

UNITED STATES DEPARTMENT OF DEFENSE

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JUDICIAL PROCEEDINGS SINCE FISCAL YEAR 2012  
AMENDMENTS PANEL

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PUBLIC MEETING

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FRIDAY  
SEPTEMBER 19, 2014

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The Panel met in the Glebe and  
Fairfax Rooms, Holiday Inn Arlington at  
Ballston, 4601 Fairfax Drive, Arlington,  
Virginia, at 8:51 a.m., Hon. Elizabeth  
Holtzman, Chair, presiding.

PRESENT

HON. ELIZABETH HOLTZMAN, Chair  
MR. VICTOR STONE  
PROF. THOMAS W. TAYLOR  
VADM (R) PATRICIA TRACEY

## WITNESSES

CAPT STEVEN ANDERSON, U.S. Coast Guard,  
Commanding Officer, Legal Services  
Command

Col JOHN BAKER, U.S. Marine Corps, Deputy  
Director, Judge Advocate Division,  
Military Justice & Community  
Development

CAPT ROBERT CROW, U.S. Navy, Director,  
Criminal Law Division (OJAG Code 20)

HON. LOIS FRANKEL, U.S. House of  
Representatives

PROF. VICTOR HANSEN, New England Law Boston\*

CDR JASON JONES, U.S. Navy, Defense Service  
Office, Bremerton, WA

Col POLLY KENNY, U.S. Air Force, Staff Judge Advocate,  
Headquarters Air Education Training Command, Joint  
Base San Antonio, Randolph, TX

LTC JOHN KIEL, U.S. Army, Criminal Law  
Division, Office of The Judge Advocate  
General

MAJ FRANK KOSTIK, U.S. Army, Senior Defense  
Counsel

Col MIKE LEWIS, U.S. Air Force, Chief,  
Military Justice Division

Maj MELANIE MANN, U.S. Marine Corps,  
Military Justice Officer, MCAS  
Miramar, CA

CAPT (Ret) STEPHEN McCLEARY, U.S. Coast  
Guard, former Chief of Military Judge

ELISHA MORROW

E.J. O'BRIEN, Highly Qualified Expert, U.S.  
Army Trial Defense Services

LTC ALEX PICKANDS, U.S. Army, Trial Counsel  
Assistance Program

Lt Col JULIE PITVOREC, U.S. Air Force, Chief  
Senior Defense Counsel

Maj MARK ROSENOW, U.S. Air Force, Special  
Victims Unit, Chief of Policy and  
Coordination

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LtCol MICHAEL SAYEGH, U.S. Marine Corps,  
Staff Judge Advocate, Training  
Command, Quantico, VA  
TERESA SCALZO, Highly Qualified Expert, U.S.  
Navy Trial Counsel Assistance Program  
HON. JACKIE SPEIER, U.S. House of  
Representatives  
LCDR RYAN STORMER, U.S. Navy, Trial Counsel  
Assistance Program  
LtCol CHRIS THIELEMANN, U.S. Marine Corps,  
Regional Trial Counsel  
PROF. RACHEL VanLANDINGHAM, Southwestern Law  
School  
LTC JAMES VARLEY, U.S. Army, Government  
Appellate Division  
RONALD WHITE, former Highly Qualified  
Expert, U.S. Army Trial Defense  
Services  
Col TERRI ZIMMERMANN, U.S. Marine Corps,  
Officer-in-Charge (Reserve), Defense  
Services Organization

ALSO PRESENT

BILL SPRANCE, Designated Federal Official  
Lt Col KYLE GREEN, U.S. Air Force, Judicial  
Proceedings Panel Staff Director

\* Present via Teleconference

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## PROCEEDINGS

8:51 a.m.

MR. SPRANCE: Good morning, everyone. I am Bill Sprance, the Designated Federal Official, and this meeting of the Judicial Proceedings Panel is now open. At this time I will turn you over to the Chairwoman, the Honorable Elizabeth Holtzman. Good morning, ma'am.

CHAIR HOLTZMAN: Good morning. Thank you very much. Good morning everybody, and welcome. I'd like to welcome everyone to the second hearing. Four members of the panel are present today. Unfortunately, Judge Barbara Jones had another commitment and is unable to be with us.

The Judicial Proceedings Panel was created by the National Defense Authorization Act of 2013. Our mandate is to conduct an independent review and assessment of judicial proceedings conducted under the Uniform Code of Military Justice involving adult sexual assault and related offenses since the most recent amendment to Article 120 of the UCMJ in 2012.

Today we will continue the review we began last month of recent and proposed changes by Congress to Article 120. The Panel will hear first perspectives on Article 120 from civilian legal experts. Next we will hear from Military Justice practitioners, both prosecutors and defense counsel, who will discuss how recent and proposed changes to Article 120 affect trial practice at courts-martial.

After lunch, the Panel will take up its tasking to review whether

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the definition of rape and sexual assault under the UCMJ should be amended to include situations in which sexual acts occur as a result of access or coercion by a service member abusing his or her position in the chain of command.

Two members of Congress who have advocated for such change will be here to provide their perspectives, and to answer questions from Panel members. They will be joined by a sexual assault survivor who will share her personal experience and perspectives concerning military trainers and trainees and sexual assault.

The Panel will then hear from Judge Advocates from the Military Services about prosecuting abuse of power offenses under Article 120.

In today's final session, the Chiefs of Criminal Law and Military Justice Departments from each of the service's JAG Corps will provide their insight and military policy perspective on prosecution of sexual assault offenses under Article 120.

Each public meeting of the Judicial Proceedings Panel includes time to receive comments and input from the public. The Panel did not receive any requests from the public to appear at today's meeting, but we did receive written public comments from the Service Women's Action Network, a document on Article 120 and Affirmative Consent. That submission has been provided to the Panel members and posted along with all materials for today's meeting and previous meetings on the JPP's website at [jpp.whs.mil](http://jpp.whs.mil).

Since our last meeting, one Panel member, Mr. Stone, has had the

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opportunity to attend a one-week training course for Special Victim's Counsel at the Army JAG School in Charlottesville, Virginia. Mr. Stone is now finalizing a summary of his observations, and we're scheduling time for him to discuss his report at the upcoming panel session that will focus on the services' SVC programs.

We very much appreciate the fact that the Army JAG Corp hosted Mr. Stone for this course, and members of the Panel look forward to participating in similar opportunities in the future.

Thank you very much for your attention. I believe we're ready for our first presenters. They are Ms. Teresa Scalzo, Mr. E.J. O'Brien, Mr. Ronald White, and Professor Rachel VanLandingham, who have joined us to discuss their assessments of Article 120.

They are joined by phone by Professor Vic Hansen. Professor Hansen, are you on the phone?

PROF. HANSEN: Yes, I am, ma'am. Good morning.

CHAIR HOLTZMAN: Good morning, sir. Thanks all of you for joining us. Professor Hansen, we will hear first from you.

PROF. HANSEN: Chairwoman Holtzman and members of the Panel, thank you very much for inviting me to present today, and thank you also for allowing me to participate by phone. I apologize for not being able to be there in person.

Just briefly, I'll give you a brief background of my experience with

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Article 120. I am a retired Army JAG Officer. I retired in 2005. That's significant within the context of Article 120 primarily in that my experience with Article 120 as a prosecutor was with the more traditional, the older form of Article 120 before the 2007 amendments, and then certainly before the 2012 amendments to the statute. So, I want to qualify any comments I have from my own experience by saying that my own practitioner's experience comes well before the most recent amendments to Article 120.

Since leaving the JAG Corps and beginning my career in academia, I have taught rape statutes and the development of rape statutes as part of my Criminal Law courses that I've taught to first-year law students. And there is quite a debate in academia as to whether to teach rape as part of the core curriculum, and lots of opinions on both sides of the issue. I've actually discussed this with Professor VanLandingham who's on the panel this morning as well, and I have elected to continue to teach this concept, and teach the crime of rape to students even though it's a difficult subject, and can raise lots of personal issues among students, as well, primarily because I think it's important to remember that the law, in general, the criminal law, in particular, and rape in very particular ways is a challenging subject, but it also reflects the -- it's certainly a reflection of our social mores as they've developed over time, developed -- the rape statutes have changed and modified as our understanding of human behavior has changed and developed. And I think it's an important subject to continue to teach.

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In the context of the work of the Panel, I think it's useful to remember that while it's important to look at the statute and look at how best to create a statute that's going to address these concerns, I think we have to be also realistic to realize that you can't legislate everything, and that the reality is regardless of how much you legislate, there's going to be an aspect of this crime, in particular, and the issues surrounding this that are going to be very difficult to capture precisely, and codify every situation or scenario that may arise.

So, I guess that's where I come from as I look at Article 120. I know during the Question and Answer period, I'm happy to comment on other issues. I know the Panel is specifically charged with looking at modifications to Article 120. They're breaking out certain provisions of the statute, and also considering the notion of abuse of authority and how that plays currently in Article 120 and modifications, so when that discussion begins I'm happy to give you my thoughts on that as well. Thank you, again, very much.

CHAIR HOLTZMAN: Ms. Scalzo, we'd like to call on you next, please.

MS. SCALZO: Yes, ma'am. Chairwoman Holtzman and Panel members, good morning, and thank you for the opportunity to discuss Article 120 with you.

I would like to tell you a bit about my background to put my testimony in context. I began my career in Northampton County, Pennsylvania where I

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spent two and a half years as a public defender, and almost five as a prosecutor. I handled everything from traffic to homicide, but my primary goal was as Chief of the Sex Crimes Unit.

After serving as a prosecutor, I worked for the National District Attorney's Association for six years, first as their policy attorney, and later as the Director of the National Center for the Prosecution of Violence Against Women.

I would like to note that the funding for this program has since been awarded to AEquitas, who I believe has already sent several attorneys to brief you.

While at the National Center, I trained civilian and military prosecutors, designed curricula on sexual assaults prosecution, and consulted with prosecutors across the country on sexual assault cases, including charging decisions.

In addition, I've authored numerous publications, including a manual published by the National DA's Association in partnership with the Department of Justice called, "Prosecuting Alcohol-Facilitated Sexual Assault." It is the only published manual on this topic, and is currently being cited by the Department of Justice in its assessment of civilian sexual assault prosecutions. A section of this manual is dedicated to charging decisions, because charging alcohol-facilitated sexual assault is quite complicated.

After leaving the National Center for the Prosecution of Violence Against Women, I spent two years at OSD SAPRO as the senior policy advisor, and

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finally moved to Navy JAG in 2009, where I was first in the criminal law division known as Code 20, and now I'm the Deputy Director of our Trial Counsel Assistance Program. In this position, one of my roles is to consult with trial counsel on charging decisions. The opinion I'm about to give is my own, and not the Navy's.

I can speak to you as a practitioner who advises Navy trial counsel worldwide on charging recommendations. The first issue we consider when recommending charges is what is the harm you are trying to prevent? With the exception of the recent Army case dealing with the sexual contact by a stethoscope, I have yet to hear about a sexual assault allegation that could not be charged under most recent law due to inadequacy of the law. The law might be complicated and poorly worded, but we have not seen cases that should have been charged that could not be charged due to the law itself.

I would also like to note that part of what allows us this broad charging scope is defining bodily harm to include non-consensual sexual acts. Although there is much confusion amongst those who are not actual practitioners about the role of consent in this crime, I can tell you that at least among Navy trial counsel we are not confused.

I would like to note that there is one area that we do struggle with, is the definition of incapable of consent. We know that consent must be given by a "competent person," but the law provides no further guidance beyond this. I have had the privilege of being the lawyer to train on the topic of alcohol-facilitated sexual

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assault at several national conferences of the Society of Forensic Toxicologists over the past decade. I had asked these toxicologists what it means to be capable of consent, and they tell you --and I can tell you that they do not agree.

Personally, I believe that the standard for competence can be compared to the standard for competence to stand trial, make medical decisions, and sign a contract or a will. The crime is about having a capacity to process information, consider the information, and make decisions utilizing that information; however, this explanation is not included in the law. Therefore, the issue becomes the subject of expert testimony in almost every trial where incapable of consent is charged.

