UNITED STATES DEPARTMENT OF DEFENSE

JUDICIAL PROCEEDINGS PANEL

SUBCOMMITTEE MEETING

WEDNESDAY,
DECEMBER 2, 2015

The Subcommittee met via teleconference, at 10:35 a.m., Hon. Barbara Jones, Chair, presiding.

PRESENT
Hon. Barbara Jones, Chair
Hon. Elizabeth Holtzman
Laurie Rose Kepros
Dean Lisa Schenck, COL(R)
Prof. Lee Schinasi, COL(R)
BG(R) James Schwenk
Jill Wine-Banks
MG(R) Margaret Woodward

STAFF:
Colonel Kyle W. Green, U.S. Air Force - Staff Director
Lieutenant Colonel Glen Hines, U.S. Marine Corps - JPP Subcommittee Staff Attorney
Lieutenant Colonel Kelly L. McGovern, U.S. Army - Deputy Staff Director
Maria Fried - Designated Federal Official
Kirtland Marsh - Staff Attorney
William Sprance - Designated Federal Official
Sharon H. Zahn - Senior Paralegal
10:35 a.m.

MS. FRIED: Okay. Judge Jones, whenever you're ready, you can proceed.

CHAIR JONES: Great, thank you. And we can start.

We still obviously have at least two issues. One is based on Professor Schulhofer's email that relates to our definition of cognitive ability. And the other is indecent act. But for the sanity of Glen and the Staff, why don't we go through the report itself. And as we reach the issues we can stop and discuss them at that point, unless somebody disagrees. Maybe we can go ahead that way? Okay.

I see that on page 1, Ms. Kepros has added some language, which looks fine to me. Does everybody have their reports and know what I'm talking about?

MS. WINE-BANKS: Yes.

CHAIR JONES: Okay. Any problems with that language? I think it does help. Okay, no,
I don't have any, so --

HON. HOLTZMAN: Well, the only

suggestion I would make is after -- in the second

line is after the word "amendments" should say

"to Article 120." I don't know if it's

necessary, but --

CHAIR JONES: I think that's not a bad

idea, "would form such amendments to Article

120."

LTCOL HINES: Yes, ma'am.

CHAIR JONES: Any other issues? And

it's going to be prepared by the -- why is

Members -- is the proposal to say various

proposals prepared by the Subcommittee Members,
or just Subcommittee?

LTCOL HINES: Judge, I think the reason

Members is highlighted is, I just -- I had to

attach the bubble comment to it somewhere and I

think it just attached it to that last word, so

you could do it either way. You could say

prepared by the Subcommittee --

CHAIR JONES: Oh, I see. Okay. There's
no significance.

   LTCOL HINES: Right.

   CHAIR JONES: I thought maybe it was something you wanted us to discuss. Alright, that's fine. And as is, that's approved.

   There are -- on page 2 there is --

   MS. WINE-BANKS: Barbara?

   CHAIR JONES: Yes?

   MS. WINE-BANKS: It's Jill. And I don't -- it's a minor issue but the first sentence of the next paragraph or the last paragraph on that page still seems to me internally inconsistent, and could use perhaps an extra sentence. It says that, "Overall, it's reasonably effective but often confusing."

   CHAIR JONES: Right.

   MS. WINE-BANKS: And we decided that we were -- we didn't need to make changes to 9. And I just felt like if we explained that, we felt that although it was confusing, it was reasonably effective, and the confusion could be cured by amending the proposals that we're preparing to
amend, and that the rest were fine. It's a slight difference. I mean, I could write it out. I'm sorry, go ahead.

HON. HOLTZMAN: I don't know where you are.

MS. WINE-BANKS: Right after the --

CHAIR JONES: After paragraph --

MS. WINE-BANKS: -- we just added, it says, "Overall, the Subcommittee determined that Article" --

HON. HOLTZMAN: Oh, I'm sorry. Okay, got it.

CHAIR JONES: Okay, sorry.

MS. WINE-BANKS: I mean, we're saying it's effective but confusing, and then we go on to say we don't need to make changes to 9. Some definitions are sufficiently confusing. I just thought a rephrasing of it would make it clear that we felt that overall it works, that with the changes that we're proposing the confusion could be eliminated, so that we're not just ignoring the confusion, we're fixing the confusion.
CHAIR JONES: Alright.

MG WOODWARD: I agree. This is Maggie.

It's interesting that I reacted to that one, but I didn't write anything down. But, yes, I think the inconsistency deserves to be addressed.

CHAIR JONES: I actually reacted to it, too, and then left all of my notes at home, but I recall that I didn't like "often confusing." I think I wanted to mellow it out to "sometimes confusing."

MS. WINE-BANKS: Right. Do you want me to -- I can type up some language and send it to Glen while we're on the phone.

CHAIR JONES: That would be great.

Thank you.

MS. WINE-BANKS: Okay.

CHAIR JONES: There's a very minor edit on page 2 in the second paragraph. "Who was a victim," and I think that's right. I think the point was that she's not a former victim.

MS. WINE-BANKS: Well, it's all -- I added the "who is." It said something else which
was just grammatically incorrect.

CHAIR JONES: Okay.

MS. WINE-BANKS: That "who is" was necessary to make it a correct statement of who and what she was.

CHAIR JONES: Okay. Well, it reads fine to me right now.

MS. WINE-BANKS: Yes.

CHAIR JONES: Any other comments or changes, suggestions? Okay.

Okay. Well, here we run straight into Professor Schulholfer's comment, but first let's just deal with what is changed in terms of what appears in red here. I think all that does is be a numerical piece, which I didn't have a problem with.

MS. KEPROS: Can I say something?

CHAIR JONES: Yes, go ahead. Sure, Laurie.

MS. KEPROS: Yes, sorry. This is Laurie Kepros. On page 2, it's sort of the first place another issue arises, and I just emailed Glen
about this within the hour, so I don't think the rest of you maybe have been apprised of it. Our recommendations around Issue 2 are inconsistent in some places. It recommends a change to statute or MCM, in other places it says or the Benchbook, and other parts it says just change the Manual for Courts-Martial, so we need to straighten that out. It's both here in the summary recommendation and in the broader recommendation, that inconsistency is also present.

CHAIR JONES: You know, can we deal with this right now because I thought we were not going to change the statute, we were just going to make it clear that those defenses still existed because our concern was that if we change the statute, then people would start saying well, if you put it in now, it mustn't have been in before. That's my recollection, but I'm --

Laurie, what's yours?

MS. KEPROS: I remember that conversation, too. I don't remember like a final vote, but I remember that conversation you just
DEAN SCHENCK: This is Lisa. I agree with that, as well.

LTCOL HINES: Judge Jones?

CHAIR JONES: Is that you, Glen?

LTCOL HINES: Yes.

CHAIR JONES: Yes.

LTCOL HINES: What I would recommend, and I answered Ms. Kepros' email with that's probably my fault for not tightening up the language in front of the report. I think the easiest thing would be to make the recommendation specific to clarify that the defenses are available in the Manual. Otherwise, I agree with what you said, Judge. If we're talking about putting it in the statute, now we're going to go back and change 120(f) on defenses, which is very broadly worded. And I think the concern expressed was if you start to list specific defenses in the statute, then maybe by implication you're excluding others. So, that would be my recommendation. It's still consistent with your
recommendation that it be clarified, but it would
just be much less painful to do it in the Manual
for Courts-Martial.

CHAIR JONES: Okay. So, the answer to
2 is no, the statute doesn't have to do it, but
we would make a recommendation that it be
clarified in the Manual for Courts-Martial. Is
that what we're all agreed upon? I think that's
where we came out. That was my recollection.

LTCOL HINES: Yes, ma'am.

CHAIR JONES: Okay. So, you'll make
that change for us, Glen?

LTCOL HINES: Yes, ma'am.

CHAIR JONES: Okay, great.

LTCOL HINES: I'll fix those.

CHAIR JONES: Laurie, is that --

MS. KEPROS: That addresses my concern.

And, again, we'll see the similar inconsistency
in the fuller description in the recommendation.

CHAIR JONES: Right. It will have to be
taken out there, as well.

MS. KEPROS: Yes, that's on page 12.
CHAIR JONES: Great. Okay. I don't have a problem with the additional language in the first paragraph on page 3. I think it makes it clearer. We're just saying where our recommended definition would appear. So, I'm not sure I understand that. What are we saying?

LTCOL HINES: Well, the way --

CHAIR JONES: Incapable of consenting. I'm sorry. We're saying "incapable of consenting" will appear at 120(g)(8), and a new definition of cognitive ability is 120(g)(9). That's fine.

LTCOL HINES: Okay.

CHAIR JONES: Any other -- could we move on to the next paragraph then on 3?

HON. HOLTZMAN: Sorry, Barbara. I have something that's not -- that doesn't relate to the new language, but it's clearing up some points in the prior language. It said that the -- that something is an issue at many prosecutions. It should be in many prosecutions, that statement is wrong.

CHAIR JONES: Right.
HON. HOLTZMAN: And, also, the other thing I would like to add is that it's not just that the -- will create a problem for counsel or judges, but it may also create a problem for panel members in terms of their ability to understand. So, I don't have language but, you know, I just wanted to raise those points.

