it -- we're not all messed up with this bodily harm definition, I don't know why that doesn't come under that. It's nonconsensual.

DEAN ANDERSON: Because it's not within the -- it's not explicitly covered under the definition of consent. I understand that it

could be and there would be circumstances in which it would work.

CHAIR JONES: I have to look at the definition of consent.

MS. FRIEL: But that goes back to the basics of bodily harm was defined as nonconsensual sex, it just gave off a different impression. But yet, there is a problem with charging these abuse of power situations even with that definition. So, calling it nonconsensual sex doesn't seem to me to totally solve the problem. Creating a subsection that totally addressed seems --

MajGen WOODWARD: Because it comes across as consensual sex. And, I mean I think that's our concern, right, is that there is that case where the trainee says I can't say no and so the implication is that there's some communication that says yes to the person who's abusing them.

CHAIR JONES: Well, I took this away from two suggestions. One that we try to figure

out what's been resolved for the sanity of our very good staff. And, two, to just go back to your suggestion, Lisa, about language.

I think that's going to be a bigger discussion. I think we all have it, but what time is it anyway? Someone's concerned about time. 4:20? I think we can do this relatively quickly and then why don't we come back to that, if that's okay?

MS. WINE-BANKS: I have to leave promptly today.

CHAIR JONES: Okay.

MS. WINE-BANKS: For a flight. So, coming back to a longer one is not going to -- I won't be here for that.

CHAIR JONES: No, I didn't mean today. I'm sorry.

So, that's good because I'd like you here as we decide what's resolved.

MS. WINE-BANKS: Could I -- on your comment about the consent and the nonconsensual, if you look at the definition of consent, I think

there's going to get a little complicated to treat it -- I mean, you could under lack of consent can be inferred on the total circumstances.

CHAIR JONES: Right.

MS. WINE-BANKS: All surrounding circumstances considered. Well, one of the circumstances would be the --

CHAIR JONES: What we heard today.

MS. WINE-BANK: -- relative relationship between the parties and whether that eliminates the possibility of consent.

But, if that eliminates the possibility of consent, then you're back to basically a per se.

CHAIR JONES: Yes, I have to read both the actual Statute in term so of how it defines consent and think about it some more.

And then, the rest of it, well, it is all --

DEAN ANDERSON: So, Issue 1 is about the current definition of consent and there was a

proposal that was on the table. It has not been finally assessed, but there was some time spent preparing that proposal for this body.

It doesn't address either abuse of authority nor affirmative consent. It was basically on the question of -- it was limited to the question of trying to get away from --

CHAIR JONES: Resistence.

DEAN ANDERSON: -- locations within the definition around resistance.

So, this was as an explanatory note to handle that issue. But, it doesn't deal with some of these other questions around consent.

CHAIR JONES: And, I think this is a classic case of we don't -- we need to make sure this fits into our scheme as we go forward.

DEAN ANDERSON: All right.

CHAIR JONES: So, I think no one wants to talk about incapable of consenting right now, do they? This is unresolved. I'm in favor of doing that as well.

(Simultaneous speaking.)

CHAIR JONES: Oh, sorry, I skipped to three. Two, should the Statute define defenses relying on the victim's consent or the accused mistake of fact as to consent? I don't even remember this one.

DEAN ANDERSON: I thought we resolved it, so we're good.

LtCol HINES: At the June meeting in New York, Judge, we went around the room and --

CHAIR JONES: Oh, I do -- now I know the issue.

LT COL HINE: -- the conclusion was --

CHAIR JONES: Yes, I completely agree. This is resolved.

LtCol HINES: -- mistake of fact as consent --

CHAIR JONES: I think we resolved this the day we walked in at the first meeting. Okay.

Three, can we all agree that's unresolved to this moment?

Okay, four, definition concerning the

accused administration of a drug or intoxicant. I can't say it's resolved, so unresolved.

BGen SCHWENK: Five we just resolved.

CHAIR JONES: Five, we did resolve with the caveat that we're going to do it but we're not sure where we're putting it.

MajGen WOODWARD: You don't think we've resolved four?