We would look to the states for guidance on this issue, but very few states have a crime where the bar is this low. Most require that the victim be physically helpless, unable to appraise the nature of the conduct which is typically defined as being unaware that sex is occurring, unable to communicate non-consent, or unconscious. All of these are much higher levels of incapacitation than simply being incapable of consent.

I can tell you that a good deal of the cases prosecuted by the military are not crimes with any state jurisdictions. I know this because of my decade plus of consulting with state and local prosecutors as a specialist in alcohol-facilitated sexual assault. As a result, the military ends up prosecuting cases that are far more difficult to prove than many of our civilian colleagues.

That being said, if the goal is to insure that the statute itself does

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not preclude prosecutions, this goal has been met. I look forward to answering your questions.

CHAIR HOLTZMAN: Thank you very much. I think the procedure we'll follow is to allow the Panel members to testify and then ask questions afterwards. So, our next presenter will be Mr. E.J. O'Brien, who is a highly qualified expert at the U.S. Army Trial Defense Services. Mr. O'Brien, sir.

MR. O'BRIEN: Madam Chair and members of the Panel, I am Edward J. O'Brien, and I am pleased to be here this morning to discuss Article 120. I currently serve with the U.S. Army Trial Defense Service, and I had the good fortune to serve with Mr. Ron White for a period of time prior to his retirement.

I practiced Military Justice for almost 20 years. I served in the Army for 26 years, of which 18 were in the Judge Advocate General's Corps. Of those 18 years, I spent 15 years in Military Justice jobs. I served as a trial counsel, a senior defense counsel, professor of criminal law, regional defense counsel, military judge, and finally the Deputy Chief of the Trial Defense Service.

I was a trial counsel, defense counsel, and trial judge when rape was defined as sexual intercourse done by force and without consent. I was a trial judge on 1 October 2007 when our sexual offense law changed. Since June of 2012 when the law changed again, I've been in my current position, the point being that I have experience with all three versions of Article 120.

I'm grateful to the panel for this opportunity to discuss my

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concerns with the current law. I will not read my written submission to the Panel, but I'd like to summarize the many points.

CHAIR HOLTZMAN: Thank you.

MR. O'BRIEN: First, focusing solely on the conduct of the perpetrator when defining and proving sex crimes is an unobtainable goal. Even if Congress can write laws focusing only on the perpetrator's conduct, when the case gets to trial the accused's right to present a defense allows the accused in many cases to go into the alleged victim's conduct, sometimes in intimate detail.

Second, the Military Justice System has paid a price for attempting this goal. The reputation of the system has been damaged, and innocent soldiers have been put at risk unjustly.

Third, the 2012 version of Article 120 is not perfect, but it is workable. With proper implementation we can have a system where the results of trials match the harm suffered by victims, and innocent soldiers do not face the risk of injustice.

Fourth, the pattern jury instructions adopted by the Army Trial Judiciary do not properly implement the statute.

Finally, although Congress and appellate courts can correct the Trial Judiciary's implementation of statute, the fastest way to make the correction is for the President to act by Executive Order, and the Executive Order will originate with the Joint Service Committee which, of course, is within the Department of Defense. Thank

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you, Madam Chair.

CHAIR HOLTZMAN: Thank you, Mr. O'Brien. Our next presenter will be Mr. Ronald White who is a former highly qualified expert at the U.S. Army Trial Defense Services. Mr. White, welcome.

MR. WHITE: Yes, ma'am, thank you. I thank the Panel Members for the opportunity to appear.

Like Mr. O'Brien, I had a long military career, probably twenty years of active duty and had the opportunity to serve as a prosecutor, defense counsel, military judge, and presiding over and participated as counsel in many sex cases.

Unfortunately, I retired in 2003 so all of my litigation experience is under the former statute. After I retired, I spent two years as the Commissioner for Chief Judge Stephen Crawford in the Court of Appeals for the Armed Forces, and after that writing rules of evidence and rules of procedure for the Military Commissions. And then I had the opportunity to work for 26 months primarily on this statute with Mr. O'Brien and the Trial Defense Service of the U.S. Army.

You have a written product that I have submitted that's fairly detailed, and in the interest of preserving time for questions and discussion, I'd just tell that I concur completely in what Mr. O'Brien has said, and adopt those remarks as my own. Thank you.

CHAIR HOLTZMAN: Thank you. Our last presenter will be Professor Rachel VanLandingham of Southwestern Law School. Welcome Professor.

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PROF. VANLANDINGHAM: Good morning. Thank you, Madam Chair and members of the Panel. Thank you so much for the opportunity to speak today and last fall when I had the opportunity to speak before some of you. I was down in Florida and I'm happy to announce that I'm now an Associate Professor at Southwestern Law School in Los Angeles. I was a Judge Advocate in the Air Force. I actually had the opportunity to be a panel member on a sexual assault case back in the '90s, but here today I'm here as a law professor.

I'm currently teaching 89 young men and women on the law of crime in their very first semester of law school. And as Professor Hansen has mentioned, teaching criminal law is difficult, and teaching about how our society deals with sexual crimes is even more so. But I include rape in my syllabus for several reasons; because it, almost more than any other crime, demonstrates the essence of criminal law as an expression of society's collective foundation of changing mores lead to legal evolution, and crucially for this panel how legal evolution can also help change social mores.

Of course, there's also case study on gender cognitive devices at work and showcasing emotional, a lot of emotion, actually. Your panel's collective experience in the law is staggering and you truly don't need criminal law 101 and my expertise is not in the ins and outs of every rape statute in the United States, nor how gender biases actually work in the courtroom. But what I teach every week in my criminal law class revolves around two things, and that is the principles of punishment,

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why we criminalize something -- is directly related to why we punish something, and why we want to punish, and so the principles of punishment are also kept in mind while analyzing crimes. And, two, that the modern criminal law today is all about statutory interpretation. So, the various principles of punishment involved in sexual assault crimes, deterrents and retribution. Keep in mind when we're looking at this very detailed technical nuanced critiques from such highly qualified experts as Professor Schulhofer, Dean Schenck, those detailed analyses need to be linked back to, as Ms. Scalzo mentioned, the harm.

Retribution theory is both indicative and accountability from -- start by asking what is the harm we're trying to punish? Sexual assault and rape devalue a person by robbing them of their sexual autonomy, so according to the attributive communicative theory to equally value a woman's right to her own sexual autonomy or a person's right to their own sexual autonomy we criminalize the most egregious transgressions against it; therefore, we criminalize it. The point here is the statutory language is analyzing, I urge everyone to ask what is the harm at issue? Why are we criminalizing this conduct?

Does an Article 134 Fraternization Prosecution target or collectively morally condemn, using H.L.A. Hart's words, the same harm as a sexual assault prosecution does? Of course not. The disruption to the ranks of enlisted and officers or the trainee-trainer relationship where they are overly familiar is profoundly different than the graver harm caused by the non-consensual essence of sexual contact

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to your drill sergeant and his troop. The harm there is the coercive nature of the act, and its degradation of sexual autonomy in a trainee, plus the collateral harmful impact upon discipline.

The harm our society is trying to condemn has long been though ancient roots as merely property harm, regarding these crimes. The physical injury and forceful harm where I believe much of 120 remains. To the harm caused by negating another's sexual autonomy integrity, exacerbated by force and fear of additional physical injury, but the root harm is still the denial of the victim's right to retreat a mutual agreement with another regarding his or her body as an expression of their sexuality. It is about freely giving consent and a lack of it. Things like threats and power relationships often serve as proxies for the lack or inability to so freely consent.

Secondly, in closing, deterrence is closely linked to the goals of communicative retribution, and that has also an educational aspect of it. Article 120 not only serves to hold accountable, an eye for an eye, those that commit a particular harm, and serves to demonstrate that society values each individual's right to their own sexual autonomy. It also serves to deter others in the future who engage in what society and the statute says is wrongful.

As for both communicative retribution's sake and deterrence's sake the statute must clearly communicate what is deemed as wrongful conduct. This is particular true in a crime such as this, where the heart, the sine qua non of the crime is lack of consent, which itself runs along the continuum, how much non-consent

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should the law be punishing? What is the harm?

While I do have some specific comments in review of Professor Schulhofer's 8 August memo, and I'm thrilled that Dean Schenck brings up my new home states Mayberry instruction, dealing with consent defenses, I am motivated through principles of punishment and the canons of statutory interpretation that I teach, to absorb this panel to recommend at least a partial overhaul of Article 120, specifically regarding clarifying the definitions of consent, clarifying definitions of including capacity to consent, and moving forward in shaping the -- reshaping the mores defining reasonable, and what a reasonable standard is.

While much of criminal law often uses vague, evaluated language and terms, in order to allow a jury to infuse them with the community's expression, cultural preconceptions about rape and subconscious gender biases often make such decisions uninformed. And, therefore, such terms should be legislated upon as a product of Congress' informed deliberation to lead public attitudes much as it did in the last century to racial biases. I look forward to your questions.

CHAIR HOLTZMAN: Thank you. I guess we'll start with our questions now. Professor Taylor.

MR. TAYLOR: Great. Well, first of all, thank you very much to all the members of the Panel. And thank you, Professor Hansen, for testifying by telephone.

PROF. HANSEN: Thank you.

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MR. TAYLOR: I first would like to direct a question or two, if I may, to Ms. Scalzo.

You spoke about the problem with incapability of giving consent, and would you elaborate on that on what you think a proper definition would be? You started to tell us a little bit, but could you expand on that a little, please?

MS. SCALZO: Sir, I'm not sure precisely what it would look like, but I would suggest that it should include some sort of explanation that it's about the process. Oftentimes, this crime is critiqued as over-broad because many people perceive that it's about the end result being a good or bad decision. I believe it should be about the capacity to process information, the ability to recognize consequences of the action, the ability to recognize the action itself, the ability to recognize alternatives. So, much like we do with medical care where we look at do they recognize alternatives? Do they understand that they can decline? Do they understand what the end result is?

MR. TAYLOR: I'm sure that you're aware and, of course, I'm sure our professor from California is aware of the recent statute passed by your legislature that spells out in great detail a fuller definition of consent, of consent being something that almost amounts to, if I may sort of contract between two individuals, to be sure that both are voluntarily and willingly entering into some sort of activity.

And I'm going to ask this of every panel member so you can be thinking about it. And, Ms. Scalzo, since you're the first person I've asked, what do you

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think about this? Is this the direction that we should be thinking and recommending?

MS. SCALZO: To be honest, when people are not incapacitated, again, I have not seen a problem with our ability to punish the harms that we seek to punish with our current definition of consent. Capturing it simply as freely given agreement between two competent people has been working.

Are there better definitions? I'm sure there possibly are, but is it working as it is? I haven't seen problems with that piece of the statute.

MR. TAYLOR: Well, I guess I'd be interested in knowing whether from your examination so far of those -- the State of California, of course, has adopted that definition and applied it, as I understand it, and please correct me if I'm wrong, to all the schools, the public schools within California, and those receiving funds from the State of California.

My alma mater, the University of North Carolina Chapel Hill just in the last couple of months has adopted a similar standard, and I know that other colleges and universities are considering the same sort of fulsome standard. Do you think that's a good idea or not?

MS. SCALZO: Frankly, sir, my understanding is, and correct me if I'm wrong, but my understanding is that these colleges are adopting standards that are broader than the actual criminal law. I think it's a mistake for colleges to have one standard and state law to have another. What that does is it allows crimes to be pushed underground.

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I come from the jurisdiction where the Clery Act crime occurred, the homicide and rape at Lehigh University, and I've watched the evolution of that law. And I think that colleges and criminal jurisdictions should be similar in their language and what they're punishing.

MR. TAYLOR: Professor Hansen, would you like to make some general comments about consent as it applies to Article 120?

PROF. HANSEN: Sure. And to go along with that last comment, my current position is the Associate Dean here at the Law School. We are looking very carefully at amending our own internal rules regarding sexual assault, sexual harassment, and how those acts are defined, and how we deal with them administratively on a campus environment versus how the law enforcement community might deal with them.

So, I guess going back to your initial question, sir, regarding the language that's used and this kind of notion of contract language. We've seen that in other statutes, as well. I know New Jersey was one of the first states to adopt this more broad kind of language. And I tend to agree with the comments that generally speaking it's probably okay. The one question I would raise is does this language comport with reality, with how people really interact with one another in social settings, and social environments.