CHAIR JONES: Well, we can add panel members in the first sentence, with practitioners, "including military judges, prosecutors, defense counsel, and panel members and appellate courts." We have to distinguish between the group of practitioners and the panel members, and then the appellate courts, but I think we can do that.

HON. HOLTZMAN: Well, it's up to you. I mean, I don't really care where it goes, but it should be --

CHAIR JONES: Okay. So, Glen, why don't we try to add that somewhere where it goes.

LTCOL HINES: Yes.

CHAIR JONES: I think we all agree that
we want panel members -- it to be not confusing
for panel members, as well.

LTCOL HINES: Yes, ma'am. I'll add that
language.

HON. HOLTZMAN: And the "in" part
should be changed, as well.

CHAIR JONES: Right. It should be "in
many sexual assault," not "at many sexual
assault" --

LTCOL HINES: Yes, ma'am.

CHAIR JONES: -- "and abusive contact
prosecutions." Okay.

MS. KEPROS: This is Laurie Kepros. On
that comment about some of the litany of people
who would be interested in this definition, I
wonder if we rework that just to make it even
broader, because it isn't even just the people
involved in litigation, or panel members. There's
that notice issue for all Servicemembers, and
having, you know, guidance for what makes
something criminal.

CHAIR JONES: You know, we said
something like that later with respect -- I don't know if it was with respect to this. Glen, do you know what I'm talking about? We also said it was the counsel for --

LTCol HINES: Yes, Judge. I don't know which issue, but that's come up quite a bit, the notion of just, you know, during the training being able to --

CHAIR JONES: Right.

LTCol HINES: -- tell all your Servicemembers what level of conduct is expected. So, I can add Servicemembers into -- along with panel members into one of these sentences.

CHAIR JONES: Okay. After you do that, we'll have time to re-jigger it if we still have some tweaks. But you'll do that and change the "at" to "in," and make sure we add panel members.

LTCol HINES: Yes, ma'am.

CHAIR JONES: And then we can take a look at that. Thank you. Anything -- go ahead. Sorry.

MS. WINE-BANKS: I just was going to
say I sent Glen the redraft of that paragraph, or our proposal.

LTCOL HINES: Okay, ma'am. Thank you.

MS. WINE-BANKS: It actually turned out -- it turned out to be very simple to do. I moved things around so that it just read, "Overall, the Subcommittee determined that Article 120 provides a reasonably effective statutory framework for prosecution of sexual assault offenses in the military, but that some definitions and terms in Article 120 are sufficiently confusing or vague as to create uncertainty," so I put that part in there and then ended with the next -- what was the second sentence. "The Subcommittee determined change or amendment is not warranted for nine of the issues it reviewed."

CHAIR JONES: I just followed along with you on that last paragraph on page 1, and that sounds like it does the trick. I like it. So, you'll send that out in red so everyone can take a look at it, Glen.

LTCOL HINES: Yes, ma'am.
CHAIR JONES: Okay. Thanks, Jill.

Alright. I think we're on page 3, paragraph 2. Let me just take a quick look here.

Oh, okay. Here we go. This is Professor Schulhofer's note. This is simple, and I agree with it. Since bodily harm is being removed, we have to make sure that the subparagraphs are renumbered. Any issues with that?

MS. WINE-BANKS: No.

CHAIR JONES: Okay, great. So that takes care I think of page 3, unless there are additional comments.

HON. HOLTZMAN: Yes. I have a question about the bodily harm if you don't mind for second.

CHAIR JONES: Not at all.

HON. HOLTZMAN: Maybe it belongs later when we go into bodily harm specifically, but what troubles me about the explanations we're giving about the confusion with bodily harm is that it ignores the whole question that the way the statute is structured it requires bodily harm...
to be committed by bodily harm. I mean there's a
tautology and illogical problem in the structure
of the paragraph. And that's never alluded to in
any of our discussions of bodily harm, and it
should be.

CHAIR JONES: Just that it makes it
very difficult to understand at all.

HON. HOLTZMAN: Exactly. That's another
way of putting it.

MS. WINE-BANKS: I think Liz is right
on that.

CHAIR JONES: You'd like to point out
just how bad it is, since we've gone to the
trouble of removing an entire concept. Alright.

HON. HOLTZMAN: The question is whether
it belongs here or whether it belongs later, and
I am agnostic on that score.

CHAIR JONES: Okay. Alright. Why don't
we leave that open and see what kind of language
Glen and I come up with on that. Anyone who would
like to send in a little something, great. It
could go later where we're going in some depth,
or it could go here because, you know, most
people only read, you know, the first couple of
pages of a report. So, I'm open on that. Let's
see what we decide to say, because I think that
is important. We need to succinctly show how
ridiculous, you know, it is when you're just
trying to read through 120. Okay.

HON. HOLTZMAN: Okay. Well, if that's
going to be in the front, I'd just like to add
that maybe we ought to add that the language
"bodily harm," is also itself confusing because
it suggests the requirement of physical injury
when, in fact, there is none.

CHAIR JONES: That's an easy thing to
add. The other one may be more difficult to sort
of say succinctly, but that's easy. I agree. That
I think -- I think both could go in there. We
just have to figure out how to say your first
suggestion. Okay. Anything else?

Well, was there anything on page 4
that anyone wanted to talk about? There's nothing
added there. Well, I guess there was one sort of
change at the bottom in Issue 6, a little edit.
And it looks fine, express that this definition
was too narrow. So, hearing nothing more, I'll
move on to page 5.

In Issue 10, Professor Schulhofer, and
I think we all remember this, has raised concerns
about the level of knowledge as part
of --

LTCOL HINES: Judge Jones, first of
all, you're breaking up a little bit.

CHAIR JONES: Yes, go ahead. Oh, I'm
sorry.

LTCOL HINES: Okay. I can hear you now.
No, this is -- if I could just succinctly explain
it. Professor Schulhofer, as everyone probably
recalls, has been concerned throughout the
deliberations that our statute as written opens
it up for the possibility that an accused could
be convicted for mere negligence, and that was
deliberated.

I think everyone else was satisfied
that the statute -- you know, Congress has spoken
in this area, and they requiring the Government
to prove not only the incapacity, but that the
accused knew or reasonably should have known. And
so I think his concern here in the bubble comment
was, he just wanted me to explain in more detail
that the Article 120 isn't on all fours with
Title 18. His concern was that we may have
misrepresented that Article 120 and Title 18 were
basically the same, and his position was that our
statute is a little broader in terms of being
able to capture perhaps some criminal conduct
that Title 18 couldn't. So, I think as stated
there, he was satisfied with it. He's seen the
redraft, and I think he's satisfied that what it
states now clarifies his concern.

CHAIR JONES: Okay. I don't have a
problem with clarifying that. And I do think that
-- I don't remember anyone else being concerned,
or at least having any strong opinion other than
that we should go ahead with what Congress has
already written, which is that reasonably should
have known is sufficient for an accused to be
held responsible.

MS. KEPROS: Well, I will say -- this is part of the record. I think it should be an actual knowledge standard everywhere, and I'm addressing that in my dissenting comments.

CHAIR JONES: Oh, okay. Good.

HON. HOLTZMAN: It should be a what standard? I didn't hear what you said. It should be what kind of standard?

MS. KEPROS: Actual knowledge.

HON. HOLTZMAN: Okay.

CHAIR JONES: Alright. Well, then we'll have it --

MS. WINE-BANKS: I think that Professor Schulhofer also pointed out that the reasonably should have known standard is a quite high one of almost reckless disregard. I can't remember the exact phrase that he included in his discussion, but that it would be higher than just say should have known.

CHAIR JONES: Right. Well, does anyone -- okay. Then, Laurie, you're going to bring this
up. I'm sure Professor Schulhofer will root you
on. He will be -- you two will be the dissent on
that, but I think everyone else is solid that we
should leave what Congress says the level -- the
necessary level intent for the accused is as
Congress has written it. Any other comments about
that?

MS. WINE-BANKS: No. Maybe we should
make it clear that we're relying on the
Congressional standard as set in this paragraph.

CHAIR JONES: Well, I think we already
-- don't we already say that 120?

LTCOL HINES: Yes. Judge, I would just
say deeper in the --

MS. WINE-BANKS: Oh, it does say it.

LTCOL HINES: Deeper in the report when
we go into it, we do reference -- on page 36, we
do reference -- the last sentence on page 36,
"The Subcommittee determined the standard
established by Congress in Article 120(b)(2) to
(3) is neither unclear, nor ambiguous; therefore,
the standard."

MS. WINE-BANKS: Okay. Great.

LTCOL HINES: Okay.

CHAIR JONES: And I think that still preserves your notion, Laurie, and Professor Schulhofer's, that it's not fair. We're just saying it's Congress' mandate.

Alright. So, under 12 --

MS. WINE-BANKS: I have a question on Laurie's suggested edit.

CHAIR JONES: Yes.

