

## UNITED STATES DEPARTMENT OF DEFENSE

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## JUDICIAL PROCEEDINGS PANEL

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## SUBCOMMITTEE MEETING

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WEDNESDAY,  
DECEMBER 2, 2015

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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

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

2 10:35 a.m.

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

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

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

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

20 MS. WINE-BANKS: Yes.

21 CHAIR JONES: Okay. Any problems with  
22 that language? I think it does help. Okay, no,

1 I don't have any, so --

2 HON. HOLTZMAN: Well, the only  
3 suggestion I would make is after -- in the second  
4 line is after the word "amendments" should say  
5 "to Article 120." I don't know if it's  
6 necessary, but --

7 CHAIR JONES: I think that's not a bad  
8 idea, "would form such amendments to Article  
9 120."

10 LTCOL HINES: Yes, ma'am.

11 CHAIR JONES: Any other issues? And  
12 it's going to be prepared by the -- why is  
13 Members -- is the proposal to say various  
14 proposals prepared by the Subcommittee Members,  
15 or just Subcommittee?

16 LTCOL HINES: Judge, I think the reason  
17 Members is highlighted is, I just -- I had to  
18 attach the bubble comment to it somewhere and I  
19 think it just attached it to that last word, so  
20 you could do it either way. You could say  
21 prepared by the Subcommittee --

22 CHAIR JONES: Oh, I see. Okay. There's

1 no significance.

2 LTCOL HINES: Right.

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

6 There are -- on page 2 there is --

7 MS. WINE-BANKS: Barbara?

8 CHAIR JONES: Yes?

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

16 CHAIR JONES: Right.

17 MS. WINE-BANKS: And we decided that we  
18 were -- we didn't need to make changes to 9. And  
19 I just felt like if we explained that, we felt  
20 that although it was confusing, it was reasonably  
21 effective, and the confusion could be cured by  
22 amending the proposals that we're preparing to

1 amend, and that the rest were fine. It's a slight  
2 difference. I mean, I could write it out. I'm  
3 sorry, go ahead.

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

6 MS. WINE-BANKS: Right after the --

7 CHAIR JONES: After paragraph --

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

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

13 CHAIR JONES: Okay, sorry.

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

1 CHAIR JONES: Alright.

2 MG WOODWARD: I agree. This is Maggie.  
3 It's interesting that I reacted to that one, but  
4 I didn't write anything down. But, yes, I think  
5 the inconsistency deserves to be addressed.

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

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

14 CHAIR JONES: That would be great.  
15 Thank you.

16 MS. WINE-BANKS: Okay.

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

21 MS. WINE-BANKS: Well, it's all -- I  
22 added the "who is." It said something else which

1 was just grammatically incorrect.

2 CHAIR JONES: Okay.

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

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

8 MS. WINE-BANKS: Yes.

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

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

17 MS. KEPROS: Can I say something?

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

20 MS. KEPROS: Yes, sorry. This is Laurie  
21 Kepros. On page 2, it's sort of the first place  
22 another issue arises, and I just emailed Glen

1 about this within the hour, so I don't think the  
2 rest of you maybe have been apprised of it. Our  
3 recommendations around Issue 2 are inconsistent  
4 in some places. It recommends a change to statute  
5 or MCM, in other places it says or the Benchbook,  
6 and other parts it says just change the Manual  
7 for Courts-Martial, so we need to straighten that  
8 out. It's both here in the summary recommendation  
9 and in the broader recommendation, that  
10 inconsistency is also present.

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

19 Laurie, what's yours?

20 MS. KEPROS: I remember that  
21 conversation, too. I don't remember like a final  
22 vote, but I remember that conversation you just



1 described.

2 DEAN SCHENCK: This is Lisa. I agree  
3 with that, as well.

4 LTCOL HINES: Judge Jones?

5 CHAIR JONES: Is that you, Glen?

6 LTCOL HINES: Yes.

7 CHAIR JONES: Yes.

8 LTCOL HINES: What I would recommend,  
9 and I answered Ms. Kepros' email with that's  
10 probably my fault for not tightening up the  
11 language in front of the report. I think the  
12 easiest thing would be to make the recommendation  
13 specific to clarify that the defenses are  
14 available in the Manual. Otherwise, I agree with  
15 what you said, Judge. If we're talking about  
16 putting it in the statute, now we're going to go  
17 back and change 120(f) on defenses, which is very  
18 broadly worded. And I think the concern expressed  
19 was if you start to list specific defenses in the  
20 statute, then maybe by implication you're  
21 excluding others. So, that would be my  
22 recommendation. It's still consistent with your

1 recommendation that it be clarified, but it would  
2 just be much less painful to do it in the Manual  
3 for Courts-Martial.

4 CHAIR JONES: Okay. So, the answer to  
5 2 is no, the statute doesn't have to do it, but  
6 we would make a recommendation that it be  
7 clarified in the Manual for Courts-Martial. Is  
8 that what we're all agreed upon? I think that's  
9 where we came out. That was my recollection.

10 LTCOL HINES: Yes, ma'am.

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

13 LTCOL HINES: Yes, ma'am.

14 CHAIR JONES: Okay, great.

15 LTCOL HINES: I'll fix those.

16 CHAIR JONES: Laurie, is that --

17 MS. KEPROS: That addresses my concern.  
18 And, again, we'll see the similar inconsistency  
19 in the fuller description in the recommendation.