And, you know, this is true in the college campus context, and when you see colleges and universities amending their policies to create these broader

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definitions of consent and affirmative consent, and create kind of a contractual obligation.

I think the real question we have to ask is does that comport with how people really interact on a very fundamental basis? And if it doesn't, and if people see this language as somewhat nonsensical, then I think there is a risk that it's frankly over-legislated, it doesn't comport with how people really engage in social interaction.

MR. TAYLOR: Well, yes. Thank you very much for that response. As a public policy professor at Duke, I'm always interested in best practices, so I think that one of the things this panel should be thinking about is what are the best practices from other venues, things that we wouldn't necessarily think about ourselves.

But I'd like now to ask you, Mr. O'Brien, you mentioned that you had had experience with all three statutes. And not trying to put words in your mouth, but I think I heard you say that the Military Justice system has paid a price with where we are right now with Article 120, and referred to innocent soldiers perhaps being caught up in this. Could you elaborate on that, please?

MR. O'BRIEN: Yes, sir. In my position, and Mr. White was in essentially the same position, we would receive reports daily from defense counsel, and some of those reports really illustrated the effect that the current dynamics are having on the system. In fact, the one that leaps to mind is I had a defense counsel report to me that a client had reported to him that after he had enlisted and processed through the MEP station the drill sergeant handed him a piece of paper and said, you

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know, here are the orders for basic training, here is your conviction for sexual assault. And having been a line officer before I went into the JAG Corp, when NCOs are making light of situations like that, normally it's a sign that somebody ought to take a look at it and see what's going on.

More generally, you see the criticism of the Military Justice system in the paper from time to time, whether it was General Sinclair's trial at Fort Bragg, or any of the other higher profile, you know, the cases from the Naval Academy, for example. The reporting is very critical of our system, and I'm not certain that all of this reporting is accurate, but those are the types of things that I meant when I say that our system has paid a price, you know, for this manipulation of the concept of consent, whether it's an element, whether it's a defense, whether it's neither.

MR. TAYLOR: Mr. White, you said basically that you pretty much concurred with everything Mr. O'Brien said, so although it may be unfair, and you can back away from this a little bit if you want to when I ask you my next question.

One of the things Mr. O'Brien said, I think, was that the President should act with an Executive Order to make some changes that would make the current statute better. And if I understood the tenor of your paper, you're totally agreed with that. Is that correct?

MR. WHITE: Yes, sir.

MR. TAYLOR: Would you highlight some of those changes that you think ought to be made?

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MR. WHITE: Yes, sir. One of the things, of course, the President has the power to do under Articles 36 and 57, if I've got the numbers recalled correctly, he can actually say here's what I think elements are. Of course, we know it's up to CAAF essentially to say no, we'll tell you what the elements are. He can give guidance to prosecutors about what is to be prosecuted and what's not. He has done so under many other Articles.

We just had a thing called the Exculpatory No Guidance was in the UCMJ and the President's guidance, although not in the law, that was you couldn't have a false official statement if the only thing the soldier said was no. Did you do that? No. Now, that has been eliminated by statute and actually by the UCMJ as well, but those kinds of limitations, those kinds of descriptions, that's what we expected to see from the President. And what we saw, the main ones that existed since '51 was every increasingly, more complex, more detailed guides from the President as our system evolved under the statute that was in force since that time, so by the time that the statute was changed in 2006, the manual provisions under Article 120 were very descriptive of the state of practice at the time. Absent those, I think the worst thing we can have happen is that the Benchbook Committee that writes the PAM that actually most of the services use, the Navy and Marine Corps, even though all of them slightly different. But the Benchbook Committee was left to draft on their own what the instructions should be without the benefit of the President's guidance. So, I agree with Mr. O'Brien that the quickest way to make this happen in theory is to have that Joint

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Service Committee produced, DOD General Counsel reviewed product, that goes to the President and becomes the Manual for Court-Martial.

That said, I am sympathetic to the fact that it's been over two years now and we still don't have any guidance, so is it more efficient to, perhaps, go back to Congress? I worry about the risks inherent in that, but I would rather see the Presidential guidance. I think it's easier doing that.

MR. TAYLOR: So, just to follow-up on that point, and you may also chime in if you'd like, Mr. O'Brien, in answer to this question. We had some very interesting testimony at the first panel from a distinguished panel of judges, and at least one of those individuals made a fairly strong case for the notion that what really should happen at this point is that we should stop changing things.

That we should simply let the judges through what he called the common law of case decisions work out the problems because of the difficulties that have arisen from having three different sets of rules over a relatively short period of time when you consider the span of the law. So, what would be your thoughts on that? Both of you can please comment on that.

MR. WHITE: I noted one of those in my paper as one of the reasons I believe we should not change the statute, that we need settled law, and we have cases in the pipeline and CAAF will get it done within short order, or in actually two months.

MR. TAYLOR: Mr. O'Brien?

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MR. O'BRIEN: Yes, Mr. Taylor. I agree with the idea that you want to give the law some stability, and not to change the statute itself. However, you can probably tell from my submission that I don't agree with the implementation by the Army Trial Judiciary. I think they've got it wrong, and I think it creates some gaps and some dangers.

I think the President, in Rule 916, has collected, you know, different legal justifications and excuses, labeled them with the more general title defenses, and put them in our rule. Now, when the President does that, he didn't create those defenses, he really looked at the federal common law and recognized those are defenses. They're going to be defenses in the military, and no trial judge that I know of has ever thought of Rule 916 as an exhaustive list.

What I propose is the Executive Branch, and ultimately it will be the President's signature, look at the way we have handled sexual assault in the past. Has consent to a sexual act been the defense? And, of course, it has. We expressed that for decades by having lack of consent as an element of the defense. And in 2006, Congress essentially made consent to the sexual act a legal excuse by making it a statutory defense.

The way they did it, by putting the burden on the defense to raise the issue and to prove it by a preponderance, comports with the common law rule for legal excuses. That is the default rule of common law for a legal excuse.

Of course, Congress, like they did in the lack of mental

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responsibility defense changed the standard of certainty to clear and convincing evidence. I mean, that can be done. And if you look at Rule 916(b), the President when he captured these legal justifications and excuses and collected them all in Rule 916, with three exceptions said that if these are raised at trial, the government will bear the burden of disproving them beyond a reasonable doubt.

So, who the burden is on and what the standard for proof of consent, I think we can discuss, and negotiate, and come to a satisfactory conclusion. But I think the idea that consent to the sexual act itself excuses, you know, some of the conduct that we're seeing charged.

MR. TAYLOR: Thank you both very much. Professor, I'd like to come back to you, please, and ask you to share your views on the new California statute recognizing that it's not the same to say a definition for purposes of student disciplinary proceedings is the same or should be the same as a statute that imposes criminal liability, but what are your thoughts about that? Would that be a fair thing to do, or how do you feel about it?

PROF. VANLANDINGHAM: Actually, Mr. Taylor, thank you very much for the question. I think they should be the same, because of the law's deterrent value. One of the reasons we're criminalizing the conduct is to educate people on what we, as society, collectively deem as wrong.

If you go to the Air Force's Sexual Assault and Prevention Training website and you go down through Frequently Asked Questions, they use the

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statutory definitions for the purposes of training and educating our Air Force, and the other services do something similar, so they are one and the same. That's the basis of what we're training. And with the definition of consent as is, in particular, as Professor Schuhofer more eloquently pointed out than I did, is internally inconsistent. There isn't a clear message being sent.

You ask can our extremely competent judge advocates with the help from experts such as Ms. Scalzo, can they get the job done? Sure, but holding folks accountable is only one component of the law.

MR. TAYLOR: Thank you. I'm through, Madam Chair.

CHAIR HOLTZMAN: Thank you. Admiral Tracey.

VADM TRACEY: Thank you. I'm not a lawyer, so forgive me if I have to calibrate my thinking a little bit about how some processes actually work inside the professions. So, if I could ask Professor Hansen --

PROF. HANSEN: Yes, ma'am.

VADM TRACEY: Could you give me a little bit of a sense of extent of your actual experience with Article 120 cases while you were on active duty? I think you said that you left active duty before the current changes, so it would have been with the older statute.

PROF. HANSEN: That's correct. So, my experience primarily was as a prosecutor and as a senior prosecutor where I prosecuted and supervised the prosecution of a number of rapes under that statute, both I guess what you could refer

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to as stranger rapes, as well as acquaintance rapes, rape situations under that statute.

And I think as Mr. O'Brien has alluded to, and also Mr. White, over time from the inception of Article -- excuse me, from the inception of the UCMJ and the Manual for Courts-Martial, definitions around many of the terms have developed through case law. So, certainly, the statute itself was rather stark in its elements, but the case law that had developed around it was our primary reference for how to prosecute, how to understand consent, how to understand force, and all the other aspects of the old statute.

VADM TRACEY: Have you had a chance to evaluate whether the implementation has been proper or not, as Mr. O'Brien has suggested it's not helpful?

PROF. HANSEN: So, I guess my thoughts on that, I should have said that since leaving active duty I've coauthored a treatise, a legal treatise of military crimes and defenses with a number of other military experts, David Schlueter, Charlie Rose, and Christopher Behan. And we have, basically, yearly done updates to changes to the statute. And luckily, me, I got Article 120 as the statute that I've been tracking over time, and as I think I noted in my written materials that there's no statute in the code that has undergone such significant modifications.

I tend to agree with Mr. O'Brien with respect to a couple of points, that regardless of how you write the statute, there's no way that you're going to completely remove the focus from the victim, as well as the defendant in these crimes. That's certainly a conclusion that when I teach rape to my criminal law students, one of

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the conclusions that they generally come to, and this is reviewing statutes outside of the military, as well. But, generally speaking, I think that the 2012 version of the statute is certainly better than 2007. I think it's certainly better than the old statute.

I would agree that there needs to be more clarification, that it could best be accomplished by Executive Order. But I think I am also of the view that, I believe, Mr. Sullivan expressed in the hearings on August 7th, that generally speaking, it's probably time to let the statute work its way through, and let the appellate courts work their way through the statute, generally.

I would not be in favor -- I don't see a need, nor would I be in favor of drastic changes or amendments. I think clarifications through Presidential action, through Executive Order might be useful, but I don't see a need for drastic changes.

VADM TRACEY: All right, thank you. Ms. Scalzo, what is the requirement for trial counsels to consult with your office? Is there a process that --

MS. SCALZO: They're not mandated to do it, but we remain available to assist on any case they need assistance with. We monitor their cases, we sometimes inject ourselves if we think they need a little more help.

VADM TRACEY: So, you have an opportunity to oversee virtually 100 percent of cases on this?

MS. SCALZO: Yes.

VADM TRACEY: Okay, thank you. And Professor

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VanLandingham, you talked about the deterrent value of the law. Do you have methods by which you evaluate the effectiveness of the deterrent value?

PROF. VANLANDINGHAM: I think that's one of the most difficult questions. There is, and there was a terrific article, that I believe was part of the read-ahead, the information that this panel is considering, overlooking the difficulty of quantifying and measuring the exact effect of the law on individuals, on individual's behavior. But I do think just pointing to the fact that these definitions are on the websites.

They are what our trainers are using to train our folks on the ground, that in itself, that message is educational. And that can't be quickly and easily explained, I agree with Ms. Scalzo that freely given permission between two competent adults, that sounds great.

And if that's really what our statute said, you know, or something very similar to the California definition, that would be fine, but the problem is our statute doesn't stop there. The current statute goes on to provide several other sentences which modify, and I think muddy, as Professor Schuhofer said, provide for a very inconsistent message that it's so vague.

So, do I know how to measure or quantify it? No, except for the various surveys that the Department already uses to capture what do people think is actually the illegal behavior that they should be avoiding, and actually asking them – - instead of asking them, instead of have you experienced this and giving the current

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definition say, what do you think? Have we asked our service members what do you think should be appropriate behavior?

VADM TRACEY: Okay, thank you. That's all.

CHAIR HOLTZMAN: Mr. Stone.