MS. WINE-BANKS: I can understand, because her edit would make the answer reflect the question where the question is just when sexual conduct is involved. It doesn't say when consensual. But as I recall our discussion, the issue really was that when it's consensual, it should not be a sex crime, although it could be punished under 92 or 93, appropriately so. And so that it isn't -- I think we lose that distinction by taking away the word "consensual," so maybe the answer is to say "when consensual sexual
conduct is involved, and that 120 is appropriate and effective when non-consensual sex is involved. "I mean, 120 is already adequate for non-consensual.

MS. KEPROS: So, the reason that I suggested striking the word "consensual," was because there was just such an array of scenarios presented by the witnesses, some of them were sex crimes, and some of them were already prosecutable even under Article 120. Some of them involved maltreatment that was not a sex crime, and that was why I thought they did not limit their comments about their ability to prosecute to sort of the way the question is framed, "inappropriate relationships or maltreatment." And there could be maltreatment that is a non-consensual sexual conduct. Whether we prosecute it under 120 or something else would really just depend on what the behavior was, and I thought there was too much nuance in the testimony to keep the word "consensual" because they didn't limit their comments to only consensual sexual
activity; although, that was certainly one example of the kinds of things they might prosecute outside of 120.

MS. WINE-BANKS: Right, and I understand that, and I agree with what you're saying, but the question that we were charged with answering, in order to answer it fully, I think we'd have to say that it's effective when consensual sex is involved to use these other portions, but that when non-consensual sex is involved as the definition of inappropriate relationship or maltreatment, then it can go under 120. I just don't want to lose the -- because our focus, even though witnesses may have gone beyond the question that we were interested in, it doesn't change that the testimony when it addressed the question we were interested in, so they said, well, yes, I mean, when non-consensual you have a clear sex crime under 120. When it is consensual, this goes to our discussion of it shouldn't be a per se illegal crime because it can be consensual. And I just thought by taking
away the word "consensual," it just makes it --

it loses that distinction, and could be put back in with the caveat that when it is non-
consensual, then 120 does cover it.

CHAIR JONES: Anybody else?

DEAN SCHENCK: This is Lisa. I see both sides to this, because it's problematic to call these relationships consensual when they're basically members of different ranks, and subordinates are technically, you know, not considered to be consensual from a military perspective. On the other hand, we do use 120 for the forcible sexual conduct. I'm just not sure how to fix that. And if we remove -- if we do remove the word "consensual," it's problematic. And you can't just put inappropriate sexual conduct because, you know, that doesn't fix it either.

CHAIR JONES: Right. Maybe what we really want to say is can be appropriate and effective. I don't know that we need to define what kind of sexual conduct.
DEAN SCHENCK: That's a great idea. May be appropriate and effective, I agree with that, with the Judge.

MG WOODWARD: And leave out the consensual piece and just talk about -- I mean, because really what it is is an inappropriate relationship that we're addressing in something other than Article 120.

CHAIR JONES: Yes. Well, my suggestion is we just say can be appropriate and effective when sexual conduct is involved.

DEAN SCHENCK: That's absolutely it, when sexual conduct is involved. That's perfect.

CHAIR JONES: Okay. So, is everybody okay with that? Laurie?

MS. KEPROS: Yes, that's great.

CHAIR JONES: Okay. Good. Got that, Glen?

LTCOL HINES: Yes, ma'am.

CHAIR JONES: Good.

LTCOL HINES: I'll fix it.

CHAIR JONES: Alright, great. Okay. Can
we move to page 6?

HON. HOLTZMAN: Before we finish page 5, there's a typo.

CHAIR JONES: Okay, Liz.

HON. HOLTZMAN: I could just give that to Glen. I don't have to bother you. Right?

LTCOL HINES: Yes, ma'am.

CHAIR JONES: Yes, okay, great. Page 6, I didn't have any problems with page 6. I see nothing on there in terms of suggestions. Any problems with page 6? Okay.

Now, making it to page 7, I don't -- let's see now. What are we doing here? So, Liz, we have your recommendation that the statutory text be put in there. Any problems with that, anyone?

MS. WINE-BANKS: I thought that helped a lot.

CHAIR JONES: Yes.

MS. WINE-BANKS: And it might even be clearer if we said "current UCMJ, Article 120," so it's not confused with -- because we do
recommend changes in many of them.

CHAIR JONES: Sure.

MS. WINE-BANKS: That's what we were working off of.

CHAIR JONES: Right. You mean inside the box rather than --

MS. WINE-BANKS: Inside the box, just add the word "current UCMJ, Article 120." Because we know what it is, but someone else reading it may wonder if that's what we're proposing, as opposed to what already exists.

CHAIR JONES: Oh, I see. As opposed to what --

MS. WINE-BANKS: I mean, they'll know by the time they get to conclusions what it is.

CHAIR JONES: Yes.

MS. WINE-BANKS: But it's a simple --

CHAIR JONES: I get it.

MS. WINE-BANKS: I thought it helped having those words there at the beginning.

CHAIR JONES: Yes. Current as opposed to proposed, so they don't have to wonder.
MS. WINE-BANKS: Right.

CHAIR JONES: I got it.

MS. WINE-BANKS: Exactly.

CHAIR JONES: Alright. Unless there's anything else on 7, why don't I -- we go to 8. And there's some minor editing on 8 in the third full paragraph. The edit looks fine to me. Okay?

No issues on 8?

On 9, there's simply some minor edits which look fine in terms of numbering. And nothing on 10. Does anyone have anything on those pages they'd like to discuss, any issue, or changes?

HON. HOLTZMAN: On page 10, just a small, itty-bitty. Basically, we say this doesn't amount to consent, and this doesn't amount to consent, but the last sentence on page 10 of A says that, "The conduct at issue shall not constitute consent." Why don't we just say does so that we're using the same verb?

CHAIR JONES: Okay. I see -- I got.

Yes, A basically --
HON. HOLTZMAN: The last line of A we have "shall not constitute."

CHAIR JONES: "Shall not constitute."

HON. HOLTZMAN: And one we say does not, which is the formulation that we use in all -- in the other cases.

CHAIR JONES: That sounds right to me.

Any objections? Okay. So, "shall" becomes "does," on page 10 right above where B starts in Section A.

LTCOL HINES: Yes, ma'am.

CHAIR JONES: Got it. Okay. Thanks, Glen.

Alright. Now, moving to page 11 which is Issue 2. And on that page, again, there are very minor edits. Does anyone have any issues or additional edits?

MS. WINE-BANKS: I'm sorry, on page 11?

CHAIR JONES: We're on page 11, yes.

MS. WINE-BANKS: I'm sorry. Could we go back to page 10 again. Just in reading it again, after hearing Liz' comment, which I think is
right, we're saying here's what consent means.
And in that same definition we're saying
submission from things is not consent, does not
constitute consent, sleeping and unconscious is
not consent. And then we say all the surrounding
circumstances are to be considered in determining
whether a person gave consent. So, isn't that
really limited to in all other circumstances
besides the ones specified above? Because I see
there's no circumstance of either sleeping,
unconscious, or incompetent.

CHAIR JONES: I think I read that to --
I read that to mean all of the surrounding
circumstances of the case are always to be
considered.

MS. WINE-BANKS: Right.

CHAIR JONES: That's how I read it.


Page 11, I have no comments.

CHAIR JONES: Okay, great. Thanks.

Anybody else on 11?

MS. KEPROS: 11 is where we need to
clean up our recommendation to Manual for Courts-Martial --

CHAIR JONES: Right.

MS. KEPROS: -- that has all the other ones.

CHAIR JONES: Okay. So, we need to clean up the fact that we're not going to try to change the statute, and we're only going to the courts-martial manual. If we do that, are we okay, Laurie? I think that's what we're talking about here.

MS. KEPROS: Yes. I'm just mentioning this is where that line just needs to change. You see, if you go down to D, and in fact that may be on to the next page.

CHAIR JONES: Yes. Well, Glen, you're going to scrutinize this section and make sure that we make it consistent with what our decision is.

LTCOL HINES: Yes, ma'am.

CHAIR JONES: Add statutory --

LTCOL HINES: Right. I'll fix it in C
and D, and I'll note that when I get through
making all of these amendments, when I route the
report back around, I'll put a bubble comment out
to the right so that everyone can see that I've
captured, come back, stop my work and make sure
that I've captured all the edits and fixes that
we're talking about today.

CHAIR JONES: Great. Wonderful.

Okay. There are a number of pages, 12, 13, 14 that have no comments from anyone, and no
edits. Are there any additional comments or edits
on those pages? Most of this is sort of the
roundup, the rationale for referring it to
testimony, and I think when I read it, it all
sounded accurate to me with respect to that
issue.

Alright. Now, we get to page 15, and
we're talking about incapable of consenting. And
we have a suggested addition by Ms. Kepros, which
I think is -- works well. Are there any comments
or additional discussion about page 15?

HON. HOLTZMAN: What is her suggestion?
CHAIR JONES: Basically, it's language that came from the Peace case, or Pease case. I don't know how they pronounce it. And I became extremely fond of the Pease case when I read it. I'm sorry, Liz. What did you ask?

HON. HOLTZMAN: No, no. I just wanted to know what -- so, the suggested change that Ms. Kepros made was in red?

CHAIR JONES: Yes, I'm sorry. It is, it's in red.

HON. HOLTZMAN: Okay, good.