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

22 MS. KEPROS: Yes, that's on page 12.

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

7                   LTCOL HINES: Well, the way --

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

12                  LTCOL HINES: Okay.

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

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

22                  CHAIR JONES: Right.

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

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

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

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

21          LTCOL HINES: Yes.

22          CHAIR JONES: I think we all agree that

1 we want panel members -- it to be not confusing  
2 for panel members, as well.

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

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

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

10 LTCOL HINES: Yes, ma'am.

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

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

22 CHAIR JONES: You know, we said

1 something like that later with respect -- I don't  
2 know if it was with respect to this. Glen, do you  
3 know what I'm talking about? We also said it was  
4 the counsel for --

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

9 CHAIR JONES: Right.

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

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

18 LTCOL HINES: Yes, ma'am.

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

22 MS. WINE-BANKS: I just was going to

1 say I sent Glen the redraft of that paragraph, or  
2 our proposal.

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

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

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

22 LTCOL HINES: Yes, ma'am.

1 CHAIR JONES: Okay. Thanks, Jill.

2 Alright. I think we're on page 3,  
3 paragraph 2. Let me just take a quick look here.  
4 Oh, okay. Here we go. This is Professor  
5 Schulhofer's note. This is simple, and I agree  
6 with it. Since bodily harm is being removed, we  
7 have to make sure that the subparagraphs are  
8 renumbered. Any issues with that?

9 MS. WINE-BANKS: No.

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

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

16 CHAIR JONES: Not at all.

17 HON. HOLTZMAN: Maybe it belongs later  
18 when we go into bodily harm specifically, but  
19 what troubles me about the explanations we're  
20 giving about the confusion with bodily harm is  
21 that it ignores the whole question that the way  
22 the statute is structured it requires bodily harm



1 to be committed by bodily harm. I mean there's a  
2 tautology and illogical problem in the structure  
3 of the paragraph. And that's never alluded to in  
4 any of our discussions of bodily harm, and it  
5 should be.

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

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

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

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

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

18 CHAIR JONES: Okay. Alright. Why don't  
19 we leave that open and see what kind of language  
20 Glen and I come up with on that. Anyone who would  
21 like to send in a little something, great. It  
22 could go later where we're going in some depth,

1 or it could go here because, you know, most  
2 people only read, you know, the first couple of  
3 pages of a report. So, I'm open on that. Let's  
4 see what we decide to say, because I think that  
5 is important. We need to succinctly show how  
6 ridiculous, you know, it is when you're just  
7 trying to read through 120. Okay.

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

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

20 Well, was there anything on page 4  
21 that anyone wanted to talk about? There's nothing  
22 added there. Well, I guess there was one sort of

1 change at the bottom in Issue 6, a little edit.  
2 And it looks fine, express that this definition  
3 was too narrow. So, hearing nothing more, I'll  
4 move on to page 5.

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

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

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

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

21 I think everyone else was satisfied  
22 that the statute -- you know, Congress has spoken

1 in this area, and they requiring the Government  
2 to prove not only the incapacity, but that the  
3 accused knew or reasonably should have known. And  
4 so I think his concern here in the bubble comment  
5 was, he just wanted me to explain in more detail  
6 that the Article 120 isn't on all fours with  
7 Title 18. His concern was that we may have  
8 misrepresented that Article 120 and Title 18 were  
9 basically the same, and his position was that our  
10 statute is a little broader in terms of being  
11 able to capture perhaps some criminal conduct  
12 that Title 18 couldn't. So, I think as stated  
13 there, he was satisfied with it. He's seen the  
14 redraft, and I think he's satisfied that what it  
15 states now clarifies his concern.

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

1 held responsible.

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

6 CHAIR JONES: Oh, okay. Good.

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

10 MS. KEPROS: Actual knowledge.

11 HON. HOLTZMAN: Okay.

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

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

21 CHAIR JONES: Right. Well, does anyone  
22 -- okay. Then, Laurie, you're going to bring this

1 up. I'm sure Professor Schulhofer will root you  
2 on. He will be -- you two will be the dissent on  
3 that, but I think everyone else is solid that we  
4 should leave what Congress says the level -- the  
5 necessary level intent for the accused is as  
6 Congress has written it. Any other comments about  
7 that?

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

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

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

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

16 LTCOL HINES: Deeper in the report when  
17 we go into it, we do reference -- on page 36, we  
18 do reference -- the last sentence on page 36,  
19 "The Subcommittee determined the standard  
20 established by Congress in Article 120(b)(2) to  
21 (3) is neither unclear, nor ambiguous; therefore,  
22 the Subcommittee does not recommend changes to

1 the standard."

2 MS. WINE-BANKS: Okay. Great.

3 LTCOL HINES: Okay.

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

8 Alright. So, under 12 --

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

11 CHAIR JONES: Yes.

12 MS. WINE-BANKS: I can understand,  
13 because her edit would make the answer reflect  
14 the question where the question is just when  
15 sexual conduct is involved. It doesn't say when  
16 consensual. But as I recall our discussion, the  
17 issue really was that when it's consensual, it  
18 should not be a sex crime, although it could be  
19 punished under 92 or 93, appropriately so. And so  
20 that it isn't -- I think we lose that distinction  
21 by taking away the word "consensual," so maybe  
22 the answer is to say "when consensual sexual

1 conduct is involved, and that 120 is appropriate  
2 and effective when non-consensual sex is  
3 involved." I mean, 120 is already adequate for  
4 non-consensual.