MR. STONE: Thank you. I guess I'd like to start with Mr. O'Brien. I also was struck by your comment about some examples that you were referring obliquely to of innocent soldiers, and I didn't quite even understand your answer that you gave a few minutes ago. I couldn't tell whether you were saying that that was sarcasm when the officer got his instructions, or whether that was supposed to be -- I'm not sure what -- maybe you can tell me what was exactly the point, that that's the wrong training? I'm not sure I understood your example.

MR. O'BRIEN: Well, in the example, again, I didn't mean to say that this was reported to me. I took it that it was sarcasm on behalf of the recruiter at the MEP station. And, you know, was simply making the point that, you know, for young soldiers that are going out and, if they engage in sexual activity, it's risky. And I think that's the point of that anecdote.

MR. STONE: Well, no one is being convicted, you're not suggesting anybody is being wrongly convicted there, are you?

MR. O'BRIEN: No, sir. I am not -- I have no examples of wrongful convictions.

MR. STONE: Okay.

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MR. O'BRIEN: My point is that people are being put at risk. We have soldiers -- again, I saw many, many sexual assault cases in five years on the trial bench that when I was a Captain would have never gone to trial, where the, in my opinion, the hope of conviction was somewhere around zero. And that's what I refer to when I say innocent soldiers are being put at risk.

I'm a big believer in the Military Justice system. I'm a big believer in military panels. In my experience, they do the right thing, and those cases, I believe, turned out the correct way. So, no, no, I'm not saying anybody has been wrongly convicted. I'm simply saying that being put at risk -- having been a defense counsel, simply going through this process is excruciating. I mean, so even if you're convicted at the end, I mean, you are paying a price, to some extent.

MR. STONE: So, I guess what you're suggesting is you'd like to see some better or more detailed factual prosecutorial guidelines as to which cases should go forward and which shouldn't. Examples, is that what you're suggesting?

MR. O'BRIEN: Well, that certainly would be helpful, but what I was suggesting was a clarification of the application of consent as to the charged sexual act, and what effect that has on the member's decision.

You know, right now if you look at Article 120(a)(1), it talks about unlawful force. It defines -- the statute defines the word unlawful as without legal justification or excuse, but it modifies the word force. So, if you agree that consent is a legal excuse, unlawful force means consent to the act of force. It doesn't address the

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act, you know, the charged sexual act. And we're left wondering what is the application of consent to the charged sexual act.

In Article 120(a)(5) you have the same situation where the act of -- where the sexual act is done by administration of a drug without the knowledge or permission of the victim. Again, we're focused on consent to the administration of the drug. We're left with no guidance about consent to the sexual act itself.

Now, in ordinary circumstances the consent will encompass both, but there can be, and there have been circumstances where there is consent to one and there is not consent to the other. And those are some of the thought experiments I included in the paper that I submitted.

MR. STONE: Yes, I read it, and my reaction to that, as well as your comment, is that while I think it's a good comment, I think this comment and this discussion is way over the head of that new individual who's coming in and getting his first orders. So, that's why I was suggesting that what I thought the practical implications of what you were saying is, you'd like to see some factual examples for prosecutors in the military, so they'd know if this and this happens, that's not a case that, ordinarily, should go forward without supervisory approval.

If this and this happens -- in other words, laying out -- I think you're talking about outlier cases, generally, which can be a problem. And I think that is the purpose of having examples. And I might add, the U.S. Attorney's manual, which federal prosecutors use, and has gotten to the point where it's so long it's electronic.

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Once upon a time it was on paper, but I don't think anybody has a shelf long enough to hold it any more, had hyperlinks to examples for the prosecutors, because even the prosecutors regularly doing this have trouble, because they're not all law professors, appraising some of these fine definitions to particular cases. And the most helpful thing that I know, that I used to get positive comments on every day when I worked at the Department of Justice, was that when prosecutors called me and I'd say well, take a look at this section and look at the hyperlink.

Go to the factual situations. There's five scenarios there, and then after you've read them we'll talk about it. And many times they would call me back and say we don't have to talk. I read those scenarios. I see which one is closest to my case. I understand it now.

So, I actually think that, and maybe I'm wrong, tell me if I'm wrong, I think what you're looking for is guidelines on what are --- in sentencing guidelines they call it the heartland cases, what is meant to be covered, and some of the circumstances that are unusual and difficult, but that typically would warrant an exercise of prosecutorial discretion not to go forward. Am I getting close to what you're suggesting? Will it cover your concerns, or not?

MR. O'BRIEN: Well, sir, not completely, but I agree that that kind of guidance would be invaluable. It would be a big step in the right direction, particularly if it gave guidance on the outlier situations.

What I'm recommending is simply recognizing consent to the

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sexual act as a legal excuse, and then that would clarify it, and it would apply, it would clarify it for both the outlier cases, for the garden variety cases. But absent that, I think your practice of providing guidance to individual prosecutors on what should and should not be prosecuted would be very valuable.

MR. STONE: Is there any reason that consent to the sexual act as a legal excuse couldn't be part of the guidelines? Do you think the statute precludes it?

MR. O'BRIEN: No, sir, there's no excuse that couldn't be. And I believe --

MR. STONE: Okay.

MR. O'BRIEN: -- prosecutors would use it.

MR. STONE: So, that clarification to satisfy some of your concerns could be done in implementing guidelines.

MR. O'BRIEN: I believe so. Yes, sir.

MR. STONE: Maybe I'll ask Mr. White if he agrees with that, that we don't necessarily need anything more than some clarification in the places where the statute appears to be difficult.

MR. WHITE: Yes, sir. The point of my -- the part I submitted, this could be taken care of in the Manual for Courts-Martial which then when that product is produced, of course, the President does outrank the Military Judge's Benchbook Committee, so the Benchbook Committee would then implement that, just as they've done in the past, we've had clarifying guidance within the instructions, and that would

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be getting back to the system that we needed.

MR. STONE: Well, let me back up one second again. I was in the military but I wasn't in the JAG Corps when I was in the military, so maybe I don't quite appreciate some of those nuances.

But if there was a manual for prosecutors which told them which kinds of cases to go ahead, and which kinds of cases that they would need supervisory approval before they would go ahead, and because they're more difficult, maybe from a Central Office official, then I guess I don't understand why that necessarily even involves the Judge's Benchbook, or needs to await the difficulties of getting the President to focus on this and sign off, either on those orders, or in some kind of an Executive Order. If the prosecutors don't bring those cases that are difficult, won't that satisfy your objections?

MR. WHITE: Well, technically, this goes to a different part of my career in the Administrative Law Division at the Judge Advocate General's office. Given the hierarchy that we have, if you had a secretarial publication that was at -- a Navy regulation, Army regulation, Air Force regulation, that would trump the Benchbook automatically, it wouldn't go further. So, in theory you could do it this way when the Service Secretary's say so. But the Benchbook is DA pamphlet which ranks below regulations in terms of how it -- what power it has.

The Benchbook is also a guidance product. Judges are not required to follow the Benchbook, and many of our judges aren't following the

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Benchbook because they don't believe the Benchbook correctly states the law. So, yes, if you could do it with a Secretarial product and with the guidance, as you say, prosecutors don't bring these cases, or do bring these cases.

MR. STONE: Do you feel the same way, Mr. O'Brien?

MR. O'BRIEN: Yes, sir. And I think Mr. White's point is to, you know, what authority would this book of guidelines have, whether it's an Army regulation, or a DA panel, or whatever. But whatever it is, and whatever binding authority it has, to the extent that it prevents soldiers from being put at risk if followed, then yes, absolutely that addresses my concerns.

MR. STONE: I guess the reason I'm asking the question is, based on Ms. Scalzo's response, that prosecutors in the military can go forward without necessarily contacting her. It seems to me that they have some discretion right now. I see no reason why there can't be guidance letting them know from a higher level that there will be certain circumstances that they shouldn't go forward.

Ms. Scalzo, maybe you could tell me if I'm wrong in thinking that that kind of guidance could be put out without having to run it all the way up the chain to the President.

MS. SCALZO: Actually, sir, I believe that we're conflating two different issues. With all due respect to my esteemed colleagues, Mr. O'Brien spoke of the hope of conviction being low means that innocent soldiers are at risk. I believe what we're talking about are charging standards. Should we charging to a probable

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cause standard, or charging when we believe we can prove it beyond a reasonable doubt?

This has nothing to do with the adequacies of the statute. This has to do with we're prosecuting really difficult cases. Most of our cases have very little corroboration, other than the victim's word itself. The difference between probable cause and reasonable doubt is whether or not you believe the victim unless, of course, there's other evidence that exists. It's an entirely different issue.

PROF. HANSEN: If I may, this is Professor Hansen. I think one other issue that has to be considered here is that, ultimately, it's not the prosecutor who decides to bring the case. It is the Convening Authority, the Commander who decides what cases to bring.

And I think that some of the things that Mr. O'Brien makes reference to are not necessarily issues with the statute, so much as they are issues surrounding the current pressures that Convening Authorities and others feel that they are under when they have to respond to these cases.

And perhaps feel, given the amount of attention that's being placed on this issue, that they're bringing cases. or referring cases to trial that perhaps five or ten years ago they would not have done. And I don't know that there's a statutory change that's going to address that issue.

And I'm not here to comment on whether it's right or wrong, if this increased pressure is right or wrong, but I think it's a reality that's somewhat

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independent of the statutory changes.

MR. STONE: Well, I guess my reaction to that is you're confirming what I just thought, which is if these Convening Authorities are feeling pressure, maybe some of that pressure which we -- which they're feeling would be alleviated if that written guidance, that policy guidance helped them out, too, in terms of outlier cases.

PROF. HANSEN: Sure.

MR. STONE: I don't think Mr. O'Brien was just talking about the difference between whether there's probable cause or likely to be proof beyond a reasonable doubt, but maybe he'll tell me if I'm right. I thought he was talking about particular factual circumstances that didn't seem to warrant, rather than looking at the veracity of a single witness for the prosecution case.

MR. O'BRIEN: Well, I kind of strayed into two different areas. One is the prosecutorial discretion issue that we're talking about, and that is how strong does the case have to be before it goes to trial?

But my other point, which I made in the paper is, and would require some sort of fix, either by Congress, or by the President, or the Army Trial Judiciary is if the case goes to trial, there are outliers and circumstances where a victim could consent to the sexual act, but not consent to the act of force, or the act of administration of a drug, and the accused could still be convicted of rape.

Mr. White makes that point, and the problem is in the Trial Judiciary's implementation. They think they fixed that problem with the instruction

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that follows what they call no hate, but if you read the explanatory part of no hate, it identifies the problem, it may create a causation between the sexual act and the act of force through the word by in the statute.

But when you read the actual instruction that follows the warning to the judge, it does not mention, you know, that consent to the sexual act breaks this causal link between the sexual act and the act of force, and similarly in (a)(5) between the sexual act and the act of administration of the drug or intoxicant.

MR. STONE: I guess that sounds a little bit to me, tell me if you agree, like felony murder. Guy goes in to rob a bank and on the way out the bank guard shoots one of his -- one of those robbers. Those robbers are all going to be charged with felony murder, even though all they did was plan to rob the bank.

And there are consequences to committing a crime that may not be the most straightforward, but they are there. Is that basically what you're complaining about with the word by?

MR. O'BRIEN: Well, no, sir. Essentially, my complaint is if you have an adult in private consenting to a sexual act, and on the way to get there the partner commits a battery of some sort, without --

CHAIR HOLTZMAN: Commits a what?

MR. O'BRIEN: A battery.

CHAIR HOLTZMAN: A battery.

MR. O'BRIEN: And offensive touching of some sort, without the

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knowledge or permission of the partner. The harm to the partner, in my mind is the battery, but the way the statute has been written and is being implemented by the Army Trial Judges, that could result in a finding of guilty to rape.

MR. STONE: But that also could be handled by those cases not being prosecuted. Correct?

MR. O'BRIEN: Oh, absolutely. Yes, sir.

MR. STONE: Okay. That was what I was trying to get at. And I guess, correct me if I'm wrong, but I think what you're just saying is that as to the fact that there's a Convening Authority, just means that the guidelines have to encompass the Convening Authority, or the Judge Advocate who advises the Convening Authority, because I gather that most of them have their own counsel who advises them, because they Convening Authorities are not lawyers, as well as the line prosecutor who's preparing a case, and sees that he's got factual situations that are ones that the military doesn't expressly intend to cover.