CHAIR JONES: Okay.

BG SCHWENK: This is Jim. You know by doing that it does highlight the cognitive versus mental issue, because the Pease court uses both cognitive and mental. And we decided at the end I think the last time we talked to do away with mental and just use cognitive twice.

CHAIR JONES: We did.

BG SCHWENK: So, it does show that we made a slightly different language choice than the court did.
MS. WINE-BANKS: Well, I think the court is defining cognitive ability as including mental and physical ability, as well. So, they're using mental in a different way than mental ability.

HON. HOLTZMAN: I don't agree with that. I think that actually -- there may be a difference in the meaning of those two terms. I didn't have time to look it up, and a good enough dictionary actually here. But cognitive does not imply physical, in my understanding.

CHAIR JONES: No, and I don't think Pease says that either. It says lacked the cognitive ability to appreciate the sexual conduct in question or the physical --

HON. HOLTZMAN: Right.

CHAIR JONES: -- mental ability.

HON. HOLTZMAN: Right.

BG SCHWENK: Right. And then we went along and said the cognitive ability to appreciate, and then we changed in the second formulation, instead of mental or physical
ability we put down mental or -- I mean, physical
or cognitive. And I --

CHAIR JONES: We all agreed on
cognitive rather than mental, and didn't try to
use both mental and cognitive like --

BG SCHWENK: Right. That was after we
had said -- we had mental to begin with and it
came out of Pease, so then we said, oh, well, now
we have a distinction between mental and
cognitive. What should we do? And we said well,
let's come up with a definition of cognitive so
there's a difference. And then later on we did
away with mental all together, which calls into
question whether we still need a definition of
cognitive.

CHAIR JONES: Right. And that's sort of
-- I think Professor Schulhofer's is a little
anti the definition now. Who gave us that Rules
of whatever it is that says if you can avoid a
definition, avoid a definition in a Manual for
Courts-Martial? Glen, was that your work?

LTCOL HINES: That was Kirt Marsh's,
Judge. Kirt's here and can answer some questions on that, if you want to discuss that issue.

CHAIR JONES: Oh, no. I understand the general principle, which is a good one, which is if you don't really -- if you avoid having to define something, you should try to because it's -- you know, when you put words in, then other people come up with shades of different meanings, and wonder whether they're included or not included.

But, anyway, leaving that aside, I guess the real issue is -- well, I happen to like putting the Pease language in there. And I don't think it matters that we've dumped mental and have all decided just to use cognitive. I don't -- I think the -- you know, I might have preferred mental over cognitive, or cognitive over mental, but I certainly prefer just using one of those. Yes?

HON. HOLTZMAN: I'm just going to go -- this is Liz Holtzman. I'm just going to read something. I just looked up the definition on the
internet, which is very dangerous, of cognitive. But it deals with the act or process of knowing and perceiving. So, this would revisit the issue of mental. But if it's the process of knowing and perceiving, that is not the same as the ability to make and communicate a decision. The mental processes may not be the same. That's why I suggest that maybe that we stick with the formulation of Pease here, because cognitive may have a more restrictive meaning than mental with regard to the issue of the ability to make and communicate a decision. And this is coming from the internet, so you can say, Liz, it's ridiculous, but I don't have a dictionary in front of me.

LTCOL HINES: Well, Judge Jones?

CHAIR JONES: Yes?

LTCOL HINES: I would just -- this is Glen. I would just interpose that I think one of the biggest concerns that the Members had at the last meeting on this was we were -- we didn't like the use of "and" as opposed to "or." We
wanted to be as inclusive as possible in protecting the victim, and that's why we went back and we got rid of all the ands, and we put or, so that we could give the prosecution several different places, you know, to put their victim. And I think that last phrase, you know, "or does not possess the physical or cognitive ability to make or communicate a decision regarding such conduct." I think what we were trying to do there is cover either the victim who's physically incapacitated but mentally aware of what's going on, but she can't physically express her decision, but also to cover the person who's mentally incapacitated and can't even formulate the decision. So, I think really what we're talking about is, do we use cognitive or mental?

HON. HOLTZMAN: I'm making a different point, Glen, though. That's not my point. My point is that you're aligning or combining the two factors of apprehension or perception and the ability to make a decision, and then knowing that you're communicating it or intending to
communicate it, because it's not just physical
when you want to communicate. The brain has to
send a signal to the --

    CHAIR JONES: But I think it does say,
Liz, does not possess the physical or cognitive
ability to make or communicate a decision.

    HON. HOLTZMAN: But that's my problem.
The cognitive may mean just the perception
ability. It may not be -- let's just -- and maybe
this is an incorrect metaphor here, but let's say
you have a perception so you understand or you
don't understand what's going on. And so you
maybe understand what's going on, but you can't
make the decision. You don't have the brain
ability for whatever reason to make the decision
to say no, or you don't have the -- for whatever
reason you can't formulate the words to say no.
You can't give that signal to your mouth, or your
tongue, or whatever. And I'm not sure that that
mental process is called cognition. That's what
I'm saying.

    The second part of that, you know,
understanding what's going on. I have no problem using cognition there. But the second part, which is, you know, do you have the mental -- do you have the ability to express and communicate. That may not be a cognition function. That's all I'm saying.

MS. WINE-BANKS: Liz, for example, if you were aphasic, you would not be able to get the -- you know the words you want to say, no, but your brain doesn't connect to the speech center.

HON. HOLTZMAN: Right.

MS. WINE-BANKS: So that you can't say the word.

HON. HOLTZMAN: Right. So, what I'm saying is at that point, that may not be a cognition issue, that may be a mental process issue. That's all I'm saying. So, that's why I'm concerned that the word cognition may be too narrow in this circumstance, or inappropriate. That's all.

CHAIR JONES: Well, I mean, I always
liked mental better, but -- because I think it covers more ground.

HON. HOLTZMAN: That's the point I'm making. That's the point I'm making.

CHAIR JONES: I don't remember the whole discussion, but I do recall most people wanted cognitive, I thought. Does anybody remember the --

HON. HOLTZMAN: I think it was Lisa who was the big advocate for --

CHAIR JONES: Pushing for cognitive.

HON. HOLTZMAN: I was at that point, but now I've changed my mind, that's all. I'm just raising it because I'm a little concerned. That's all. I like the way Pease says it.

CHAIR JONES: Yes, if Pease had just kept it mental, mental, I don't think we'd be here. I honestly think mental is simpler. I always favored it. I don't know, do we want to talk about this some more? Do other people -- what's the group's thinking on this now in terms of mental versus cognitive? I honestly don't
remember why -- I would like the broader term.
For some reason, I think of mental as being more
broad. And, certainly, Pease does use it when
they talk about mental or physical ability.
Mental ability to -- we wouldn't be trying to --

MS. WINE-BANKS: Well, if you change
the word "cognitive" in our recommendation to
mental, you would then have mental, physical, and
cognitive all in the definition.

CHAIR JONES: I would take cognitive
out.

MS. WINE-BANKS: You would then say
does not possess the mental ability to appreciate
the nature of the conduct, or does not possess,
is that the physical or mental ability to make --

CHAIR JONES: Yes.

MS. WINE-BANKS: Okay.

BG SCHWENK: Yes, this is Jim. I like
mental in both places. It avoids the problem of
what the difference is between cognitive and
mental, and it avoids people dancing on what Liz
was bringing up, and our definition brings it up,
what the heck is cognitive and, you know, what
isn't. And just it makes it broader, lowers the
bar, and is simpler I think, probably, to use in
court.

LTCOL HINES: So, Judge Jones, it's
Glen again. My question would be, if we do that,
what do we do with the proposed -- and this gets
into Professor Schulhofer -- and I think we could
clean it all up right now. You know, Professor
Schulhofer's concern with the proposed definition
of cognitive ability. And Kirt wrote on that
about maybe -- I mean, I guess there's two
choices now. You either change 9 to mental
ability, and define that, or you just get rid of
a definition of mental ability all together.

MS. KEPROS: This is Laurie Kepros. I
think we should not define it. As I was
processing, you know, one had been drafted in our
last call, as well as Professor Schulhofer's
recommendation, I thought, gosh, this could be so
confusing to a Panelist. Information about
remembering could become conflated with being
memory on the stand and other things, and it
could really just be --

CHAIR JONES: That's a really good
point. What does everybody else think?

MS. WINE-BANKS: I think hearing the
conversation, I think the use of the word
"mental" and no definition is a good conclusion.

CHAIR JONES: Anyone else?

MG WOODWARD: This is Maggie. I concur.
I was one of the ones who didn't like the term
mental, because I just thought that a Panel would
interpret that as a mental disability more than a
cognitive impairment. But I'd buy into the
argument now, especially if we use no definition.

CHAIR JONES: Great. Okay, anybody
else? So, Glen, can you do this for us, make the
changes?

LTCOL HINES: Yes, ma'am.

CHAIR JONES: Okay. Then we'll all have
to take a look at that section again. We've got
nine more days, so we can -- if any of us, how
many, you know, would like further conversation
on this, do not hesitate. This is important, even though, of course, the JPP will be looking at this, and may make their own modifications. But I think we should take advantage of the time we have left, if anyone has any additional feelings about this.