5 MS. KEPROS: So, the reason that I  
6 suggested striking the word "consensual," was  
7 because there was just such an array of scenarios  
8 presented by the witnesses, some of them were sex  
9 crimes, and some of them were already  
10 prosecutable even under Article 120. Some of them  
11 involved maltreatment that was not a sex crime,  
12 and that was why I thought they did not limit  
13 their comments about their ability to prosecute  
14 to sort of the way the question is framed,  
15 "inappropriate relationships or maltreatment."  
16 And there could be maltreatment that is a non-  
17 consensual sexual conduct. Whether we prosecute  
18 it under 120 or something else would really just  
19 depend on what the behavior was, and I thought  
20 there was too much nuance in the testimony to  
21 keep the word "consensual" because they didn't  
22 limit their comments to only consensual sexual



1 activity; although, that was certainly one  
2 example of the kinds of things they might  
3 prosecute outside of 120.

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

1 away the word "consensual," it just makes it --  
2 it loses that distinction, and could be put back  
3 in with the caveat that when it is non-  
4 consensual, then 120 does cover it.

5 CHAIR JONES: Anybody else?

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

19 CHAIR JONES: Right. Maybe what we  
20 really want to say is can be appropriate and  
21 effective. I don't know that we need to define  
22 what kind of sexual conduct.

1 DEAN SCHENCK: That's a great idea. May  
2 be appropriate and effective, I agree with that,  
3 with the Judge.

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

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

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

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

16 MS. KEPROS: Yes, that's great.

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

19 LTCOL HINES: Yes, ma'am.

20 CHAIR JONES: Good.

21 LTCOL HINES: I'll fix it.

22 CHAIR JONES: Alright, great. Okay. Can

1 we move to page 6?

2 HON. HOLTZMAN: Before we finish page  
3 5, there's a typo.

4 CHAIR JONES: Okay, Liz.

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

7 LTCOL HINES: Yes, ma'am.

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

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

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

19 CHAIR JONES: Yes.

20 MS. WINE-BANKS: And it might even be  
21 clearer if we said "current UCMJ, Article 120,"  
22 so it's not confused with -- because we do

1 recommend changes in many of them.

2 CHAIR JONES: Sure.

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

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

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

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

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

16 CHAIR JONES: Yes.

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

18 CHAIR JONES: I get it.

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

21 CHAIR JONES: Yes. Current as opposed  
22 to proposed, so they don't have to wonder.

1 MS. WINE-BANKS: Right.

2 CHAIR JONES: I got it.

3 MS. WINE-BANKS: Exactly.

4 CHAIR JONES: Alright. Unless there's  
5 anything else on 7, why don't I -- we go to 8.

6 And there's some minor editing on 8 in the third  
7 full paragraph. The edit looks fine to me. Okay?  
8 No issues on 8?

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

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

21 CHAIR JONES: Okay. I see -- I got.  
22 Yes, A basically --

1 HON. HOLTZMAN: The last line of A we  
2 have "shall not constitute."

3 CHAIR JONES: "Shall not constitute."

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

7 CHAIR JONES: That sounds right to me.  
8 Any objections? Okay. So, "shall" becomes "does,"  
9 on page 10 right above where B starts in Section  
10 A.

11 LTCOL HINES: Yes, ma'am.

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

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

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

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

20 MS. WINE-BANKS: I'm sorry. Could we go  
21 back to page 10 again. Just in reading it again,  
22 after hearing Liz' comment, which I think is

1 right, we're saying here's what consent means.  
2 And in that same definition we're saying  
3 submission from things is not consent, does not  
4 constitute consent, sleeping and unconscious is  
5 not consent. And then we say all the surrounding  
6 circumstances are to be considered in determining  
7 whether a person gave consent. So, isn't that  
8 really limited to in all other circumstances  
9 besides the ones specified above? Because I see  
10 there's no circumstance of either sleeping,  
11 unconscious, or incompetent.

12 CHAIR JONES: I think I read that to --

13 I read that to mean all of the surrounding  
14 circumstances of the case are always to be  
15 considered.

16 MS. WINE-BANKS: Right.

17 CHAIR JONES: That's how I read it.

18 MS. WINE-BANKS: Okay. Alright. Fine.

19 Page 11, I have no comments.

20 CHAIR JONES: Okay, great. Thanks.

21 Anybody else on 11?

22 MS. KEPROS: 11 is where we need to



1 clean up our recommendation to Manual for Courts-  
2 Martial --

3 CHAIR JONES: Right.

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

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

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

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

20 LTCOL HINES: Yes, ma'am.

21 CHAIR JONES: Add statutory --

22 LTCOL HINES: Right. I'll fix it in C

1 and D, and I'll note that when I get through  
2 making all of these amendments, when I route the  
3 report back around, I'll put a bubble comment out  
4 to the right so that everyone can see that I've  
5 captured, come back, stop my work and make sure  
6 that I've captured all the edits and fixes that  
7 we're talking about today.

8 CHAIR JONES: Great. Wonderful.

9 Okay. There are a number of pages, 12,  
10 13, 14 that have no comments from anyone, and no  
11 edits. Are there any additional comments or edits  
12 on those pages? Most of this is sort of the  
13 roundup, the rationale for referring it to  
14 testimony, and I think when I read it, it all  
15 sounded accurate to me with respect to that  
16 issue.

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

22 HON. HOLTZMAN: What is her suggestion?

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

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

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

11          HON. HOLTZMAN: Okay, good.

12          CHAIR JONES: Okay.

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

19          CHAIR JONES: We did.

20          BG SCHWENK: So, it does show that we  
21          made a slightly different language choice than  
22          the court did.