It seems to me as we get a more complicated society and as both various drugs, legal and prescribed, and situations evolve, you always have circumstances arise that you couldn't account for in a statute. And since we have some prosecutorial discretion, I guess I don't understand why there isn't, or couldn't be some -- an ongoing committee that meets once a year to add circumstances that seem to have come up that didn't warrant going forward, and might be added to a guidance manual. Is there some reason that we can't --

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PROF. HANSEN: I guess my thought on that is, I think that the guidance manual might be useful.

CHAIR HOLTZMAN: Excuse me, Mr. Hansen. Mr. Hansen, excuse me.

PROF. HANSEN: I guess the question I would have is, you know, where would that committee be drawing the hypotheticals from --

CHAIR HOLTZMAN: Mr. Hansen, sir. Excuse me. I'm just going to for the moment -- other people -- I haven't had a chance to ask any questions, and there may be other panel members who want to, and our time is almost expired, so would you just hold your response for a second. And if you want to come back to this point, I appreciate that, but I think I'd like to move forward for a moment, because 10:00 is our expiration.

First of all, I'm concerned about the example that you used and the use of the word pressure, and the concern about the number of times the statute has been changed. The example, sir, I'm referring to you, Mr. O'Brien.

The social changes with regard to the status of women in this society have provoked enormous backlash, and enormous outcry, and enormous outrage, and enormous protest. And that problem hasn't been solved. We haven't yet, as a society, accepted the standard of adult mutual consent.

The issue with the NFL today is not rape, but the issue with the NFL today shows the fact that it's taken a long time to catch up. In fact, the use of the

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word pressure, I was just thinking about this conversation here. Pressure to deal with new standards or new acceptance of the autonomy and dignity of women, you can look at that as pressure as a pejorative term, but you can also say that this is wait a minute, people are catching up to the reality.

So, I just think we need to be cognizant of the fact that there will be objection, backlash as there has been, and the reaction of the drill sergeant that you mentioned suggests problems of education, as opposed to problems of the imposition of proper standards.

I don't take that example as showing anything that the military is doing is wrong, except in terms of educating the drill sergeant with regard to advancements and our understanding of that personal autonomy and dignity.

I also want to ask a question about the point of consent to force as opposed to — I mean, consent to the sexual act as opposed to consent to force. I see an incoherence in this statute, and maybe it's just me, and maybe somebody here could explain it. But the standard for rape is using unlawful force.

And, Mr. O'Brien, you talked about the importance of consent, which is obviously a factor, but a person — if you go down to the definition of consent, the statute says a person cannot consent to force that's causing or likely to cause death or grievous bodily harm, or being rendered unconscious. So, on the one hand, and we have the standard of unlawful force, which as you properly point out includes justifiable force. On the other hand, is an absolute prohibition against consent to force

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of this kind under any circumstances.

MR. O'BRIEN: Yes, ma'am. I mean, what you said is --

CHAIR HOLTZMAN: That's an incoherence in the statute.

MR. O'BRIEN: No, ma'am, I don't think it's an incoherence in the statute, but your observation is absolutely correct, and if you read the next two subsections you see certain circumstances where the victim cannot consent.

CHAIR HOLTZMAN: I know. I'm not going there. I'm just going to the force, so I don't understand how there could be justifiable force under any circumstances. I mean, you could have justifiable force if you're threatening grievous bodily harm, but there cannot be consent to it.

MR. O'BRIEN: Under our Assault Statute, Article 128, you can consent to a simple assault and simple battery. You cannot consent to --

CHAIR HOLTZMAN: I'm --

MR. O'BRIEN: I'll get there. I'm sorry, ma'am. You can't consent to an aggravated assault. The language that you've read there about not being able to consent, that's our definition of aggravated assault, grievous bodily harm, et cetera, et cetera.

CHAIR HOLTZMAN: Okay.

MR. O'BRIEN: So, our case law has long been no one can consent to an aggravated assault.

CHAIR HOLTZMAN: Okay. So, then how can you have justifiable

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--

MR. O'BRIEN: Because --

CHAIR HOLTZMAN: -- use of force under those circumstances?

MR. O'BRIEN: Under those circumstances you cannot. Under those circumstances there is no justifiable force unless -- well, there's justifiable homicide but there wouldn't be justifiable sexual act. Our point is that when you're not dealing with grievous bodily harm, et cetera, et cetera, that you're dealing with the force sufficient to accomplish a sexual act, that that force has to be unlawful force. It has to be without justification or excuse as defined in the statute.

CHAIR HOLTZMAN: Well, okay. I'm not sure I agree with that point, but I take it. Going back to certain other points that were made earlier. Ms. Scalzo, you talked about there were basically no problems in prosecuting cases. I don't want to -- or charging cases.

MS. SCALZO: Charging, very different.

CHAIR HOLTZMAN: Sorry, except for a stethoscope case.

MS. SCALZO: Yes.

CHAIR HOLTZMAN: What problem in charging has that created, and can that problem be handled by an Executive Order?

MS. SCALZO: The problem was that the definition of sexual contact does not include objects, unlike acts, and because a stethoscope is an object --

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CHAIR HOLTZMAN: Yes. Right.

MS. SCALZO: -- then the crime was non-consensual. It's my understanding that the JSC is going to look at that. It's a gap in the statute.

CHAIR HOLTZMAN: Can that be solved by an Executive Order?

MS. SCALZO: No.

CHAIR HOLTZMAN: The statute has to be amended --

MS. SCALZO: I believe so.

CHAIR HOLTZMAN: -- to deal with objects.

MS. SCALZO: Yes, ma'am.

CHAIR HOLTZMAN: Anybody have any other comment on that point? Okay.

Professor VanLandingham --

MR. STONE: Before we leave that, won't sexual -- the prosecution not for rape but for aggravated sexual contact cover that? It specifically says by any object.

MS. SCALZO: The definition of contact, or sexual --

MR. STONE: The definition of sexual act says the penetration of any --

MS. SCALZO: She wasn't penetrated.

MR. STONE: I'm sorry. Sexual contact means -- I just saw that here. I thought it was by any object. Here it is. Penetration, however slight of the vulva,

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anus, or mouth of another by any part of the body or by any object, with intent to abuse.

MS. SCALZO: Yes, sir.

MEMBER SCHULTZ: That's in the definition of sexual act. Right?

MS. SCALZO: Penetration is the sexual act. Contact is just touching, it's not penetration.

MR. STONE: I see.

MS. SCALZO: Sexual contact means touching or causing another person to touch, either directly or through the clothing the genitalia, anus, breast, inner thigh or thighs of any person with the intent to humiliate, abuse, or degrade. And then they go on, any touching or causing another person to touch either directly or through the clothing any body part of the person with an intent to gratify sexual desire.

MR. STONE: What you're saying is they left the word any object out of some of those other definitions?

MS. SCALZO: Right. Touching may be accomplished by any part of the body, period.

MR. STONE: Okay. I'm sorry.

CHAIR HOLTZMAN: Thank you. No, no. Thank you for the clarification, so that's with regard to that. Okay. Professor VanLandingham, you say that consent needs to be changed in the statute. How would you change it?

PROF. VANLANDINGHAM: I haven't crafted a definition yet. I do

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think looking at best practices and looking at California, I think moving from the –  
- taking out the no model that's infused into this, and make it more of a purely yes  
model, such as California, and such as New Jersey would be beneficial.

CHAIR HOLTZMAN: Have those statutes worked in practice? Of course, California is — I don't know that — it's not a criminal statute, but how has the New Jersey statute worked in practice, and how is California's new rule with regard to universities been operating in practice?

PROF. VANLANDINGHAM: Your Honor, I do not know. I do not know for California since it's so new for the university level, and there hasn't been any quantifiable data yet gathered. New Jersey has been -- and there's quite a bit of literature on how New Jersey is working.

CHAIR HOLTZMAN: I'm sorry, I'm not familiar with it. Could you summarize it?

PROF. VANLANDINGHAM: I think it makes it easier for the prosecution. It requires — it's much more difficult to find the reasonable mistake, to make a reasonable mistake of fact defense for consent. But I think that's very similar to what the California — actually, the California is not through this new definition of consent.

It's actually almost a way for finding reasonableness, and California does it through something called the Mayberry instruction, in which a reasonable, a mistake of fact as to consent can only be raised if there's evidence of

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equivocal conduct, that is, the instruction itself, which the California Supreme Court has given its imprimatur, essentially defines reasonableness as that there has to be equivocal conduct.

In essence, in practice, how it works is that a defendant cannot argue both consent, she consented to it, and oh, I was mistaken. I had a reasonable good faith belief that she was consenting. You essentially have to pick one or the other. And in California that seems to have streamlined and focused the jury on that, on the exhibition of consent.

CHAIR HOLTZMAN: Since the SWAN group is recommending that we go to the military adopt that standard, I'd like to ask the other witnesses at the table what difference it would make to adopt that standard with regard to the military, Code of Military Justice? Mr. White?

MR. WHITE: It would change some of the ways we do business in the defense community. And I think I would, from a TDS point of view, I would attack it on due process grounds to see if we could win there, since it does limit the ability of an accused to present the defense that he wants to present.

On the other hand, it's also clear as a matter of statute. If you take it out of the statute, I think the Supreme Court's pretty much in line with the limitations of defenses by statute, not necessarily by other means, as long as it doesn't go so far as to create a fundamentally unfair trial. So, it would change the way we do business, sure.

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CHAIR HOLTZMAN: For the good or the bad?

MR. WHITE: From my point of view, for the bad.

CHAIR HOLTZMAN: Mr. O'Brien.

MR. O'BRIEN: I'm not really familiar with the standard, but I agree with Mr. White. It would change the way we do things, and in my opinion, not for the better.

CHAIR HOLTZMAN: Ms. Scalzo?

MS. SCALZO: Ma'am, can you clarify? Are you asking if we moved to an affirmative consent statute, or if we limited the defense to only consent, or mistake of fact as to consent?

CHAIR HOLTZMAN: No, if we were to move to an affirmative consent statute.

MS. SCALZO: It would, perhaps, in theory make it easier to prosecute. I suspect it would criminalize a lot more behavior. However, I'm not sure that we would necessarily get more convictions. We live in a world where people have a lot of beliefs, and myths, and stereotypes, and it's difficult to get convictions now where there is a manifestation of non-consent.

To move to that standard would theoretically criminalize more, but I don't think that we'd see more offenders going to jail.

CHAIR HOLTZMAN: And what about the second part? I mean, if we did look at it in terms of limiting defenses?

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MS. SCALZO: Again, I think that because we live in a society where people expect that those defenses are fair and that they should exist, that limiting them won't necessarily get us more convictions. The jury has those ideas in their mind.

They embrace certain ideas of what they think is fair or not fair regardless of the fact that they're trying to follow the judge's instructions, they can still default to reasonable doubt. So, we always train our prosecutors regardless of the legality of the defense, you need to rebut it on the facts.

PROF. HANSEN: I agree with that last set of comments. I think that's exactly what would happen.

CHAIR HOLTZMAN: Thank you very much, Professor, for that. Any of the other panel members have any other questions they'd like to ask?

VADM TRACEY: Maybe not a question, but a comment. A couple of points that have come up here that suggest that our assessment does need to look at how the statute is playing out in the line community, this MEPCOM comment. I ran the group training. I ran the MEPs. Those comments were happening in the 1990s.

That's an NCO's perspective of being unfairly burdened with – in that era, unfairly burdened with a mixed gender training environment. That's — it might be important to understand how the assessment process would indicate how effective the training is that people are receiving, their interpretations.

The people who actually live life and commit crimes are

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supposed to be, how they're interpreting what their behavior -- acceptable behavior standards, although that might be an important part of our number one task, to assess the effectiveness here. It's not just about how the trial counsel is successful or not, it's whether we're actually affecting the behavior or the expectations of people who actually are the defendants, and the victims.

CHAIR HOLTZMAN: Thank you. Anything more?

MR. STONE: Just one quick comment, and I don't know if the panel members will want to respond. I'm struck with the idea about this affirmative consent statute, that it doesn't change the nature of what these trials are going to look like. For the most part, they're still going to be a he said-she said affair between two witnesses, without much corroboration, except now maybe the person who's charged is going to say well, I didn't take out a piece of paper to show the consent, but when I suggested that she come back to my apartment so that we could more intimate, and she knew what I was talking about, she smiled and nodded her head.