MS. KEPROS: I actually was curious about that. So, are we in a situation where we don't have an earlier publication deadline than the presentation on the 11th?

CHAIR JONES: I didn't really -- I don't know, when were we get our report to the JPP, to Ms. Holtzman?

HON. HOLTZMAN: Yes, I need to know that.

LTCOL HINES: Well, it's Glen, Judge. So, our plan was to, obviously, you know, it's scheduled in the agenda for the Subcommittee to report out next Friday at the JPP's meeting.

CHAIR JONES: Right.

LTCOL HINES: And backward planning for that in our office was, we were going to try to
finalize the written report here in our office.
And finalize means routing what we're doing today
back around to the Members, making sure it says
what you want it to say, but we would need to get
that to Ms. Faulk to do her scrub on it. And then
we would print up copies in our office here and
disseminate those next Friday to anyone who wants
a copy of it. And, obviously, including the JPP.
And, you know, Dean Anderson, Professor
Schulhofer, and Ms. Wine-Banks would be giving
their presentation and delivering the report next
Friday.

CHAIR JONES: Right.

LTCOL HINES: So, it's a pretty short
timeline for us to finalize this.

CHAIR JONES: Okay. Well, I know, Glen,
you're probably going to get all of this back to
us sometime tomorrow.

LTCOL HINES: Yes, ma'am.

CHAIR JONES: Early tomorrow. This is
assuming, since it's already 11:30, we make it
through the rest of this. And then let everyone -
any serious issues after we get this next version back, will have to have an immediate reaction because I think -- well, we know the tight time frame for the Staff. So, you need it. I don't think this will be as hard to duplicate and all that as the RSP report was, so we don't need quite the same lead time, but you at least need to know you've got a final in your hands by what, Wednesday? That you can start, you know, making copies of. And you'll probably have it by the end of Tuesday, Glen?

LTCOL HINES: Yes, ma'am.

CHAIR JONES: Does that sound right?

LTCOL HINES: That's right. That should be -- I mean, if we waited much longer than that, we're probably putting our presenters in a bit of a bind, I would think.

CHAIR JONES: Right. Right. Well, let's say this then. Assuming Glen gets this back to us tomorrow early, let's make sure that everybody has their comments in by the end of the day tomorrow. And then that will -- and, frankly, I'm
assuming there are going to be very few. And then
when you send those out, Glen, it may be that,
you know, if you don't hear anything from anybody
by, you know, immediately, they're good. So, it's
going to be on the Members of the Subcommittee to
alert you by say 1:00 on Wednesday that they have
some issue with the new changes. I don't think
there'll be any. But I don't think another phone
conference --it's hard to put people together for
a phone conference. I'm sorry. I cut somebody
off.

MS. KEPROS: Yes, I'm sorry. This is
Laurie Kepros. My reason for asking is just that,
because I am preparing dissenting comments. I
want to make sure I'm responding to what is
actually being recommended in my draft.

CHAIR JONES: Right. Understood. But
you're going to have to publish your draft, too.
We have to publish your draft, too. You've got to
get it to them.

MS. KEPROS: Right. So, I want to be
timely.
CHAIR JONES: Well, look, I'm assuming that what we're hearing today is going to be it, except for minor changes, hopefully.

Okay. So, I think we're -- since we've decided we're getting rid of the definition and we're changing cognitive to mental, don't anybody tell Lisa -- we can't do any more with pages 16 or 17 until Glen makes those changes.

Okay. Now we're talking about Issue 4 on page 18, the definition concerning the accused's administration of a drug or intoxicant. I didn't think that one was particularly controversial, and I don't see any comments or changes on pages 18 and 19. Is there any discussion on that one? Okay.

HON. HOLTZMAN: Judge Jones, can I just go back to 16, because there's a small typo here.

CHAIR JONES: Sure.

HON. HOLTZMAN: D, the second line right after D where it says, "Part of the Subcommittee's redraft at Article 120," shouldn't it be "of Article 120?"
CHAIR JONES: Yes, should be "of."

HON. HOLTZMAN: Okay.

LTCOL HINES: Yes, ma'am.

CHAIR JONES: Thank you. Alright. Now we're at 5, the definition of bodily harm. And that's where we're going to add those two concepts that Liz brought up earlier.

LTCOL HINES: Yes, ma'am.

CHAIR JONES: And they should be both in the Executive Summary and here. So, that's one way we'll be looking at what you come up with, and if anybody has some suggestions on how to phrase it, send them in to Glen right away. I do think it's helpful to show that it was totally unworkable in terms of someone not in the military looking at it and trying to figure out what it meant.

Okay. On page 20, I just see that there's some language. Again, we're in the sections where it's essentially what was the rationale for this decision, testimony, summaries, and conclusions. And that goes through
from 20 to 22. Were there any other edits that
anyone wishes to suggest now with respect to 20,
21, 22, bodily harm, other than the more global
issue we're going to deal with?

MS. KEPROS: No. Just looking at page
22, that blue line, the language gets at one of
the concepts Liz was describing?

CHAIR JONES: Yes, it does. It takes
care of the fact that you think some kind of
physical injury is required. So, really, the only
one that's going to need some phrasing is the
first one. Okay, great. That can just be lifted
from 22 and put right in the Executive Summary it
looks like, and then we'll just fiddle with the
other ones. Anything else, 20 to 22?

HON. HOLTZMAN: Yes. I have a question
on 20 at the end of the first paragraph. There's
a sentence there which I don't really understand,
and I don't -- I don't understand it, and I don't
understand why it belongs there at all. And
that's just -- says, "Thus, in cases in which
bodily harm alleges the sexual act or contact
itself, lack of consent can effectively become an element of the offense." I don't exactly know what that means, but why does that need to be there anyway?

MS. WINE-BANKS: Where are you reading from, Liz?

HON. HOLTZMAN: The end of page 20, the first full paragraph, the last three lines. It starts, "Thus, in cases."

BG SCHWENK: Yes. Liz, this is Jim. I think in all of our questions when we get down to the A part, JPP rationale, it's just a quote from the JPP report of February 2015.

LTCOL HINES: That's right.

BG SCHWENK: I just pulled that report and looked at what -- the bodily harm question, and it's the exact language. That's where that came from.

HON. HOLTZMAN: Alright.

CHAIR JONES: You know what, Liz, you or I probably said it.

HON. HOLTZMAN: Okay. And then there's
just two small things.

CHAIR JONES: Yes.

HON. HOLTZMAN: On the next page 21, it says "memories help in cases of poor or old memories." Shouldn't it be just memory? Anyway.

CHAIR JONES: I'm sorry. Where are we again, on 21?

HON. HOLTZMAN: Page 20, line 2.

CHAIR JONES: Oh, 20.

HON. HOLTZMAN: 21, line 2. Memories sound like, you know, I have a lot of memories, nice memories of my parents. That's not what we're talking about here, so I think memory is more appropriate, but that's just my own --

CHAIR JONES: Yes, we could change it to memory without probably disturbing the testimony of -- whoever made that testimony.

Okay. Anything else between 20 and 22?

HON. HOLTZMAN: Yes, on page 22 the first full paragraph, line 1, 2, 3, 4, 5, where it says, "However, bodily harm in lay terms often means," -- okay, no, that's fine. That's fine.
I'm all right with that. Sorry.

CHAIR JONES: Okay. And I think we're
done through 22. Any other discussion? Okay.

Moving on to 6 on page 23, the
definition of threatening wrongful action. This
is another one where we go through and decide no
change. And what I see on these three pages -- on
22 there's some editing. Liz, you recommended
some edits here.

HON. HOLTZMAN: I did.

CHAIR JONES: Let's see. The edit looks
fine. It's in already.

HON. HOLTZMAN: I'm fine with the
edits.

CHAIR JONES: Okay. Were there any
other comments on 23, 24, 25? Okay.

Moving to page 26, Issue 7, how should
fear be defined? We recommended no change on
this. And, again, I see a few edits that have
been suggested and incorporated that look fine to
me. Does anyone have any additional edits or any
concerns with the text as it is now? Okay, great.
HON. HOLTZMAN: Judge Jones, when I read this on page 26, the last paragraph, the D paragraph, or the last part of the D paragraph. I thought that it was really dense and very hard to understand. I didn't have time to rewrite it, but maybe somebody would want to look at it and see if it could be made a little clearer or easier to -- for a lay reader.

CHAIR JONES: Okay. Alright. I mean, Glen, if someone could take a look at that, that might be helpful. I realize it's -- you're trying to create a synopsis of testimony there, and maybe none of it is very coherent when it's all put together. But why don't you take a look at it for us. Okay?

LTCOL HINES: Yes, ma'am. I will.

CHAIR JONES: That's Section B on page 26.

LTCOL HINES: Right.

CHAIR JONES: Was there anything else in that section through page 27? Okay.

Eight, is the definition of force too
narrow? And, again, because of our considerations of other issues, we decided that we didn't need a change here either. But I do note that there's very minor edits in this section, so let me go back. If anybody has any concerns, or additional comments, or problems with that.

HON. HOLTZMAN: On what pages?

CHAIR JONES: These are 28, 29, and 30.

Okay.