1 MS. WINE-BANKS: Well, I think the  
2 court is defining cognitive ability as including  
3 mental and physical ability, as well. So, they're  
4 using mental in a different way than mental  
5 ability.

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

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

16 HON. HOLTZMAN: Right.

17 CHAIR JONES: -- mental ability.

18 HON. HOLTZMAN: Right.

19 BG SCHWENK: Right. And then we went  
20 along and said the cognitive ability to  
21 appreciate, and then we changed in the second  
22 formulation, instead of mental or physical

1 ability we put down mental or -- I mean, physical  
2 or cognitive. And I --

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

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

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

22 LTCOL HINES: That was Kirt Marsh's,

1 Judge. Kirt's here and can answer some questions  
2 on that, if you want to discuss that issue.

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

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

20 HON. HOLTZMAN: I'm just going to go --  
21 this is Liz Holtzman. I'm just going to read  
22 something. I just looked up the definition on the

1 internet, which is very dangerous, of cognitive.  
2 But it deals with the act or process of knowing  
3 and perceiving. So, this would revisit the issue  
4 of mental. But if it's the process of knowing and  
5 perceiving, that is not the same as the ability  
6 to make and communicate a decision. The mental  
7 processes may not be the same. That's why I  
8 suggest that maybe that we stick with the  
9 formulation of Pease here, because cognitive may  
10 have a more restrictive meaning than mental with  
11 regard to the issue of the ability to make and  
12 communicate a decision. And this is coming from  
13 the internet, so you can say, Liz, it's  
14 ridiculous, but I don't have a dictionary in  
15 front of me.

16 LTCOL HINES: Well, Judge Jones?

17 CHAIR JONES: Yes?

18 LTCOL HINES: I would just -- this is  
19 Glen. I would just interpose that I think one of  
20 the biggest concerns that the Members had at the  
21 last meeting on this was we were -- we didn't  
22 like the use of "and" as opposed to "or." We

1 wanted to be as inclusive as possible in  
2 protecting the victim, and that's why we went  
3 back and we got rid of all the ands, and we put  
4 or, so that we could give the prosecution several  
5 different places, you know, to put their victim.  
6 And I think that last phrase, you know, "or does  
7 not possess the physical or cognitive ability to  
8 make or communicate a decision regarding such  
9 conduct." I think what we were trying to do there  
10 is cover either the victim who's physically  
11 incapacitated but mentally aware of what's going  
12 on, but she can't physically express her  
13 decision, but also to cover the person who's  
14 mentally incapacitated and can't even formulate  
15 the decision. So, I think really what we're  
16 talking about is, do we use cognitive or mental?

17 HON. HOLTZMAN: I'm making a different  
18 point, Glen, though. That's not my point. My  
19 point is that you're aligning or combining the  
20 two factors of apprehension or perception and the  
21 ability to make a decision, and then knowing that  
22 you're communicating it or intending to



1 communicate it, because it's not just physical  
2 when you want to communicate. The brain has to  
3 send a signal to the --

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

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

22 The second part of that, you know,

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

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

12 HON. HOLTZMAN: Right.

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

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

22 CHAIR JONES: Well, I mean, I always

1 liked mental better, but -- because I think it  
2 covers more ground.

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

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

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

11 CHAIR JONES: Pushing for cognitive.

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

16 CHAIR JONES: Yes, if Pease had just  
17 kept it mental, mental, I don't think we'd be  
18 here. I honestly think mental is simpler. I  
19 always favored it. I don't know, do we want to  
20 talk about this some more? Do other people --  
21 what's the group's thinking on this now in terms  
22 of mental versus cognitive? I honestly don't

1 remember why -- I would like the broader term.  
2 For some reason, I think of mental as being more  
3 broad. And, certainly, Pease does use it when  
4 they talk about mental or physical ability.  
5 Mental ability to -- we wouldn't be trying to --

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

10 CHAIR JONES: I would take cognitive  
11 out.

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

16 CHAIR JONES: Yes.

17 MS. WINE-BANKS: Okay.

18 BG SCHWENK: Yes, this is Jim. I like  
19 mental in both places. It avoids the problem of  
20 what the difference is between cognitive and  
21 mental, and it avoids people dancing on what Liz  
22 was bringing up, and our definition brings it up,

1 what the heck is cognitive and, you know, what  
2 isn't. And just it makes it broader, lowers the  
3 bar, and is simpler I think, probably, to use in  
4 court.

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

16 MS. KEPROS: This is Laurie Kepros. I  
17 think we should not define it. As I was  
18 processing, you know, one had been drafted in our  
19 last call, as well as Professor Schulhofer's  
20 recommendation, I thought, gosh, this could be so  
21 confusing to a Panelist. Information about  
22 remembering could become conflated with being

1 memory on the stand and other things, and it  
2 could really just be --

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

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

8 CHAIR JONES: Anyone else?

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

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

18 LTCOL HINES: Yes, ma'am.

19 CHAIR JONES: Okay. Then we'll all have  
20 to take a look at that section again. We've got  
21 nine more days, so we can -- if any of us, how  
22 many, you know, would like further conversation

1 on this, do not hesitate. This is important, even  
2 though, of course, the JPP will be looking at  
3 this, and may make their own modifications. But I  
4 think we should take advantage of the time we  
5 have left, if anyone has any additional feelings  
6 about this.