So, that's just going to replace whether there was consent or not. So, I guess I don't really understand, unless one of these statutes is going to require a piece of paper that you sign that's consent, how it's going to change, significantly change the fact that you've got two witnesses on the stand, and that's all you've got, and the jury's got to believe one or the other.

PROF. VANLANDINGHAM: Well, part of the way California deals with that is that the jury will not be instructed that the defendant could have that

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reasonable mistake as to whether that action was actually consent, unless there's unequivocal evidence, excuse me, unless the evidence is equivocal.

Therefore, if the victim's story, the victim's testimony is that he never even asked her. He just broke in her room and raped her, there is no equivocal conduct for which a mistake of fact defense instruction will be given.

It is just purely she consented, and two completely starkly different theories of the case, which then the jury is supposed to consider was it consent or not consent, versus whether he had a reasonable mistake. Whether they will bypass that, and that's what I was struggling with with Chairwoman Holtzman's question, the empirical evidence on whether -- I mean, that actually -- what's going on in the jury's mind because of these various instructions, because of these various definitions, there isn't any empirical evidence, or any empirical evidence of whether there's been less prosecutions because of it, or greater convictions.

We just have, of course, the appellate opinions in which the convictions were either thrown out or upheld. And it seems like there are more convictions, at least in California, being upheld for sexual assault because of the, in essence, a way of defining reasonableness via the use of these instructions.

CHAIR HOLTZMAN: Thank you very much to all the members of the panel, and to Professor Hansen for being with us on the phone.

PROF. HANSEN: Thank you.

CHAIR HOLTZMAN: Thank you for enlightening us, trying to

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enlighten us. Thanks. Okay, we're ready for our next panelists?

(Off microphone comment)

CHAIR HOLTZMAN: Excuse me. We'd like to begin. Excuse me, please, in the back of the room. We'd like to begin. Excuse me, we'd like to begin. Thank you.

Thank you very much, ladies and gentlemen. Our next panel includes eight people, and that's a lot to take in one swallow, so we're going to do it – - we're going to break it up. It focuses on the prosecution and defense of Article 120.

We will begin the first half to hear from prosecutors, and then we will hear from the defense counsel. We will begin with Lieutenant Colonel Alex Pickands, U.S. Army Trial Counsel Assistance Program.

LTC PICKANDS: Good morning, ladies and gentlemen. I'm Alex Pickands. I'm the Chief of the Special Victim Prosecutors for the Army and the Trial Counsel Assistance Programs. In the former capacity, I supervise 23 trial teams across the world who collectively are responsible for developing and litigating the Army cases involving sexual assault, domestic violence, child abuse and exploitation.

In the latter capacity, I'm responsible for developing and delivering continuing legal education and training to prosecutors worldwide. It provides me a good perch from which I can see information coming from the field about how cases are being prosecuted, and also to push the information down from our government appellate division, which I share office space with and the use also at

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Fort Belvoir.

I want to preface my remarks by saying I understand I've been called here to answer questions about what my experience has been with the three statutes, so my views are my views. They're not the views of the Judge Advocate General, the U.S. Army, or the Department of Defense.

I want to briefly introduce myself. I understand we turned in bios. I've served in every prosecutorial position that we have between unit trial counsel and my current one, my last position in which I was a trial attorney was as the Special Victim Prosecutor for Fort Hood and Fort Sam Houston.

I've prosecuted most military offenses in the code from malingering to war crimes and murder; although, the area of most of my experience is in sexual violence, and domestic violence.

In terms of how effective the current statute is, I do have to echo somewhat some of my predecessors in saying that looking at the statutory changes in 2012 now in 2014, we have a very small window to look at, between the offenses occurring after the statutory change, they're being charged, disposed of, some of them brought to trial, and then sent into the appellate process. That process hasn't generated a lot of cases, so my comments are directed mostly at what we've seen in trial practice, not afterward.

The two areas of any difficulty that I have seen so far remain consistent with the previous statute, which are generally reaching alcohol-facilitated

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sexual assault and addressing abuses of military authority. And I understand both of those topics are of interest to the panel.

The present version of Article 120 seemed to bring into Article 120 the possibility of the abuse of military authority to accomplish a sexual assault simply by removing part of the definition of threat or fear in sexual assault. And by doing so, I understand that the intent was to encompass a lesser degree of harm, which is to say harm that's not necessarily related to physical, violence, or power. Now, by implication that could be a threat, or placing a person in fear of some form of career or economic harm.

I've have polled my SVPs and seen that we've charged very few cases under that theory. In fact, only three come to mind, only one that I know of has been brought to trial. It's actually in trial this week. I don't think it's an effective way to get at abuse of military authority because it depends on a threat or fear of some form of wrongful action. And most of the use of military authority to coerce sex is either implicit or the explicit threat relates to something within the scope of the person's duties, and that would be difficult to characterize as lawfully wrongful other than the purpose for which that threat is made.

So, for example, if I were the senior ranking person or the person with authority, and I spotted a deficiency, and I told the soldier I am within my rights to report this deficiency to be punished. You're about to before the Promotion Board. It could have a terrible effect on your career. I don't have to report your deficiencies, shall

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we say. That arguably doesn't threaten a wrongful act under the terms of the statute because the action of reporting that misconduct is within the discretion of that person with authority. So, practically speaking, getting at military authority offenses in the way that the present statute attempts to is just not practical. And it's probably a fair explanation for why there have only been three or four cases contemplated under theory. Otherwise, the conduct is addressed through other criminal theories, to violating orders, fraternization, conduct unbecoming, maltreatment, and so forth, but not as a sexual assault crime.

I do want to repeat or emphasize some of Teresa Scalzo's comments in saying that our practitioners could use a definition of two terms in the alcohol-facilitated sexual assault portion of Article 120, the first being incapable of consenting. The second being impairment. Incapable of consenting right now there's a change in the language from the previous statute of substantially incapacitated. We did have a definition for what that meant. We don't have one presently.

If you look at most state statutes, they do pretty -- set a very high bar, so it's generally getting at people who are rendered physically helpless or unable to understand or perceive what's happening to them, much less form and communicate a decision.

A definition of incapable of consenting and what impairment should be is an opportunity to deliberately set where that bar should be. So, if the harm that's intended to be captured by that is sex with someone who's very intoxicated, you

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could define incapable of consenting in such a way to capture that conduct.

Right now, I believe it captures the same conduct it did in the previous statute, which is essentially somebody who's just shy of falling unconscious, somebody who's just not able to understand what's going on around them, not able to form decisions, not able to express those decisions. That captures a very narrow portion of misconduct. If that isn't the intent, then a definition would simply aid us in our practice, the intent is that that bar be higher, then that should be defined, too. It's just not.

There are some other minor changes I would suggest looking at and considering for Article 120 that I'll briefly go through them and you can leap with questions if interested. And the first is that indecent acts disappeared from the current statute. Not sure why that is. I suspect it was an oversight. Article 120 had indecent acts in it, and it was imported from Article 134, and then it has vanished. So, we can still charge that conduct under Article 134 now, but that means that we have to add elements necessary for use of 134, prejudicial to good order and discipline, or service discrediting which makes an indecent act not an option as a lesser included offense at trial, so we would have to charge that separately. Something that at least I as a trial attorney do not prefer to do. I don't like charging alternative theories.

We could consider moving some currently designated sexual contact defenses to Article 128, making them some form of enhanced form of assault, much like aggravated assault and assault consummated by battery or greater

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expressions of simple assault in Article 128. We could call them something like indecent assault. Those contacts we could look at as ones outside of the hot zone, so not contacts involving the breasts, genitalia, and groin which the very location of those contacts suggests the sexual assault, or danger of those crimes.

The other contact offenses, as long as they were not expressed with an intent that is sexual arousal and gratification, might be better treated as an Article 128 offense.

There has been some discussion of capturing trainee cadre conduct. I can hold my comments about that until your questions, or I can address them now, whichever is your preference.

CHAIR HOLTZMAN: If you can do it briefly now, that would be great.

LTC PICKANDS: Okay. So, for cadre training conduct really the decision is whether to capture that conduct explicitly other than how it's captured now, which it is criminal now. It would just be Article 92 violation, or a maltreatment, or something like that order. But if you want to categorize it as an Article 120 sexual assault, I think what you would have to do is recognize that it's the unique position of dependence and vulnerability of your victim in those circumstances, legally disclaim consent in those, which is to say make it much like a statute that prohibits sex with under-aged minors. Right? So, even expressions of actual consent would not be given legal effect.

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I've seen a proposed statute that it seems very wordy and complicated to me, and I think you could just simply state it as sexual act or contact perpetrated on an initial entry training service member by someone responsible for providing them initial entry training is prohibited.

I think further prohibiting status offenses or offenses involving supervisors, supervisees, those with a vast difference between the rank, I think those should be remaining what they are, which is military discipline offenses, not sexual assault offenses.

Pending your questions, ladies and gentlemen, that's all I had planned to say initially.

CHAIR HOLTZMAN: Thank you so much for your testimony. Our next witness will be -- I can't see the names from here. Lieutenant Colonel Chris Thielemann, U.S. Marine Corps Regional Trial Counsel.

LTCOL THIELEMANN: Good morning, Madam Chair, members of the panel. Thank you for this opportunity to speak here today.

A quick sketch of my experience, all members do have my biography, but I have served in every line, supervisory role in a litigation practice in the United States Marine Corps. I've been a line trial counsel, I've been what was an archaic term of Military Justice Officer, but a supervisory trial counsel, senior trial counsel. I've been a line defense counsel, as well as a senior defense counsel. I've also had the opportunity to be a regional defense counsel for the Pacific Region, as well as in my

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current position as Regional Trial Counsel for the Western Region of the United States Marine Corps, culminating with a tour just recently as a Military Judge in the Western Region.

I share that with you because I think the Marine Corps is a little bit unique in its supervisory structure. I'm not sure how many have heard the term regional trial counsel before, but it's, as I see it, unique to the Marine Corps.

We have four regions within the Marine Corps, the Western region, the Eastern region, Pacific region, as well as a National Capital region.

The Western region being the largest, I have the privilege of serving as a supervisory counsel for approximately 52 prosecutors and paralegals as we assess cases. And in that capacity, my role as regional trial counsel is to work hand-in-hand with the Marine Corps' highly qualified expert. Now, there's a highly qualified expert in the Western region, the Eastern region, as well as the Pacific region. They are presently looking towards the National Capital region, have recently hired one for RT CAP. But with that my exposure to 120 has been incessant since I've become a litigator in the Marine Corps.

I've had the opportunity to go through all three versions of the statute. The one that has been of the most litigation for me, whether it's been as a regional defense counsel, regional trial counsel, Military Judge has been the last two iterations, clearly. I would say the majority of my cases whether I'm defending a Marine or sailor, or prosecuting, or as a judge has been with the last two versions of 120, and

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have been the bulk of my work. I know we have many other crimes that are out there, we have many real crimes in the military, but sex assault has dominated my practice over the past decade or so.

I will leave comment for later if you'd like to learn a little bit about the Regional Trial Counsel Organization. I don't think it's appropriate at this point, but I will echo all the comments that I've heard from the first panel, particularly Mr. O'Brien, as well as Ms. Scalzo as joining in those comments, as well as what I just heard from Lieutenant Colonel Pickands.

When I came into this presentation it was with the general premise of whether or not the statutory text of 120 needs to be amended. I think the statute is workable, and needs only a minor modification. I join in Ms. Scalzo's presentation that modification needs to be made to the definition of impairment, as well as what it means to be incapable of consenting.

Right now as I've seen it in practice from other military judges, this definition oftentimes is pulled from other portions of the UCMJ, which I would think is inappropriate. For example, impairment I've had military judges in my experience pull that from the 111, we start talking about intoxication under driving or drunk on duty. I don't think that fits the understanding of what we're trying to assess as the harm in a 120, as well as assessing activity of the individuals involved.