Alright. Now I am on page 31. This is the beginning of are the definitions of sexual act and sexual contact too narrow or overly broad? And we ended up making a recommendation in this area to the statute, it was to modify to change the statute. And are there any comments on the substance or any addition -- and there have been a few edits here which are minor. Are we content with this section? Okay. Hearing none, and I don't remember seeing any additional emails with comments in them, then we're good there.

At page 35, we begin the 10th issue about the accused's knowledge of a victim's
capacity to consent. And this we sort of touched
-- we touched on it earlier today. And what we
ultimately decided, that we were not going to
change, no change to Article 120. And I know
Laurie, this is the section where you and
Professor Schulhofer will have your dissent. Your
dissent, I don't know what Professor Schulhofer
may comment --

MS. KEPROS: Well, I found his email.

He had indicated he wasn't going to prepare a
written dissent.

CHAIR JONES: Right, he's not.

MS. KEPROS: He did ask, on page 37,
which I would join in. So if you want to say two,
or some, or something like that, Members of the
Subcommittee.

CHAIR JONES: Yes. You know, we're
going to print your dissent, your written
dissent, as part of the presentation to the JPP,
so we could -- and we could certainly -- we could
do a short dissent on this issue and have both
you and Professor Schulhofer's name. Do you want
to do it that way?

MS. KEPROS: One thing that I wanted to mention, he had suggested covering this paragraph out at page 37, and I would be fine like as if to be included in the Subcommittee Members who are -- they are taking that stance. I'm not actually dissenting on the Subcommittee's position --

CHAIR JONES: I'm sorry. I can't hear you. I'm getting a lot of -- let me move.

MS. KEPROS: I'm not actually dissenting on the Subcommittee's position on Issue 10, because the decision there was to not remove a mens rea, so I'm actually addressing some of the other issues where we did not narrow the means rea to actual knowledge.

CHAIR JONES: I'm sorry.

MS. KEPROS: Yes.

CHAIR JONES: You know what, am I conflating two things here?

MS. KEPROS: Well, it isn't that you're confusing them. They all have at their core the same mens rea principle. It's just since the
Committee didn't remove any mens rea, I was fine with that in Issue 10. But we're talking about Issue 10.

CHAIR JONES: I just want to make sure I'm clear. We're talking about Issue 10, which is the --

DEAN SCHENCK: This is Lisa. I've got to get off the call. Should I try to dial back in when I get back?

CHAIR JONES: Yes.

DEAN SCHENCK: I'll be gone for about an hour.

MS. WINE-BANKS: I have to leave by 11:20, which is another 45 minutes, 50 minutes.

DEAN SCHENCK: Well, I'll give it a shot. If it works, it works. If not, I will wait for the changed report, take a look, and then I will see you next week on Thursday.

CHAIR JONES: Wonderful.

DEAN SCHENCK: Thank you.

CHAIR JONES: Thank you.

DEAN SCHENCK: Bye.
CHAIR JONES: Bye-bye.
Okay. We don't need to -- this isn't a long thing. I see what your point is, which is we could just add -- we could add his paragraph. And you would say that two members of the Subcommittee. Right?

MS. KEPROS: I can at least count those two.

CHAIR JONES: Pardon me?

MS. KEPROS: I can to two, anyway.

CHAIR JONES: Okay, good. So, at least that'll give Professor Schulhofer an ally with respect to this position. Okay, fair enough.

LTCOL HINES: Yes, ma'am.

HON. HOLTZMAN: Judge Jones, I just have a very short typo or grammatical issue on page 36 in the last full paragraph starting, "The Subcommittee finds persuasive." The second line, it says, "Not just proves," I don't know if anybody is with me, but it should be "requiring that the Government prove not just that the accused engaged in, but also that." So, it's just
the wrong place for the "not just" to be.

CHAIR JONES: Remove the "not just."

HON. HOLTZMAN: Move "not just" -- in other words, yes --

CHAIR JONES: I got it. Yes.

LTCOL HINES: Yes, ma'am.

HON. HOLTZMAN: Okay, that's it.

CHAIR JONES: Yes, that's better. Okay.

And we're going to add that paragraph on 37, but we're going to -- Glen, we're going to say two members of the Subcommittee concluded.

LTCOL HINES: Yes, ma'am. I'll fix that.

CHAIR JONES: It will read as it reads.

LTCOL HINES: Yes, ma'am.

CHAIR JONES: Great. Okay. Now, at page 38 we have -- we're back to indecent act. Okay. We need a conclusion, we need a recommendation, or we need to say we can't do it. Why don't -- here's what I -- I read everything you sent, Glen, and I'm still not sure I know what we should recommend. Why don't we do this? Start me
off again and tell me now, the President has
recommended that indecent act go back into the
UCMJ?

LTCOL HINES: Yes, ma'am. So, the
offense that's winding its way through the
process that would appear back in the code would
be under Article 134. It would be called
"indecent conduct," but it's essentially a
regurgitation of the old indecent act statute
that existed prior to 2007.

CHAIR JONES: Right. What's the
possible penalty for that, for 134?

LTCOL HINES: The max penalty is five
years and a dishonorable discharge.

CHAIR JONES: Okay.

LTCOL HINES: And when will that be
promulgated? Hopefully soon, but it's sort of
speculative for us to try to determine when
that's going to hit the Manual for Courts-

Martial.

CHAIR JONES: Right. And what would you
say was the consensus of all the presenters about
this, whether we should be for it or against this?

LTCOL HINES: I think the consensus of the majority of the people you heard from was that it should go back. The rationale for wanting it was, you know, that we used to have it. We don't have that tool to prosecute indecent acts or indecent conduct any more. Some of the discussion from people who've been concerned about it, Professor Schulhofer and some others, was that -- and I think Ms. Wine-Banks, I don't want to speak for her, but I think she was concerned about maybe some over-breadth problems. Professor Schulhofer's concern is, you know, criminalizing --

CHAIR JONES: Consenting adults.

LTCOL HINES: Right, right. The other side of that from the military practitioners is that, you know, those other interests in the military of preserving good order and discipline requires, you know, an offense such as this that can be used in cases where some indecent conduct
or indecent acts are found to be either service
discrediting or prejudicial to good order and
discipline. And that's --

CHAIR JONES: Can I just ask you this?

What was the article that indecent acts was
prosecuted under before?

LTCOL HINES: It was also Article 134,
Judge.

CHAIR JONES: Okay. So, we're just
putting it back where it used to be?

LTCOL HINES: Right.

CHAIR JONES: What did I see is
prosecutable, if you want to call it that, but
only has four months as its confinement term?

LTCOL HINES: So, I think Mr. Sullivan
from the General Counsel's office explained to
you at some prior meetings that if indecent
conduct -- what is found to be indecent conduct
or acts right now are committed by a
Servicemember, the only way to charge that is
under Article 134, what we call the General
Article, which is, you know, you basically say
what the conduct is, and then you say that it was
indecent, and that it was either service
discrediting or prejudicial to good order and
discipline. And if you get a conviction on that,
then the maximum punishment if it's service
discrediting is four months, no punitive
discharge and any other lawful punishment.

CHAIR JONES: So, it was in 134 and the
President -- but the old one, the way it was
prosecuted in the old 134 is different than what
the President is suggesting it go back in as. Is
there some difference between an enumerated
offense and what it was when it was just four
months confinement? Maybe I'm just -- I'm trying
to get the lingo straight here.

LTCOL HINES: Right. So, an enumerated
offense would be something that appears under
Article 134 in the Manual for Courts-Martial, and
there's a litany of those.

CHAIR JONES: So, does the President
recommend indecent acts go in there now as an
enumerated offense?
MR. MARSH: Ma'am, this is Kirt Marsh. If I could just jump in for a little bit. So, I think there's --

CHAIR JONES: I'm sorry. I'm just trying to get a handle on all this, because I think my confusion is that I just don't know what I'm talking about.

MR. MARSH: Yes, ma'am. It's a confusing term, and we ran into this into MJRG a lot. So, enumerated means one of the numbered statutory offenses in the UCMJ. And the only way that can get into the statute, into the UCMJ, is by an act of Congress, so that's statutory. Specified offenses out of 134 are something different. So, what the President is proposing right now under 134 and the offense that you saw is a specified offense under 134. It is not enumerated. And so I don't think right now anyone --

CHAIR JONES: Okay. So, there's only one number, 134, and among the specified offenses will be indecent act.
MR. MARSH: Yes, ma'am.

CHAIR JONES: Is that right? Okay. And that's a five-year -- and this would make it a five-year crime potential. And does it or does it not require the prejudice to good order and discipline?

MR. MARSH: It does. All 134 does require that, what's called the terminal element.

CHAIR JONES: Got it. Okay.

MS. WINE-BANKS: I think I remember that someone wanted it in 120 so that it would not have to have the additional proof of prejudicial to good order. And I think there were several of us who were worried that by making it a sex crime under 120, that it would make it over-broad, and could lead to inclusion of things that we would not otherwise define as rape or sexual contact.

LTCOL HINES: That's correct, ma'am.

CHAIR JONES: I couldn't agree more -- and maybe we have a consensus on this, but I wouldn't want to see this activity, however we
define it, but certainly it's not -- I don't believe it's intended to cover rape or sexual assault. I would not want to see it in 120.