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

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

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

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

20 CHAIR JONES: Right.

21 LTCOL HINES: And backward planning for  
22 that in our office was, we were going to try to

1 finalize the written report here in our office.  
2 And finalize means routing what we're doing today  
3 back around to the Members, making sure it says  
4 what you want it to say, but we would need to get  
5 that to Ms. Faulk to do her scrub on it. And then  
6 we would print up copies in our office here and  
7 disseminate those next Friday to anyone who wants  
8 a copy of it. And, obviously, including the JPP.  
9 And, you know, Dean Anderson, Professor  
10 Schulhofer, and Ms. Wine-Banks would be giving  
11 their presentation and delivering the report next  
12 Friday.

13 CHAIR JONES: Right.

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

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

19 LTCOL HINES: Yes, ma'am.

20 CHAIR JONES: Early tomorrow. This is  
21 assuming, since it's already 11:30, we make it  
22 through the rest of this. And then let everyone -



1 - any serious issues after we get this next  
2 version back, will have to have an immediate  
3 reaction because I think -- well, we know the  
4 tight time frame for the Staff. So, you need it.  
5 I don't think this will be as hard to duplicate  
6 and all that as the RSP report was, so we don't  
7 need quite the same lead time, but you at least  
8 need to know you've got a final in your hands by  
9 what, Wednesday? That you can start, you know,  
10 making copies of. And you'll probably have it by  
11 the end of Tuesday, Glen?

12 LTCOL HINES: Yes, ma'am.

13 CHAIR JONES: Does that sound right?

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

18 CHAIR JONES: Right. Right. Well, let's  
19 say this then. Assuming Glen gets this back to us  
20 tomorrow early, let's make sure that everybody  
21 has their comments in by the end of the day  
22 tomorrow. And then that will -- and, frankly, I'm

1 assuming there are going to be very few. And then  
2 when you send those out, Glen, it may be that,  
3 you know, if you don't hear anything from anybody  
4 by, you know, immediately, they're good. So, it's  
5 going to be on the Members of the Subcommittee to  
6 alert you by say 1:00 on Wednesday that they have  
7 some issue with the new changes. I don't think  
8 there'll be any. But I don't think another phone  
9 conference --it's hard to put people together for  
10 a phone conference. I'm sorry. I cut somebody  
11 off.

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

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

21 MS. KEPROS: Right. So, I want to be  
22 timely.

1 CHAIR JONES: Well, look, I'm assuming  
2 that what we're hearing today is going to be it,  
3 except for minor changes, hopefully.

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

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

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

18 CHAIR JONES: Sure.

19 HON. HOLTZMAN: D, the second line  
20 right after D where it says, "Part of the  
21 Subcommittee's redraft at Article 120," shouldn't  
22 it be "of Article 120?"

1 CHAIR JONES: Yes, should be "of."

2 HON. HOLTZMAN: Okay.

3 LTCOL HINES: Yes, ma'am.

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

8 LTCOL HINES: Yes, ma'am.

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

18 Okay. On page 20, I just see that  
19 there's some language. Again, we're in the  
20 sections where it's essentially what was the  
21 rationale for this decision, testimony,  
22 summaries, and conclusions. And that goes through

1 from 20 to 22. Were there any other edits that  
2 anyone wishes to suggest now with respect to 20,  
3 21, 22, bodily harm, other than the more global  
4 issue we're going to deal with?

5 MS. KEPROS: No. Just looking at page  
6 22, that blue line, the language gets at one of  
7 the concepts Liz was describing?

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

16 HON. HOLTZMAN: Yes. I have a question  
17 on 20 at the end of the first paragraph. There's  
18 a sentence there which I don't really understand,  
19 and I don't -- I don't understand it, and I don't  
20 understand why it belongs there at all. And  
21 that's just -- says, "Thus, in cases in which  
22 bodily harm alleges the sexual act or contact

1       itself, lack of consent can effectively become an  
2       element of the offense." I don't exactly know  
3       what that means, but why does that need to be  
4       there anyway?

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

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

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

14                  LTCOL HINES: That's right.

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

19                  HON. HOLTZMAN: Alright.

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

22                  HON. HOLTZMAN: Okay. And then there's

1 just two small things.

2 CHAIR JONES: Yes.

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

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

8 HON. HOLTZMAN: Page 20, line 2.

9 CHAIR JONES: Oh, 20.

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

15 CHAIR JONES: Yes, we could change it  
16 to memory without probably disturbing the  
17 testimony of -- whoever made that testimony.  
18 Okay. Anything else between 20 and 22?

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

1 I'm all right with that. Sorry.

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

4 Moving on to 6 on page 23, the  
5 definition of threatening wrongful action. This  
6 is another one where we go through and decide no  
7 change. And what I see on these three pages -- on  
8 22 there's some editing. Liz, you recommended  
9 some edits here.

10 HON. HOLTZMAN: I did.

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

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

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

17 Moving to page 26, Issue 7, how should  
18 fear be defined? We recommended no change on  
19 this. And, again, I see a few edits that have  
20 been suggested and incorporated that look fine to  
21 me. Does anyone have any additional edits or any  
22 concerns with the text as it is now? Okay, great.



1                   HON. HOLTZMAN: Judge Jones, when I  
2 read this on page 26, the last paragraph, the D  
3 paragraph, or the last part of the D paragraph. I  
4 thought that it was really dense and very hard to  
5 understand. I didn't have time to rewrite it, but  
6 maybe somebody would want to look at it and see  
7 if it could be made a little clearer or easier to  
8 -- for a lay reader.