I would take issue in part with us trying to define capacity as anything dealing with the ability to enter into a contract. I think that is rife with some

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problems. I recognize that the capacity consent should be focused on the ability to process information, but if we leave it at the very bare bones level of is this person able to enter into contract, and the answer is no, that suggests the person is incapable of consenting, is rife with constitutional concerns. We need to essentially look at this process as understanding human behavior, human interaction, and how we operate as human beings sexually. And that takes me back to my concern about how we define consent.

As a practitioner, I find the definition we have for consent appropriate for the panels that we deal with. I think the definition is not confusing. I think that definition focuses on the totality of the circumstances of any given factual pattern, but at its core comes back to common sense, human experience, and that panel member's understanding of the ways of the world.

You can legislate a definition for consent all you want. I think no matter what that may be, the members as they sit back there as the trier of fact often will use, and pardon my language here, a colloquialism, but for the grace of God go I, in deciding whether or not that person should be held accountable for engaging in non-consensual sexual activity.

And, members, I could talk much more, but I was very engaged by the questions that were posed earlier. I want to give that opportunity since we have a very short time period right now.

CHAIR HOLTZMAN: Thank you very much, sir. Our next

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presenter is Lieutenant Commander Ryan Stormer.

LCDR STORMER: Thank you, Madam --

CHAIR HOLTZMAN: The U.S. Navy Trial Counsel Assistance Program.

LCDR STORMER: Thank you, Madam Chair, and members. Thank you for the opportunity to speak this morning.

I know you have my bios, but I'd also like to just give you a brief background so you can tell where I'm coming from. In coming to the Navy, my initial billet was a trial counsel, where I tried cases of wide range, specifically, the majority of those cases being sexual assault under the pre-2007 version, so I prosecuted cases under that particular statute.

Following that, I had the opportunity to work for a line officer directly while as the Assistant Command Judge Advocate for the USS Abraham Lincoln, where I began dealing specifically with military justice and observing military justice cases under Article 120 under the pre-2007, going into the 2007 standard that was out there.

Following that tour, I did have the opportunity to work at the Naval Justice School where I was an instructor in military justice. I had the opportunity to teach military evidence, trial advocacy, and military rules of criminal procedure, so I am also coming to you from somewhat of a background of academia in this conversation.

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And after that tour, I was also the senior defense counsel in Norfolk, Virginia where I prosecuted -- excuse me, where I defended a significant amount of cases dealing with Article 120 being the pre-2012 standard, so I have had experience as a defense counsel with these particular cases.

Currently, I am the Assistant Director at Navy TCAP, and in this position I have the opportunity to talk, I have the opportunity to train trial counsel, and basically observe litigation through all the regions for the United States Navy. And part of our job at Navy TCAP is that we are responsible for monitoring Article 120 cases that Ms. Scalzo talked about earlier, specifically those major cases that are being litigated. So, based on that I feel like I do have an observation of what is actually happening on the ground in the Navy's courtroom.

And the two issues that I would like to just raise to the panel's attention right now, I'm going to save time for comment, is one, dealing with the significant issues that we saw under Article 120 from the 2007 to 2012 version dealing with Constitution issues relating to construction.

I can say we are still seeing motions relating to that, but so far we have not seen that I am aware of any major motions that attack, or that are deemed a current version of Article 120 unconstitutional. And I'm not aware of any statutory construction of the current Article 120 that is an issue like it was in the 2007 to 2012 version.

So, with that being said, one of the conversations that I have with

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trial counsel when we talk about the current version of the Article 120 is one common theme I think among trial counsel on the ground, is that they, when we're talking about statutes, specifically 120, is that they prefer consistency, they prefer stability, and they prefer continuity with what they're actually prosecuting under Article 120.

And in my personal opinion, is that keeping the continuity, and I think this was echoed earlier in the conversations already by a lot of the panel members, is that keeping the continuity with the current statute understanding that the law can and will change under common law, appellate case law, and those things, that would be the most beneficial to the trial practitioners, whether it be trial counsel, whether it be defense counsel in figuring out what, in fact, is a crime, and when looking at a set of facts, which is something at Navy TCAP that when we train prosecutors, and we talk and we analyze cases, one of the first things we need to do is look at a set of facts and determine all things being equal, is and are the set of facts that we're looking, in fact, a crime. So, continuing with the current case law and continuing to develop that case law in my personal opinion would benefit those prosecutors and those defense counsel who are in the courtroom actually litigating these issues. And giving these practitioners the time and the ability to work with the current law and develop this law, again, will only improve the process and how the Military Justice system handles these cases. Thank you.

CHAIR HOLTZMAN: Thank you very much for your testimony.

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And our last presenter is Major Mark Rosenow, if I was pronouncing that correctly, U.S. Air Force Special Victims Unit, Chief of Policy and Coordination. Welcome.

MAJ ROSENOW: Yes, ma'am. Thank you. Madam Chair and members of the panel, thank you for this opportunity to talk to you. Like everyone else, you have a copy of my biography there. I've been a Judge Advocate since 2008, so I've been continuously prosecuting or defending sexual assault cases since then. My current duty is on the Special Victims Unit, Chief of Policy and Coordination over in Joint Base Andrews. I work for the government trial and appellate counsel —

CHAIR HOLTZMAN: Would you pull the mic closer to you, sir, please?

MAJ ROSENOW: Yes, ma'am. I work for the government. Is that better?

CHAIR HOLTZMAN: Yes, even closer.

MAJ ROSENOW: Thank you. I work for the government trial and appellate counsel division. There's a couple of different things that I do there. The first one is like what Ms. Scalzo was describing to you, I provide initial consultation to staff judge advocates in the Air Force and trial counsel on initial charging decisions. What that ends up meaning is most weeks I have five or six cases come in with a report of investigation, as well as some draft charges that I look at. I square it up against the law, the Benchbook, we have a consistent charging advice that goes out.

Another thing that I do is I provide training. Actually, yesterday I

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was down training special investigations officers, so we do that, as well, down at the Federal Law Enforcement Training Center. And tomorrow I'll fly to Osan Air Base in the Republic of Korea to train junior trial counsel who are coming up at our intermediate sexual assault litigation course.

Besides doing those things, I'm also the liaison between that division that I previously told you about, as well as the Office of Special Investigations in developing strategies, consistent approaches to these types of cases, including child sexual assault cases. And then more than that, what I spend a lot of my time doing, as well, is I'm still a Special Victims Unit senior trial counsel. Right now I have 12 cases to which I'm detailed, and I'm actively prosecuting as the lead attorney. And I'll let you know without speaking to any of the specific facts of the cases that are ongoing, every single iteration of the 120 Article that we've been discussing today is at issue in that. Some cases that I'm dealing with only have those, because we have people come forward at different times, and we have a different climate available for them to come forward in. I have things that cross boundaries that make it kind of difficult, that I had a conversation about it just pre-October 2007, when you're talking about a child's memory, did they fall before or after the 28 June 2012 when you're talking about a young woman's memory, maybe the summer she PCS'd, so I put that to you.

The other thing that I'll mention is any opinions that I offer are my own. I'm not speaking on behalf, certainly, of the Judge Advocate General of the Air Force, I'm not speaking on behalf of the DOD, or the Air Force. The only point I'd like to

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make in this initial part before opening it up again, because I really enjoyed that, like all of my counterparts here, too, is I would appreciate as a trial practitioner a better vector on what exactly impairment is defined as, and incapable of consent.

For the reasons that these gentlemen and everyone before had mentioned, it's nice to have that consistency, it's nice to have an idea of where you're headed. I would just offer, as well, it's important for training purposes. You've got junior counsel who just don't know over the course of preparing their case what the military judge is going to instruct the members is the law. And if we think of that like a technical order, how we're going to determine whether or not this young man or this woman made a mistake, we need to know that earlier in the process. It would be nice for counsel to know going in what the expected instruction will be.

And I'd also offer that it's incredibly important that investigators know that, too, in the first instance. When investigators for NCIS, CID, or OSI are speaking to a victim who's come forward they can ask different types of questions, if it's informed by what the definition will be once they get to trial. As we operate now, we just have a couple of words there, and kind of punching in the dark a little bit on some of those questions. And I believe more detail from your panel here would be helpful for myself, as I approach those types of cases which are very difficult cases to prosecute and win.

CHAIR HOLTZMAN: Thank you very much. We'll go to our questioning. We have actually 20 minutes for the questions before we get our next

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group of defense counsel. So, Mr. Taylor, sir.

MR. TAYLOR: Thank you, Madam. First, thank you all for your testimony. It's been very helpful for me to hear what you've had to say.

Colonel Pickands, you said that at present we're not using the most effective way to get at the problem of this abuse of military authority to facilitate sexual assault. And I thought you gave a very good example of that. So, how would you modify the law to achieve a better outcome?

LTC PICKANDS: That's why I expressed some support for the idea that you could in a very narrow circumstance, the initial entry training service member and their cadre, capture abuse of military authority in that context very easily. I think outside of that area there's just such a range of pressures that can be brought to bear both explicitly and implicitly. I'm not sure there's a way to capture that other than the way that the UCMJ captures it now, which is military discipline offenses. I don't think under this version of Article 120, I certainly don't think it's the most effective means. It's the only means right now of characterizing those coercive effects as a sexual assault. If that's what Congress intends, they're going to need to do it differently, rather than simply chopping off the end of putting somebody in threat or fear, as in the previous statute.

I don't know, you know, I am a prosecutor and I will prosecute whatever criminal offenses are designated criminal by the legislature, but I don't know philosophically whether we want to expand and encompass all implicit power

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differences between people in the military. I think we have to credit our adult service members with autonomy to make decisions, even poor decisions.

I think the only circumstance which rests well with me in terms of criminalizing explicitly is that training cadre situation. Outside of that, the fact that I'm more senior to a person that I'm in a relationship with doesn't make it more likely that I will inflict physical force or violence upon them. I don't know that I would characterize those relationships in any respect as a sexual assault.

MR. TAYLOR: So, I'm sure you're aware, and you probably even participated in the review of the question that was asked of the Defense Department, whether we needed a specific statute to address the trainer cadre's abuse of relationship situation. And DOD, as I recall, came up pretty uniformly saying no, we're fine with the punitive articles that we have that can be prosecuted under Article 92. So, I take it you agree with that.

LTC PICKANDS: I don't, actually, to be frank. I've heard a number of people express resistance to change in the statute. As a practitioner, it is easier for me to practice the statute as case law develops and explains the little gaps, and interprets the law. But if we're seeing conduct that is not criminalized appropriately in the statute that should be, that seems to warrant a change. If we're criminalizing conduct that shouldn't be criminalized, that would seem to warrant a change. And changes should be made whether they make us as trial attorneys uncomfortable. My trial counsel are capable of handling adjustments to the statute. We've had cases this

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year, I've worked on cases where we charged all three present statutory schemes successfully.

They make them more complex, but what we have to decide at the end of the day is if we're capturing the conduct that we're trying to capture, and if we're characterizing it correctly. So, I would say our present UCMJ can capture training cadre misconduct and does, but it characterizes it as a military discipline offense. And I think in that narrow circumstance, it's more appropriately designated as sexually exploitative. It's not a violent assault in many circumstances, or not necessarily a violent assault, but it certainly is exploitative in a way that should be repugnant to common decency and our services.

MR. TAYLOR: Thank you. Colonel Thielemann, I'd like to follow up on something that I thought I understood you to say, and that is that when you're looking for a definition for impairment or incapable of giving consent, now the practice seems to be to pull it from other parts of the UCMJ, and you mentioned Article 111, in particular. Is that a good outcome, is it a bad outcome?

LTCOL THIELEMANN: Sir, it's an outcome I don't agree with, or it's a process I don't agree with. I think you can inform the military judge who is instructing the trier of fact on this, but what I am concerned about when I see it being pulled from 111 is that we're almost looking at it as a strict liability offense, that if we have something that's akin to someone who was driving while intoxicated or under the influence, that we're going to impart that to an individual who's engaged in what may

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have been perceived as consensual sexual activity, but because it's at this definition we find somewhere else, we have to convict him in that regard. So, I find that to be problematic only because when I look at what the definition of consent is right now, there's a reasonableness element to it which you don't necessarily find under 111. And there's also something we have to take a look at, is the totality of the circumstances.

There are so many factual underpinnings to all of these 120 cases that it's very difficult to identify which fact pattern is going to result in an acquittal, and which fact pattern will result in a conviction.