DEAN ANDERSON: It's semi-resolved.

CHAIR JONES: Pardon me?

MajGen WOODWARD: You don't think we have consensus on four?

DEAN ANDERSON: Oh, moving it to four?

(Simultaneous speaking.)

MS. WINE-BANKS: But, we never made the presentation.

(Simultaneous speaking.)

CHAIR JONES: It's issue four on page five, I think that's what you're talking about?

MajGen WOODWARD: Yes, I just thought that this might be one we actually do have consensus on, no?

MS. KEPROS: I don't agree with the recommendations, so not from my point.

MajGen WOODWARD: Oh, okay, never mind, never mind.

(Simultaneous speaking.)

MS. FRIED: I should point out that the Subcommittee Members can -- they said that they don't support a particular recommendation right at the sentencing view, I'm just --

MajGen WOODWARD: No, but I was just thinking that --

(Simultaneous speaking.)

CHAIR JONES: Okay, five is resolved.

Issue 7, page 8, how should fear be defined?

DEAN ANDERSON: Unresolved.

CHAIR JONES: That's definitely unresolved.

Eight, on page 9 is the definition of force too narrow? I would have to say it's unresolved now because I would have to refresh my recollection on that.

But, is there anyone who thinks it's been resolved? No? Okay.

Issue 9, definition of sexual act and sexual contact too narrow or are they overly broad? Now, I'm not prepared to --

MS. FRIEL: Yes, no, we had some suggestions --

(Simultaneous speaking.)

CHAIR JONES: Number 10, should the accused knowledge of a victim's capacity of consent be a required element of sexual assault?

DEAN ANDERSON: I think we did -- I thought we did resolve this.

CHAIR JONES: We did because that --

BGen SCHWENK: Everybody agree with what's written down there?

PROF. SCHULHOFER: What is the current?

BGen SCHWENK: No change.

PROF. SCHULHOFER: No, what is the current -- what is it that wouldn't be changed?

BGen SCHWENK: Should the accused

knowledge of a victim's capacity to consent be a required element? The answer is no.

PROF. SCHULHOFER: Is it narrow? It is not required?

MS. KEPROS: The accused must know or reasonably should know.

CHAIR JONES: Or reasonably should know, that involved, what was the name of that Supreme -- the recent Supreme Court case?

HON. HOLTZMAN: Oh, the negligence issue?

PROF. SCHULHOFER: Yes.

CHAIR JONES: The negligence issue.

PROF. SCHULHOFER: So, the decision was not to follow the emanations from the Supreme court?

JUDGE JONES: Exactly.

PROF. SCHULHOFER: The point that I mentioned to Glen, I think the current -- the oddity about this is that in the U.S. Code, it does require knowledge of the victim's capacity to consent and the UCMJ it does not. So, there

is a tension.

CHAIR JONES: I think this would be a classic situation where, as Maria suggested, it would be a very worthwhile endeavor to write a descent, if you wanted to, Professor.

PROF. SCHULHOFER: Well, I'm not going to. I think we're stirring up enough hornets here. And, any appreciation for this issue in Congress is not likely to be high, so it's, you know, it's not worth it.

But, just pointing out that the Supreme Court is very troubled these days by overreach of the criminal law and abuses of the criminal justice system.

And, there seems to be a greater comfort level within this room about the way discretion is handled within the military justice system than would be within in the civilian -- and this is coming, you know, from Chief Justice Roberts and what we, you know, roughly and, you know, crudely consider the conservative numbers of the court are, you know, very troubled by this

within the civilian system.

And, it's quite clear that they've been cutting back, not only, as Lisa mentioned with that Elonis case has its little hints of free speech involving threatening of the life of the president and the court said very clearly they weren't reaching the First Amendment issue.

And then, a week later, they decided that one of those drug Affinity cases, those precursor chemicals which was, that was McFadden I think, was that the case that I mentioned to you?

And, anyway in McFadden, they did exactly the same thing with a drug dealer who was using precursor chemicals and they overturned the conviction because they hadn't proved actual knowledge that the chemicals were precursor.