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

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

17                   CHAIR JONES: That's Section B on page  
18 26.

19                   LTCOL HINES: Right.

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

22                   Eight, is the definition of force too

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

7 HON. HOLTZMAN: On what pages?

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

9 Okay.

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

21 At page 35, we begin the 10th issue  
22 about the accused's knowledge of a victim's

1 capacity to consent. And this we sort of touched  
2 -- we touched on it earlier today. And what we  
3 ultimately decided, that we were not going to  
4 change, no change to Article 120. And I know  
5 Laurie, this is the section where you and  
6 Professor Schulhofer will have your dissent. Your  
7 dissent, I don't know what Professor Schulhofer  
8 may comment --

9 MS. KEPROS: Well, I found his email.  
10 He had indicated he wasn't going to prepare a  
11 written dissent.

12 CHAIR JONES: Right, he's not.

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

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

1 to do it that way?

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

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

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

16 CHAIR JONES: I'm sorry.

17 MS. KEPROS: Yes.

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

20 MS. KEPROS: Well, it isn't that you're  
21 confusing them. They all have at their core the  
22 same mens rea principle. It's just since the

1 Committee didn't remove any mens rea, I was fine  
2 with that in Issue 10. But we're talking about  
3 Issue 10.

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

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

10 CHAIR JONES: Yes.

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

13 MS. WINE-BANKS: I have to leave by  
14 11:20, which is another 45 minutes, 50 minutes.

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

19 CHAIR JONES: Wonderful.

20 DEAN SCHENCK: Thank you.

21 CHAIR JONES: Thank you.

22 DEAN SCHENCK: Bye.

1 CHAIR JONES: Bye-bye.

2 Okay. We don't need to -- this isn't  
3 a long thing. I see what your point is, which is  
4 we could just add -- we could add his paragraph.  
5 And you would say that two members of the  
6 Subcommittee. Right?

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

9 CHAIR JONES: Pardon me?

10 MS. KEPROS: I can to two, anyway.

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

14 LTCOL HINES: Yes, ma'am.

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

1 the wrong place for the "not just" to be.

2 CHAIR JONES: Remove the "not just."

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

5 CHAIR JONES: I got it. Yes.

6 LTCOL HINES: Yes, ma'am.

7 HON. HOLTZMAN: Okay, that's it.

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

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

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

14 CHAIR JONES: It will read as it reads.

15 LTCOL HINES: Yes, ma'am.

16 CHAIR JONES: Great. Okay. Now, at page  
17 38 we have -- we're back to indecent act. Okay.  
18 We need a conclusion, we need a recommendation,  
19 or we need to say we can't do it. Why don't --  
20 here's what I -- I read everything you sent,  
21 Glen, and I'm still not sure I know what we  
22 should recommend. Why don't we do this? Start me

1 off again and tell me now, the President has  
2 recommended that indecent act go back into the  
3 UCMJ?

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

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

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

15 CHAIR JONES: Okay.

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

21 CHAIR JONES: Right. And what would you  
22 say was the consensus of all the presenters about



1 this, whether we should be for it or against  
2 this?

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

16 CHAIR JONES: Consenting adults.

17 LTCOL HINES: Right, right. The other  
18 side of that from the military practitioners is  
19 that, you know, those other interests in the  
20 military of preserving good order and discipline  
21 requires, you know, an offense such as this that  
22 can be used in cases where some indecent conduct

1 or indecent acts are found to be either service  
2 discrediting or prejudicial to good order and  
3 discipline. And that's --

4 CHAIR JONES: Can I just ask you this?  
5 What was the article that indecent acts was  
6 prosecuted under before?

7 LTCOL HINES: It was also Article 134,  
8 Judge.

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

11 LTCOL HINES: Right.

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

15 LTCOL HINES: So, I think Mr. Sullivan  
16 from the General Counsel's office explained to  
17 you at some prior meetings that if indecent  
18 conduct -- what is found to be indecent conduct  
19 or acts right now are committed by a  
20 Servicemember, the only way to charge that is  
21 under Article 134, what we call the General  
22 Article, which is, you know, you basically say

1        what the conduct is, and then you say that it was  
2        indecent, and that it was either service  
3        discrediting or prejudicial to good order and  
4        discipline. And if you get a conviction on that,  
5        then the maximum punishment if it's service  
6        discrediting is four months, no punitive  
7        discharge and any other lawful punishment.

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

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

20               CHAIR JONES: So, does the President  
21       recommend indecent acts go in there now as an  
22       enumerated offense?

1 MR. MARSH: Ma'am, this is Kirt Marsh.  
2 If I could just jump in for a little bit. So, I  
3 think there's --

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

8 MR. MARSH: Yes, ma'am. It's a  
9 confusing term, and we ran into this into MJRG a  
10 lot. So, enumerated means one of the numbered  
11 statutory offenses in the UCMJ. And the only way  
12 that can get into the statute, into the UCMJ, is  
13 by an act of Congress, so that's statutory.  
14 Specified offenses out of 134 are something  
15 different. So, what the President is proposing  
16 right now under 134 and the offense that you saw  
17 is a specified offense under 134. It is not  
18 enumerated. And so I don't think right now anyone  
19 --

20 CHAIR JONES: Okay. So, there's only  
21 one number, 134, and among the specified offenses  
22 will be indecent act.

1 MR. MARSH: Yes, ma'am.

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

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

9 CHAIR JONES: Got it. Okay.

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

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

20 CHAIR JONES: I couldn't agree more --  
21 and maybe we have a consensus on this, but I  
22 wouldn't want to see this activity, however we

1 define it, but certainly it's not -- I don't  
2 believe it's intended to cover rape or sexual  
3 assault. I would not want to see it in 120.