What is 120(c), because I hear reference to that, remainder of indecent acts that should be criminalized and is not covered by Article -- is 120(c) going to -- isn't indecent acts covered under 120(c)? I just don't know what 120(c) is.

MR. MARSH: Ma'am, this is Kirt Marsh again. Historically, part of what was covered under indecent acts was indecent exposure. That is specified in 120(c).

CHAIR JONES: Right.

MR. MARSH: So, there is a statutory provision that addresses it.

CHAIR JONES: Okay, it's still there.

MR. MARSH: It is, ma'am, indecent exposure.

CHAIR JONES: It's still there.

MR. MARSH: But other things that might fall outside of that conduct that could still be
considered indecent aren't covered anywhere right now.

CHAIR JONES: Right.

MR. MARSH: And would be covered by this offense.

CHAIR JONES: Okay. And, certainly, 120(c) doesn't have a 30-year penalty. Right?

MR. MARSH: I don't know. I'd have to get my book. I can grab my book, but I don't think so.

CHAIR JONES: Okay.

BG SCHWENK: This is Jim.

CHAIR JONES: Is there a sex registry?

Yes. Sorry, Jim, go ahead.

BG SCHWENK: I was going to say that I think we maybe can start getting around a consensus that this question when it uses the word "enumerated" from the JPP means should it be specifically listed as a separate offense under the UCMJ. Then I think we all agree the answer is probably no, having read everything. Should there be an offense under 134 specified by the
President, I think even Stephen would say yes, because that gives the protection Jill just mentioned that you can't get a criminal offense unless the conduct is prejudicial to good order and discipline, or service discrediting.

So, it gives you the protection that thing can't -- you know, the action can't be over broadly prosecuted. So, I would say, you know, maybe we should think about saying no as an enumerated offense under UCMJ, that is a separately listed offense under the UCMJ. Yes, that there should be such an offense under 134 that is specified by the President, which is what the pending Executive Order would do.

And I think our rationale can be something fairly simple like the Department of Defense thinks that 134 offense is sufficient and has so proposed. DoD operated for more than 50 years with the 134 offense from 51 through 2007 without any problems; that as a 134 offense the scope of indecent acts or conduct is appropriately limited by those two service
discrediting and conduct prejudicial stuff. And just leave it at that, not go into discussing the specifics of the DoD proposal, because then we'll get wrapped around the axle in details. We'll let -- if we do that, we'll have answered the question we were asked, should it be enumerated specifically in the UCMJ with a no, but we said yes, but yes to having one under -- having an offense under 134. Just my thought of maybe a consensus position.

MS. WINE-BANKS: Can I ask one question on that? Is the only place it could be enumerated 120, because I think what our consensus is, is that it shouldn't be in 120. But I would view it being enumerated in 134, so the answer wouldn't be no, it shouldn't be enumerated. It's just that it shouldn't be enumerated in 120.

BG SCHWENK: I think enumerated is a loaded term. I don't know that anybody really understands what it means. I think it should be -- if it's a 134 offense, Article 134 in the Uniform Code of Military Justice is a very broad
general statement with nothing specific under it. And all the specifics under it are done by the President in the Manual for Courts-Martial, and that's where all the specific offenses under 134 are listed, what the offense is, what the elements are, what the maximum punishment is, and all that. The President does all that under 134.

MS. WINE-BANKS: So, that's not considered enumeration if it's listed specifically under 134?

BG SCHWENK: I don't know what they meant -- because they said enumerated under the -- to be added to the -- this is what the JPP said. Added to the UCMJ as an enumerated offense. Well, that enumerated listed, separate, like you said, Jill, a separate offense somewhere in the Uniform Code itself, as opposed to listed by the President --

CHAIR JONES: Like 135 or something.

BG SCHWENK: Right, or whatever. You know, 120(d) or (e), or something, or whatever.

CHAIR JONES: Yes.
BG SCHWENK: But the DoD has said, no, let's go back to the way it used to be. Put it under 134, let the President specify it and put all the rules about it in there. And so I'm saying maybe that's what we should say, no, in the UCMJ, yes with the President under 134, and have some rationale and that would have answered your question, and it avoids having to get into do we like the DoD proposal or not, you know? And have fun with that.

MS. KEPROS: This is Laurie. I agree with the no in 120. I don't know if I agree with the yes in 134. And, apparently, I think I am suffering from some of the same confusion as the other civilians on our Subcommittee, which is that I don't understand why it's not already prosecutable under 134, if it is service discrediting. And I am also concerned that in the cases, the examples we were sent, you know, this can include something like people engaging in sexual behavior with a third person in the room. This was normative behavior.
And so I guess I'm worried about anything being enumerated, even within 134, even if the military says that it is not a registerable sex offense, that when people travel among United States, the state will -- the agency for the states, because I see police do this, we ask for the word indecent, and it will become a de facto registerable sex crime, you know, from one state to the next, or not. And it's just putting sort of lot of baggage on behaviors that I think are ways to get at. So, I guess that's the concern I would advance, but it might be an ignorance because I don't really understand whether this could already be done as a non-enumerated provision of 134.

BG SCHWENK: This is Jim, again. Under 134, the President lists specific offenses and puts all the rules for them, you know, what the elements of the offense are, maximum punishment, et cetera.

CHAIR JONES: And there's no indecent act there now. Right? Indecent act is out of
there now.

BG SCHWENK: Right. Indecent acts is not listed by the President currently.

CHAIR JONES: Okay.

BG SCHWENK: DoD has proposed that the President list it. There is a possibility under the law, which is not -- I guess maybe frowned upon. It is frowned upon by the courts where Commands and lawyers make up their own 134 offense, even though the President hasn't specified one, they have a fact situation so unique and so special, they make one. And it's possible the courts could uphold such an offense, but it's also possible that they're going to say forget it, you lose, and overturn any conviction that might have resulted from doing that.

So, the answer from DoD has always been let's get it in the Manual for Courts-Martial published and approved by the President as a specified 134 offense. And so that's what they're proposing to do with indecent acts, just like they did from 51 until 2007.
Now, what the states do with that, and whether they look beyond that, and how they do -- you know, each of the 50 states, how they do their sex registration, I don't know.

HON. HOLTZMAN: This is Liz Holtzman. I'm going to have to leave in about five minutes or so, just letting you know.

CHAIR JONES: Well, Liz, do you agree with what I'm hearing I think from three or four other people that we definitely don't think it should go in 120?

HON. HOLTZMAN: Right.

CHAIR JONES: That part's easy?

HON. HOLTZMAN: Right.

MS. WINE-BANKS: Rereading Paragraph 1 has helped clarify this for me a little bit, which is that 2007, added indecent acts to 120 instead of in 134. In 2012, it was eliminated from 120 but wasn't re-added to 134. So, now it is not an offense at all.

CHAIR JONES: Right.

MS. WINE-BANKS: At least not
enumerated. So, the question is really why did it go into 120 to begin with instead of 134? And that was to avoid having to prove the additional elements. And then when it got taken away, it didn't get re-added to the UCMJ in 134. So, I think I'm back to the same conclusion I had before, which is I don't want it in 120, and see no problem with putting it back in 134 with the additional elements, although I worry -- I still do have a slight concern that the definition of indecent act could be overly broad in its interpretation and include things that might not otherwise be considered dangerous. But if they are service discrediting, or disruptive of the order, then I think okay, that's within the military context, it's fine. So, I'm still at no, it shouldn't be in 120, but yes it should be somewhere in UCMJ. And that we shouldn't comment on this proposal --

CHAIR JONES: As specified by the President.

MS. WINE-BANKS: Yes.
CHAIR JONES: And we shouldn't do what, comment?

MS. WINE-BANKS: And that we don't need to comment on something outside the purview of 120. We said no to 120, and to the extent that there's a proposal pending for 134, whoever is commenting on 134 should comment on it. Unless we wanted to something about -- you know, if we knew why it was taken out in 2012, maybe we could comment. But I don't know -- and do we know the reason why it was taken out in 2012?

LTCOL HINES: No, ma'am.

MS. WINE-BANKS: So, I mean, I think that leaves us without enough information to make an intelligent comment on its inclusion in 134.

CHAIR JONES: Yes.

LTCOL HINES: You know, this is Glen, Judge. I think if I could capture what Brigadier General Schwenk was saying, and if this is the direction everyone's heading, it sounds like there's a consensus that in answering this question you can say, you know, we do not
recommend that an enumerated offense under 120, you know, be adopted for indecent acts or conduct. The second part of that is we're aware that the President has promulgated a new offense under 134. You know, I could build out the report to say that, you know, the Committee is well aware of this and has looked at it, but you don't have to -- I don't think you really have to speak one way or the other one 134 to answer the question under number 11. If you're saying we don't recommend that this go under 120.

MS. WINE-BANKS: And that we take no position on the pending proposal for 134.

LTCOL HINES: Correct.

CHAIR JONES: Right. I guess --

LTCOL HINES: And then anyone who has concerns, like any of the other issues, you know, I know Professor Schulhofer's concerned about even the pending Executive Order, and anyone else who's concerned with over-breadth even under that can submit, you know, their own comments if they would like. But the Subcommittee as a whole can
remain silent on taking a position.