LtCol HINES: Professor, correct me if I'm wrong, but I think your initial concern about this was the part about reasonably should have known, correct?

And --

PROF. SCHULHOFER: Right.

LtCol HINES: -- you had some problems with that. And I think the presenters came in and addressed that by saying the Government already on the Statute has to prove the incapacity but also that the accused knew or reasonably should.

No, in a --

CHAIR JONES: No, Elonis did have a Statute that did not --

PROF. SCHULHOFER: Right.

CHAIR JONES: -- have the language which would permit this standard.

PROF. SCHULHOFER: Right.

CHAIR JONES: And that's what they whacked them on.

We have the language.

PROF. SCHULHOFER: No, there's no doubt --

LtCol HINES: But the prosecutor said this only comes up when the accused gets on the stand and says well, I didn't know. And so, that

reasonably should have known, that's what allows the Government to come back in and rebut what the accused has said about his mistake of fact being unreasonable.

So, I just wanted to make sure that everyone was clear.

PROF. SCHULHOFER: Yes, and there's no doubt that the Supreme Court would say this is clear. It's a matter of statutory interpretation. Congress can do whatever it wants.

CHAIR JONES: Right.

PROF. SCHULHOFER: But, it's also clear, I think, that the Court is saying this is not a good idea and whenever a Statute is ambiguous, we're going to assume that it requires actual knowledge or at least recklessness unless Congress tells us very specifically otherwise.

Now, here, it has said otherwise, but I think the Court is, you know, is also --

CHAIR JONES: On the other signal?

PROF. SCHULHOFER: -- a signal they

don't think it's a good idea, I don't think it's a good idea. But that's the choice for this --

MS. WINE-BANKS: And, that's constitutional?

PROF. SCHULHOFER: No, it hasn't been -- no, it's not unconstitutional to do it.

MS. WINE-BANKS: Why do you think it's not a good idea?

PROF. SCHULHOFER: Why do I think?

MS. WINE-BANKS: It's a negligence standard.

PROF. SCHULHOFER: Yes, I don't -- I think negligence -- I think in the great majority of these cases, a jury is going to be convinced -- if a reasonable person would have known, then they're going to assume that the defendant himself knew if he's a reasonable person.

MS. FRIEL: Intoxication is a huge issue here which is why we came out the way we came out. When we have such a huge volume of sexual assault that has to do with people who are intoxicated and you sit there and say, as an

alleged perpetrator, I got so blotto drunk I didn't know. You leave that out, I had to know that. I didn't know, I was close to passing out myself.

PROF. SCHULHOFER: But he was aware of --

MS. FRIEL: That should make him culpable?

PROF. SCHULHOFER: Well --

MS. FRIEL: That doesn't make you -- and that's why everybody's got know or reasonably should know when it comes to intoxication. So, you should be culpable for what you would have known had you not gotten yourself so drunk that you didn't notice that I was saying no and pushing back and indicating all other ways, lack of consent.

Why should you avoid culpability because you got so drunk you don't see any --

CHAIR JONES: Well, right, it's like drunk driving, too. But, it's all -- it's sort of to me a nonissue because we have Congress

saying it. It's there and I don't disagree with you. I think the Supreme Court was trying to say something but I'm not going to change -- I wouldn't change this.

DEAN SCHENCK: And, I think that language already exists in other provision in the UCMJ.

PROF. SCHULHOFER: I'm sorry?

DEAN SCHENCK: I think that language knew or reasonably should have known exists in other punitive Articles in the UCMJ.

PROF. SCHULHOFER: In the UCMJ, it does.

DEAN SCHENCK: Yes, in the UCMJ.

PROF. SCHULHOFER: But is also in U.S. Code, it also does.

(Simultaneous speaking.)

DEAN SCHENCK: -- problems in the field either.

CHAIR JONES: So, Issue 10 is resolved.

HON. HOLTZMAN: And, it's not

unconstitutional then I don't see why we have to reach for it.

CHAIR JONES: All right, so 10 is resolved.

Eleven is should the offense of indecent act be added to the UCMJ and that's listed as unresolved.

MajGen WOODWARD: But they did send us those materials so, I don't know if everybody looked at them but we might be able to vote on that.