4 What is 120(c), because I hear  
5 reference to that, remainder of indecent acts  
6 that should be criminalized and is not covered by  
7 Article -- is 120(c) going to -- isn't indecent  
8 acts covered under 120(c)? I just don't know what  
9 120(c) is.

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

14 CHAIR JONES: Right.

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

17 CHAIR JONES: Okay, it's still there.

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

20 CHAIR JONES: It's still there.

21 MR. MARSH: But other things that might  
22 fall outside of that conduct that could still be

1 considered indecent aren't covered anywhere right  
2 now.

3 CHAIR JONES: Right.

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

6 CHAIR JONES: Okay. And, certainly,  
7 120(c) doesn't have a 30-year penalty. Right?

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

11 CHAIR JONES: Okay.

12 BG SCHWENK: This is Jim.

13 CHAIR JONES: Is there a sex registry?  
14 Yes. Sorry, Jim, go ahead.

15 BG SCHWENK: I was going to say that I  
16 think we maybe can start getting around a  
17 consensus that this question when it uses the  
18 word "enumerated" from the JPP means should it be  
19 specifically listed as a separate offense under  
20 the UCMJ. Then I think we all agree the answer is  
21 probably no, having read everything. Should there  
22 be an offense under 134 specified by the

1 President, I think even Stephen would say yes,  
2 because that gives the protection Jill just  
3 mentioned that you can't get a criminal offense  
4 unless the conduct is prejudicial to good order  
5 and discipline, or service discrediting.

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

15 And I think our rationale can be  
16 something fairly simple like the Department of  
17 Defense thinks that 134 offense is sufficient and  
18 has so proposed. DoD operated for more than 50  
19 years with the 134 offense from 51 through 2007  
20 without any problems; that as a 134 offense the  
21 scope of indecent acts or conduct is  
22 appropriately limited by those two service



1       discrediting and conduct prejudicial stuff. And  
2       just leave it at that, not go into discussing the  
3       specifics of the DoD proposal, because then we'll  
4       get wrapped around the axle in details. We'll let  
5       -- if we do that, we'll have answered the  
6       question we were asked, should it be enumerated  
7       specifically in the UCMJ with a no, but we said  
8       yes, but yes to having one under -- having an  
9       offense under 134. Just my thought of maybe a  
10      consensus position.

11               MS. WINE-BANKS: Can I ask one question  
12      on that? Is the only place it could be enumerated  
13      120, because I think what our consensus is, is  
14      that it shouldn't be in 120. But I would view it  
15      being enumerated in 134, so the answer wouldn't  
16      be no, it shouldn't be enumerated. It's just that  
17      it shouldn't be enumerated in 120.

18               BG SCHWENK: I think enumerated is a  
19      loaded term. I don't know that anybody really  
20      understands what it means. I think it should be -  
21      - if it's a 134 offense, Article 134 in the  
22      Uniform Code of Military Justice is a very broad

1 general statement with nothing specific under it.  
2 And all the specifics under it are done by the  
3 President in the Manual for Courts-Martial, and  
4 that's where all the specific offenses under 134  
5 are listed, what the offense is, what the  
6 elements are, what the maximum punishment is, and  
7 all that. The President does all that under 134.

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

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

19 CHAIR JONES: Like 135 or something.

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

22 CHAIR JONES: Yes.

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

11          MS. KEPROS: This is Laurie. I agree  
12          with the no in 120. I don't know if I agree with  
13          the yes in 134. And, apparently, I think I am  
14          suffering from some of the same confusion as the  
15          other civilians on our Subcommittee, which is  
16          that I don't understand why it's not already  
17          prosecutable under 134, if it is service  
18          discrediting. And I am also concerned that in the  
19          cases, the examples we were sent, you know, this  
20          can include something like people engaging in  
21          sexual behavior with a third person in the room.  
22          This was normative behavior.

1                   And so I guess I'm worried about  
2 anything being enumerated, even within 134, even  
3 if the military says that it is not a  
4 registerable sex offense, that when people travel  
5 among United States, the state will --the agency  
6 for the states, because I see police do this, we  
7 ask for the word indecent, and it will become a  
8 de facto registerable sex crime, you know, from  
9 one state to the next, or not. And it's just  
10 putting sort of lot of baggage on behaviors that  
11 I think are ways to get at. So, I guess that's  
12 the concern I would advance, but it might be an  
13 ignorance because I don't really understand  
14 whether this could already be done as a non-  
15 enumerated provision of 134.

16                   BG SCHWENK: This is Jim, again. Under  
17 134, the President lists specific offenses and  
18 puts all the rules for them, you know, what the  
19 elements of the offense are, maximum punishment,  
20 et cetera.

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

1       there now.

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

4                   CHAIR JONES: Okay.

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

17                   So, the answer from DoD has always  
18      been let's get it in the Manual for Courts-  
19      Martial published and approved by the President  
20      as a specified 134 offense. And so that's what  
21      they're proposing to do with indecent acts, just  
22      like they did from 51 until 2007.

1           Now, what the states do with that, and  
2 whether they look beyond that, and how they do --  
3     you know, each of the 50 states, how they do  
4 their sex registration, I don't know.