MS. WINE-BANKS: Laurie, are you going to be writing a comment on that?

MS. KEPROS: I think I will. Just to outline the concerns, I don't know that I'm even going to take a position on 134 because I just don't know that I'm well informed. I just think it would be good to say here are some of the areas of concern that we hope, you know, other people bring up.

CHAIR JONES: I like that. I think that's good. And if we can -- maybe reading the question was the smartest thing we did this morning. Kudos to whoever came up with that, and certainly thank you for the explanations, Kirt and General Schwenk.

Alright. So, you're going to write something for us, Glen.

LTCOL HINES: Yes, ma'am. I'll build out Sub-C and Sub-D, and I'll include that in the report that I'm going to route to everyone.

CHAIR JONES: Okay. So, our conclusion
is don't put it in, don't put it in 120, and
we're not recommending anything with respect to
the President's proposal on anything else.

LTCOL HINES: Yes, ma'am.

CHAIR JONES: We take no position.

Okay, great. And, Laurie, you're going to write
something, and I know that -- you've seen and
know what Professor Schulhofer's thoughts are on
this.

Okay. Do I still have a few people for
the last 12 pages? I think we can move this
pretty quickly.

MS. WINE-BANKS: I'm here for a few
more minutes.

CHAIR JONES: Okay.

MS. WINE-BANKS: For about 10 at the
most.

CHAIR JONES: Okay. 12 is -- well,
actually, this is interesting. The current
practice is charging inappropriate relationship
or maltreatment under Articles of UCMJ other than
Article 120. Is it appropriate and effective when
sexual conduct is involved? And our ultimate
collection was charging it that way is
appropriate and effective when consensual sexual
conduct is involved. Is this where we changed it
to can be when sexual conduct is involved?

BG SCHWENK: Yes.

CHAIR JONES: So that change has to
get made on page 41.

MS. WINE-BANKS: Yes.

CHAIR JONES: And otherwise, I think
the other suggested edits look fine.

LT.COL HINES: Okay.

CHAIR JONES: Are we all good on 40 and
41 then?

MS. WINE-BANKS: Yes.

CHAIR JONES: Okay, great. 42, this is
the question of whether the current version of
120 gives prosecutors the ability to effectively
charge coercive sexual relationships. And here we
recommended, and I -- no change --

MS. WINE-BANKS: This where we
recommended a new crime.
CHAIR JONES: Right. Yes, on this one exactly we recommended a new subsection. That's right. No change to (b)(1)(a), but we did recommend -- later we recommend on Issue 15 a new subsection. Okay, and problems with 42 and 43? A few minor edits that I see look fine. Okay, page 44. This is one where we recommended no change. It talks about threatening or placing another person -- that other person in fear. And there are not -- there are just a couple of little nits on page 45, changes which look fine.

MS. KEPROS: Do you want to put current in the box just so it keeps it straight with the other --

CHAIR JONES: Put what --

MS. KEPROS: The word "current" in the box, the current --

CHAIR JONES: Oh, I think we're going to -- yes, I guess we'll do that throughout.

LTCOL HINES: Yes.

CHAIR JONES: Okay, Glen?

LTCOL HINES: Yes, ma'am.
CHAIR JONES: Thank you. Alright, 46.

This is where we do add a new provision to address coercive sexual relationships or those involving abuse of authority. And our recommendation, which we had long discussions about and voted on at the bottom of page 46 into 47.

I don't see any comments having been sent in on this, or any changes suggested. Oh, wait, I apologize. I think I like this. In 1(e) at the very bottom of page 46, under sexual assault, and person subject to this chapter who (1) commits a sexual act on another person, and then in (e) by using position, rank, or authority to secure compliance, as opposed to compel compliance.

MS. WINE-BANKS: I like that language. I'm wondering if Lisa, who's had a long discussion about the difference between compel and coerce is happy with that. Does that -- Glen, do you know if that was okay with her?

LTCOL HINES: I think so, ma'am. This
is also where General Schwenk submitted a
comment. I tried to route it to everyone, but he
suggested changing compel to coerce for
consistency sake because we use coerce and
coercion in some other places. So, I don't know
if -- and I think he felt that compel was maybe a
little too narrow for the Government, that coerce
would cover --

CHAIR JONES: Are you saying coerce or
secure, which is what I see on the draft?

BG SCHWENK: Secure is fine. This is
Jim again. Secure is fine. Yes, if we go with
secure we might want to change some of the
writing in our conclusion to make it says, you
know, let's -- we have coercive all the way
through there. Just need to say -- address coerce
or, you know, put secure in there, too, like in
the last sentence under C.

MS. WINE-BANKS: Yes. I really like the
word "secure," and avoiding the discussion of
compel and coerce.

BG SCHWENK: Yes.
MS. WINE-BANKS: I thought it was a brilliant -- a very, very excellent change.

BG SCHWENK: That works for me.

LTCOL HINES: Okay. So, the easy fix is

--

CHAIR JONES: I like it, too.

LTCOL HINES: -- just replace compel with secure in the red line, and in the report. And I'll fix that.

CHAIR JONES: And then everyone will know what we're doing. Great. It's neutral, which is what we need it to be.

MS. WINE-BANKS: Yes, exactly.

CHAIR JONES: It means the same as obtain, so it seems good to me. Okay. Page 48, this is the one about basic training instructors. And, essentially, we reached a conclusion that we didn't recommend that any of this -- that this be treated either as a strict liability crime or illegal per se under Article 120. That was totally non-controversial, as I recall, in our discussions, and I don't see any comments, nor
proposed edits. Any other discussion on that needed? Okay.

Page 52, our last page, Issue 17.

Okay. This was also not controversial, the question related to whether coercive sexual relationships currently charged under other Articles of the UCMJ than 120 should be added to DoD's list of offenses that trigger sex offender registration, and I believe it was virtually unanimous that that should not be done. So, our recommendation is no, it should not be added. I don't see any other comments or edits.

I think we're finished the report, and let me just ask whether there's -- take a breath, everybody. Are there any other issues that come to mind, or questions, or -- I'm sure there'll be some more discussion about what to do about indecent act, but why don't we see what we get back from Glen. Anything else on anyone's mind?

Okay. Glen, I can't thank you enough.

And, Kirt, thanks for your very helpful intervention here.
MR. MARSH: Yes, ma'am.

CHAIR JONES: Do you need anything more from me, or do you want to say anything else about what we're up to, or shall we just close the meeting? Glen?

LTCOL HINES: I guess the only outlying issue I would like to pin down, Judge, is how -- if anyone's going to submit comments that they want actually reflected in the Subcommittee report -- well, I guess that's the first question. Do you want to allow for people to do that, or would you rather those dissenting viewpoints be submitted to the JPP as a whole?

The reason I ask the question is if someone wants it reflected in the report, we'd probably need those no later than Friday so that we can get it to Ms. Faulk and have time, you know, to print everything before next Friday. So, we'll do whatever you want us to do.

CHAIR JONES: Well, right now I think we have a real piece by Laurie, analysis by Laurie which dissents from some of our
recommendations and our analysis. Laurie is going
to do that as soon as -- it's probably already
done. Right, Laurie?

MS. KEPROS: It's well under way, but
exactly.

CHAIR JONES: Okay. So, that's one
issue down. Laurie will get that in, I assume --

MS. KEPROS: By Friday.

LTCOL HINES: Okay.

CHAIR JONES: So, is Friday quick

enough for you?

LTCOL HINES: That's fine, Judge. Thank

you.

CHAIR JONES: Oh, that's great. Okay,
good.

And now the other -- we've also listed
where Laurie and Professor Schulhofer, you know,
would rather see the mens rea a little stiffer
for the accused. I don't know what other dissents
you're thinking about, or that we've heard might
be coming down the road. You're saying future --

if people have some additional dissents?
LTCOL HINES: Well, I just -- you hit it, Judge, that. And then I don't know, I just haven't had a chance to directly pin down Professor Schulhofer on whether he wants to actually, you know, have his viewpoints reflected in the report, or whether he's going to do it -- if he even feels that strongly about it, if he wants them reflected in the report, or otherwise. So, I'll ask him what he --

CHAIR JONES: Certainly have the conversation with him, but my recollection or my sense of it is, he's happy not to do a separate dissent, but he did feel that it would -- he wanted that comment in on mens rea.

LTCOL HINES: Yes, ma'am.

CHAIR JONES: But whatever he wants, let's try to accommodate it.

LTCOL HINES: Okay.

CHAIR JONES: And if he wants to do a separate dissent, that's great, that's fine. And try to get it from him on Friday.

LTCOL HINES: Okay. Thanks, Judge.
That's all I have.

CHAIR JONES: Great. Okay. Terrific.

Bill, are you there to close the meeting?

MR. SPRANCE: Yes, ma'am, I am. The meeting is closed.

CHAIR JONES: Alright. Thanks a lot.

Bye-bye.

(Whereupon, the meeting in the above-entitled matter was concluded at 12:20 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: 12-02-15

Place: teleconference

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[Signature]
Court Reporter