(Simultaneous speaking.)

CHAIR JONES: Yes, I'm ready to vote on that.

LtCol HINES: I sent those out a couple of --

BGen SCHWENK: But where's the -- isn't there a 134 in the Executive Order that's pending the president?

CHAIR JONES: Yes, yes.

LtCol HINES: So, that's pending.

CHAIR JONES: Yes, it's on it's way.

LtCol HINES: So, my recollection is that everyone kind of agreed that this needed to go back, but the question was --

CHAIR JONES: We agreed what, Glen? I'm sorry.

LtCol HINES: That indecent acts needed to go back. Most of the presenters believe that needs to go back into the UCMJ.

The question was is it how it is in the -- what's the status of the president's EO or does it need to go under 120 or 134?

So, I can get those materials together again and send them out. I sent them out back in July, but I'll get the EO.

CHAIR JONES: Would you mind sending them out again?

LtCol HINES: No, not at all, Judge.

CHAIR JONES: Yes, the EO puts it under 134.

LtCol HINES: Right, correct.

BGen SCHWENK: And, what's the difference whether it's in -

(Simultaneous speaking.)

CHAIR JONES: So, we can leave this unresolved and possibly, we don't need to resolve it.

PROF. SCHULHOFER: Well, wouldn't -- given the strong sentiment, I think at our last meeting that we should try to classify things in a way that would minimize sex offended registration.

I would infer that might lead us to be agreed that this should not be under Article 120.

DEAN SCHENCK: But, again, if you're going to be convicted of indecent acts under 134, does that require a sex offender registration by the mere term? No, it has to be a 120 event?

MS. KEPROS: That's the current information we were given at the last meeting. There's a handout in the materials for --

Col GREEN: But, given the instruction limits, it only to the 120 offenses currently, but the same instruction for pre-2012 offenses includes 134 offenses.

DEAN SCHENCK: Yes, I was going to say, well they've got the EO -- my recommendation is the EO is pending, right, so they're putting it under 134.

We could, however, recommend that DoD change that about sex offender registration, you know, hey, add that to your sex offender registration.

LtCol HINES: It was always reported out before.

DEAN SCHENCK: Because we're real aware of --

CHAIR JONES: Right now, I'd just like to get through --

BGen SCHWENK: Unresolved.

CHAIR JONES: -- the unresolved and the resolved. So, 11 is unresolved.

MS. WINE-BANKS: So, it might be a registered -- you might have to register for that regardless of where it's categorized.

CHAIR JONES: So, Issue 6 which is at page 13 -- you had a comment, Dean?

DEAN ANDERSON: Oh, I was just going to say that there are a couple of these that I think are still resolved after the discussion today. There are some that are unresolved, but I think in principle, six is we still want to define a little bit better the question of threatening wrongful action or threats and --

(Simultaneous speaking.)

DEAN ANDERSON: Right, but the question has been answered.

BGen SCHWENK: So, it's unresolved.

CHAIR JONES: Right.

BGen SCHWENK: I think we've still got work to do so it's unresolved.

DEAN ANDERSON: Well, we have work to do, that's true. That's true.

CHAIR JONES: All right, so it's -- yes, it's partially resolved and partially unresolved.

BGen SCHWENK: Partially resolved.

DEAN ANDERSON: We agreed that we can answer the question, we just don't know how

exactly.

CHAIR JONES: How we're doing it yet, okay.

I like this one, it's marked preliminarily resolved. This is Number 12, is the current practice of charging inappropriate relationships or maltreatment under the UCMJ other than Article 120 appropriate and effective when sexual conduct is involved?

DEAN ANDERSON: And, that we came to -- I think we agree still after today's deliberation that it's appropriate at times. And that -- and prosecution have that flexibility. And I don't think that means we change anything.

CHAIR JONES: Right.

DEAN ANDERSON: Okay.

MajGen WOODWARD: Because the only other option is to make it a --

DEAN ANDERSON: Separate offense?

MajGen WOODWARD: No.

DEAN ANDERSON: Is to force a separate offense, to force it as a 120.