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

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

12          HON. HOLTZMAN: Right.

13          CHAIR JONES: That part's easy?

14          HON. HOLTZMAN: Right.

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

21          CHAIR JONES: Right.

22          MS. WINE-BANKS: At least not

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

20 CHAIR JONES: As specified by the  
21 President.

22 MS. WINE-BANKS: Yes.

1                   CHAIR JONES: And we shouldn't do what,  
2                   comment?

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

12                  LTCOL HINES: No, ma'am.

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

16                  CHAIR JONES: Yes.

17                  LTCOL HINES: You know, this is Glen,  
18                  Judge. I think if I could capture what Brigadier  
19                  General Schwenk was saying, and if this is the  
20                  direction everyone's heading, it sounds like  
21                  there's a consensus that in answering this  
22                  question you can say, you know, we do not



1 recommend that an enumerated offense under 120,  
2 you know, be adopted for indecent acts or  
3 conduct. The second part of that is we're aware  
4 that the President has promulgated a new offense  
5 under 134. You know, I could build out the report  
6 to say that, you know, the Committee is well  
7 aware of this and has looked at it, but you don't  
8 have to -- I don't think you really have to speak  
9 one way or the other one 134 to answer the  
10 question under number 11. If you're saying we  
11 don't recommend that this go under 120.

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

14 LTCOL HINES: Correct.

15 CHAIR JONES: Right. I guess --

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

1 remain silent on taking a position.

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

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

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

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

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

22 CHAIR JONES: Okay. So, our conclusion

1 is don't put it in, don't put it in 120, and  
2 we're not recommending anything with respect to  
3 the President's proposal on anything else.

4 LTCOL HINES: Yes, ma'am.

5 CHAIR JONES: We take no position.

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

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

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

15 CHAIR JONES: Okay.

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

18 CHAIR JONES: Okay. 12 is -- well,  
19 actually, this is interesting. The current  
20 practice is charging inappropriate relationship  
21 or maltreatment under Articles of UCMJ other than  
22 Article 120. Is it appropriate and effective when

1 sexual conduct is involved? And our ultimate  
2 conclusion was charging it that way is  
3 appropriate and effective when consensual sexual  
4 conduct is involved. Is this where we changed it  
5 to can be when sexual conduct is involved?

6 BG SCHWENK: Yes.

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

9 MS. WINE-BANKS: Yes.

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

12 LTCOL HINES: Okay.

13 CHAIR JONES: Are we all good on 40 and  
14 41 then?

15 MS. WINE-BANKS: Yes.

16 CHAIR JONES: Okay, great. 42, this is  
17 the question of whether the current version of  
18 120 gives prosecutors the ability to effectively  
19 charge coercive sexual relationships. And here we  
20 recommended, and I --no change --

21 MS. WINE-BANKS: This where we  
22 recommended a new crime.

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

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

15           CHAIR JONES: Put what --

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

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

20           LTCOL HINES: Yes.

21           CHAIR JONES: Okay, Glen?

22           LTCOL HINES: Yes, ma'am.

1                   CHAIR JONES: Thank you. Alright, 46.  
2           This is where we do add a new provision to  
3           address coercive sexual relationships or those  
4           involving abuse of authority. And our  
5           recommendation, which we had long discussions  
6           about and voted on at the bottom of page 46 into  
7           47.

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

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

22                   LTCOL HINES: I think so, ma'am. This

1 is also where General Schwenk submitted a  
2 comment. I tried to route it to everyone, but he  
3 suggested changing compel to coerce for  
4 consistency sake because we use coerce and  
5 coercion in some other places. So, I don't know  
6 if -- and I think he felt that compel was maybe a  
7 little too narrow for the Government, that coerce  
8 would cover --

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

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

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

22 BG SCHWENK: Yes.

1 MS. WINE-BANKS: I thought it was a  
2 brilliant -- a very, very excellent change.

3 BG SCHWENK: That works for me.

4 LTCOL HINES: Okay. So, the easy fix is  
5 --

6 CHAIR JONES: I like it, too.

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

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

13 MS. WINE-BANKS: Yes, exactly.

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



1 proposed edits. Any other discussion on that  
2 needed? Okay.

3 Page 52, our last page, Issue 17.

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

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

20 Okay. Glen, I can't thank you enough.  
21 And, Kirt, thanks for your very helpful  
22 intervention here.

1 MR. MARSH: Yes, ma'am.

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

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

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

20 CHAIR JONES: Well, right now I think  
21 we have a real piece by Laurie, analysis by  
22 Laurie which dissents from some of our

1 recommendations and our analysis. Laurie is going  
2 to do that as soon as -- it's probably already  
3 done. Right, Laurie?

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

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

8 MS. KEPROS: By Friday.

9 LTCOL HINES: Okay.

10 CHAIR JONES: So, is Friday quick  
11 enough for you?

12 LTCOL HINES: That's fine, Judge. Thank  
13 you.

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

16 And now the other -- we've also listed  
17 where Laurie and Professor Schulhofer, you know,  
18 would rather see the mens rea a little stiffer  
19 for the accused. I don't know what other dissents  
20 you're thinking about, or that we've heard might  
21 be coming down the road. You're saying future --  
22 if people have some additional dissents?

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

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

15 LTCOL HINES: Yes, ma'am.

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

18 LTCOL HINES: Okay.

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

22 LTCOL HINES: Okay. Thanks, Judge.

1 That's all I have.

2 CHAIR JONES: Great. Okay. Terrific.

3 Bill, are you there to close the meeting?

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

6 CHAIR JONES: Alright. Thanks a lot.  
7 Bye-bye.

8 (Whereupon, the meeting in the above-  
9 entitled matter was concluded at 12:20 p.m.)

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In the matter of: Judicial Proceedings Panel

Before: US DOD

Date: 12-02-15

Place: teleconference

was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate record of the proceedings.



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Court Reporter

**NEAL R. GROSS**

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