PROF. SCHULHOFER: So, does is that resolved?

CHAIR JONES: I think yes, it's resolved.

BGen SCHWENK: Yes, that's resolved.

PROF. SCHULHOFER: Permanently resolved.

CHAIR JONES: Permanently resolved, not preliminarily.

All right, Issue 13, does the 2012 version of the UCMJ afford prosecutors the ability to effectively charge coercive sexual relationship for those involving abuse of authority under 120?

DEAN ANDERSON: This is unresolved and the --

CHAIR JONES: Well, we want it to because the bottom line -

MajGen WOODWARD: That's right. I mean I think we've come to some preliminary ideas about what it might look like, I think it's E.

DEAN ANDERSON: So, I think we

resolved it as no and we're working on how we're changing it to make it work.

MajGen WOODWARD: Exactly. It currently says yes, but we meant it should say no.

PROF. SCHULHOFER: Well, now it says yes, but and it should say no, if.

MS. WINE-BANKS: Or no because.

CHAIR JONES: Well, for my purposes, it's unresolved.

DEAN ANDERSON: But we're close.

CHAIR JONES: Yes, we are.

DEAN ANDERSON: We're 14.

CHAIR JONES: Fourteen.

HON. HOLTZMAN: It says preliminarily resolved? Is that where we are?

CHAIR JONES: No, actually it's unresolved.

HON. HOLTZMAN: Okay.

CHAIR JONES: We're still talking.

Issue 14, should the definition of threatening or placing that other person in fear

be amended to ensure that coercive sexual relationships or those involving abuse of authority are covered under an existing Article 120 provision?

So, obviously, we're talking about that.

DEAN ANDERSON: These are related but --

CHAIR JONES: They are very related.

DEAN ANDERSON: -- I think that after today's discussion, I actually think that we both want to clarify what threatening or placing another person in fear is as well as have a separate provision that specifically addresses abuse of authority issues. I think we're in agreement on that.

PROF. SCHULHOFER: We're in agreement it should be amended.

BGen SCHWENK: Right.

PROF. SCHULHOFER: We haven't said how.

BGen SCHWENK: No, but it's still

under --

DEAN ANDERSON: But we're close.

CHAIR JONES: And, I may be holding back on doing anything but putting something in the Executive Order about abusive relationships.

But, or, you know, if we want in the Statute I'm open to that.

But, in any event, 13 and 14 are, at the moment -- we're getting closer, at least we know what the issues are and they're unresolved at the moment.

Fifteen --

DEAN ANDERSON: Fifteen, actually we flipped our position.

BGen SCHWENK: Right. We will need more work.

DEAN ANDERSON: Yes, unresolved.

CHAIR JONES: Okay, unresolved.

DEAN ANDERSON: But we're close, seriously.

CHAIR JONES: No, today was -- we got quite a distance.

Should sexual relationships between basic training instructors and trainees be treated as a strict liability offense under Article 120?

DEAN ANDERSON: We all agree.

CHAIR JONES: We still agree.

DEAN ANDERSON: I think it's resolved.

CHAIR JONES: That's resolved.

(Simultaneous speaking.)

DEAN SCHENCK: I said no, but I didn't know if it changed by that.

CHAIR JONES: Definitively no.

Seventeen?

PROF. SCHULHOFER: Should not be.

DEAN ANDERSON: No per se or strict --

CHAIR JONES: Right. And, last but not least, as an alternative to further amending 120, should coercive sexual relationships currently charged under other Articles of the UCMJ be added to DoD's list of offensives that trigger sex offender registration?

That is definitely resolved.

DEAN ANDERSON: Resolved, no.

CHAIR JONES: From everything I read and heard, the answer is no.

Okay? It was tremendously helpful to go through bodily harm. I think that's going to make a big difference. It's going to help and then, at least we know what we want to do with abuse of authority or where we want to put it.

(Whereupon, the above-entitled matter went off the record at 4:41 p.m.)

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This is to certify that the foregoing transcript

In the matter of: Judicial Proceedings Panel

Before: US DOD

Date: 09-17-15

Place: Arlington, VA

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

Court Reporter