MR. TAYLOR: I don't want to overuse my time, so I'll pass.

CHAIR HOLTZMAN: Thank you. Admiral Tracey.

VADM TRACEY: I think all of the witnesses spoke to the need for clarity on impairment and incapable of consent. Do you have thoughts on what would be the content of those definitions that would be helpful?

LTC PICKANDS: I think a balance has to be struck between what it is, the condition within the victim that you're trying to capture, and your ability to perceive it and express it or charge it, and prove it. So, I agree that it has to go to the process of being able to understand what's happening, to be able to make decisions, express those decisions freely. And I think impairment could easily be defined as something akin to a diminished physical and mental capacity, or capability. The evidence for impairment would then be all those facts that we do get in our cases, you know, slurring of speech, not being responsive to the environment, stumbling, having

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to be carried. But the capacity to consent is a threshold that I think needs to be defined so that it's a -- there's some legal meaning to it rather than it being a medical term, incapacity from a medical term, so it would be more akin to any competence standard.

But I agree with my colleague, if you set that too high you're going to obviously be over-encompassing in the conduct that you're capturing. So, something on the order of somebody who's substantially impaired, or significantly impaired by consumption of alcohol or an intoxicant would address the ability for that condition to be observed by others and proven at trial.

LTCOL THIELEMANN: Ma'am, I concur with Lieutenant Colonel Pickands. I will take us back to the 2007 enactment of 120, when we talked about substantial incapacitation. While I didn't necessarily agree with all the content of that, again, these are my own personal opinions, what I do find informative about that is oftentimes using instructions we provide to the trier of fact, we are permitting the military judge to insert other considerations or factors, so this goes back to Mr. Stone's comments to the earlier panel, that they're for a practitioner to be able to see those types of circumstances that may generate a reference to impairment are very informative, very important. And it doesn't necessarily have to be written into the statute. We give that baseline definition of impairment, but then give that practitioner a foundation or a laundry list of information that they can utilize to help us go forward. I think that creates some stability, if I have the foundation, and then we go back to the basic fairness principle, and remembering that our panel members are human beings

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like every one of us that are going to rely on their common sense, and their own life's experiences. I think with that we get the right result in our courts-martial.

LCDR STORMER: Ma'am, I think for me, what I've seen is that a lot of times what we see in the statute is getting back to what, in fact, is competency. And it was referenced earlier, such as comparing it to say competency to sign a will, competency to sign a contract, competency to do all these other things, so I think a definition or an understanding about what, in fact, does competency mean in the context of whether or not somebody can consent to sex, I think would be very helpful to the trial practitioner. And does competency mean someone who's able to basically process information, be able to analyze a situation, take on those facts and then make a competent decision to kind of understand what, in fact, are the consequences of when I do this particular act, and is that somebody who is competent?

I think kind of figuring out what exactly that means, and what that definition is would help not only the trial counsel in initially analyzing the case and determining whether or not there's actually been a crime committed, but it helps the defense in figuring out what do we have to do to defend this case, and then ultimately helping the trier of fact to understand what is the instruction that we have to rely on, what is the definition of whether or not, in fact, a crime has -- so, I think if we can somehow get it to the point where we understand what, in fact, is meant by competency, and whether that's from a medical standpoint, a legal standpoint, wrapping all that together, I think you're going to see a situation where these cases are

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going to be hopefully a little bit clearer as far as whether or not we should prosecute these cases, and what, in fact, is a crime.

MAJ ROSENOW: And then getting to the actual trials, I'll echo that concern, the medical concern that Lieutenant Commander Stormer just pointed out to you. I defer to the experience we have up there on the panel, but one of the things that comes up in the trials that I'm a part of when we're fighting these kinds of battles, you actually end up getting this thing called the Dubowski Chart, if you're familiar or not.

The professor who is well known generally accepted in the literature by the forensic toxicologists chart that says these different scales, or these different regions of how much impairment you have, a certain blood alcohol level, the different things that impacts clinical signs and symptoms you'll note. So, it sometimes ends up being a fight, and at least in the Air Force practice is you have the members who have incredibly technical backgrounds, are familiar with these bold face orders that they do to operate on planes and accomplish their mission, they like something like that, some schema they can approach this in.

I would ask that if you go back there and you're considering that, I think it might be worthwhile to consult with a forensic toxicologist and see exactly where and at what level we see the things that matter for things like competence coming up. The language that ends up operating I think forcefully at these trials, if you can get there, or you can't, are things like loss of critical judgment, and then an

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impairment of executive functioning.

You will have fact patterns in the Air Force practice where you have somebody who absolutely we are convinced, we've taken it to trial and we'll get a conviction on it, that she was substantially impaired and she could not consent to this, and yet we have her driving home from the bar to be with him. And she's made 18 different turns along the road to do it. And you have the defense counsel blowing up the math going they stopped it that way, or at least they didn't get pulled over. She made a left there, she must not have gotten pulled over. They have all these different things. So, it's a very hard fact problem to crack open. I would just ask, at least from my perspective, and again these are just my opinions, for something that takes into account the forensic toxicology background for where we see and how early we can have critical judgment and executive functioning impaired by influence of intoxicants or alcohol.

VADM TRACEY: One more question from me.

CHAIR HOLTZMAN: Yes.

VADM TRACEY: Could you talk a little bit about what you see is the benefit of the unique regional trial counsel construct?

LCDR STORMER: Yes, ma'am. We call them Regional Centers of Excellence, which moves away from a standardization approach, but for the Marine Corps' perspective you put somebody like me equivalent on the east coast and Pacific who's focused his or her entire career in litigation, has gone to school with a specialty

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in criminal law, and we now have a breadth of experience and training capacity to supervise what we call our higher level cases. In our Marine Corps Orderly Alignment Manual I'm responsible for all cases within the region that deal with 118 murder, all the way out to 134, primarily focusing on 120 offenses. That's important to note because as my Air Force brethren mentioned before, our new trial counsels just don't have that baseline. They don't have the stability in the law at this point to fully understand how they need to prosecute these cases.

The Marine Corps' ability to leverage the experience that they have in litigation despite being a war-fighting organization to me speaks volumes about the importance of having that type of oversight. Each of the services have it at different levels. We've simply taken it down to a regional level to have that more direct supervision.

VADM TRACEY: What connection do you have with SJAs?

LCDR STORMER: I know all my SJAs in the region, ma'am. We have a very --

VADM TRACEY: Formal role do you have?

LCDR STORMER: I do. It's an interesting topic you bring up. Just two weeks ago we had an Operation Planning Team about this because statutorily Staff Judge Advocates are the only ones that are authorized to advise the Convening Authority. And when you start talking about cases that fall under my detailing authority, such as 120, the question becomes whether or not I can give that advice to

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the Commander, or if it's got to the SJA. And part of the concerns, and again only my opinion, is that many times those who have the experience or expertise and prosecutorial merit reviews are not necessarily the one's voice who's being heard by the Commander, and as an individual who I wouldn't say is a generalist but has a broad level of experience founded over years, but not necessarily in the weeds as most of us are here on the panel today.

VADM TRACEY: Thank you.

CHAIR HOLTZMAN: Thank you. Mr. Stone.

MR. STONE: Can we just continue that for a second so I understand, because I'm not sure I totally do. Let's say you see a case that you think should not go forward. Are you getting involved before the Convening Authority makes a decision, or after?

LCDR STORMER: Technically before, sir.

MR. STONE: Okay. And if you think the people on the ground are too close to it, and it shouldn't go forward, what is your input exactly, and does it have controlling authority, or is it just advice?

LCDR STORMER: It is just advice to the Staff Judge Advocate, sir. It is not binding, which is part of the reason why we are exploring how we incorporate that, if at all, keeping in mind our statutory limitations for advice to Commanders. So, from my region which I operate differently than my other region, from the moment that request for legal services is provided and it falls within a 118 to 134 context,

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myself and my HQE are involved in the detailing of the counsel, only Special Victim qualified trial counsel are permitted to be on those cases, and then we do a prosecutorial merit review once I have a substantially complete investigation from Naval Criminal Investigative Service.

MR. STONE: Okay. But if you advise that this is an outlier, this shouldn't be prosecuted, it has no binding effect.

LCDR STORMER: That is correct.

MR. STONE: What about after the Convening Authority has decided to go forward, will that trial counsel also be advised by you, or not?

LCDR STORMER: He will be. I continue in the process regarding my input to the Staff Judge Advocate.

MR. STONE: And if he decides while he's going forward that you were correct, that he sees he's not going to be able to convince anybody of one of the elements, can he drop it then with or without your approval, or not?

LCDR STORMER: The trial counsel can't. The Commander can always do whatever he or she decides. But at that point, once that train is down that track, in my experience it's very hard to take it off. Once they've gone through our baseline threshold of a probable cause determination, and then we have referred charges, at that point I don't -- I have yet to see a case be taken away from the prosecution. It goes to the end.

MR. STONE: I see. So, your input is before the Commanding

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Officer makes a decision, but it's not formal approval that needs to be obtained.

LCDR STORMER: It does not need to be obtained.

MR. STONE: Okay. And if I may ask Major Rosenow the same question, because I was curious. He said he had a supervisory role, and I wondered if it's the same level of being involved before the Commanding Officer decides, and if it's purely advisory and can be ignored?

MAJ ROSENOW: Sir, it is purely advisory, and it can be ignored.

The way that I operate, because Article 34 is what captures the pretrial advice that will be going up for the purposes of our conversation most often to the General Court-Martial Convening Authority, because these are General Court-Martials, these kinds of offenses.

I guess the lever that I have to pull on is I can talk to anybody at the Base Legal Office, including the trial counsel, who has the ear of the base level for us on the Special Court-Martial Convening level, SJA's ear. I can speak to the Staff Judge Advocate and I can speak to the General Court-Martial Convening Authority's Staff Judge Advocate, as well. I don't speak to any of the Commanders who are involved in the process. That's not my role, sir, but I have absolutely taken both of those tacts before in pretrial conversations, and it does mean something when JAJG, which is the abbreviation for my organization, and my boss, and my boss' boss all come together and go we've looked at this case. We have some misgivings about going forward on it, or we feel really strongly about this case. We think you're missing some things. We

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have those ears that are open, and we tend to have a good conversation, and I feel like our input is valued, sir.

MR. STONE: And if you had to just give me a very gross estimate of the percentage of times when your advice is followed or not followed, would you say it's followed 99 percent of the time, or how would you characterize that?

MAJ ROSENOW: It's on the margin. I would say less than, and this is a rough estimate, back of the envelope, off the top of my head, sir, whatever you want to use, I would say less than 5 percent of the time I even need to have an input because it's clear that this is trending in the direction that makes sense. You tend to have consensus when a lot of different lawyers are looking at this, and we tend to come to kind of an agreement there. It's only the margin where I might feel strongly this case should really go forward, or I might feel strongly it shouldn't go forward. And I'd say when I do express my concerns, they are heard. And they're generally at least taken into account, and I'll have something in the pretrial advice that I can go oh, that's kind of them taking into account the thing that I said either in one direction or the other. That makes sense. So, I'm not writing it, but it is being communicated up the chain to the decision maker, the General Court-Martial Convening Authority.

MR. STONE: So, you feel like the authority you have is effective, that you have enough authority now?

MAJ ROSENOW: Oh, absolutely. I think it's appropriate because

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you have these things that are divided out based -- and, again, personal opinions here, they're divided out to the Commander who's independently responsible for enforcing good order and discipline. I can speak with some certainty about Air Force trends. I don't know what Aviano Air Base needs to do for their own unit, so I think it's incredibly useful and absolutely appropriate how it's set, that I speak to the lawyers and not to anybody else in the process.

CHAIR HOLTZMAN: Thank you very much, Mr. Stone. Mr. Pickands, you had some suggestions with regard to initial trainings. I'm sorry I don't know the technical term for that.

LTC PICKANDS: Initial entry training, soldiers in the Army, anyway.

CHAIR HOLTZMAN: Right. Are you suggesting, I just want to make I understand the suggestion you've made. Are you proposing that there be, in essence, a kind of strict liability in that circumstance for sexual relations between a -- someone in a supervisory role, a commanding role, and the trainee?

LTC PICKANDS: No, much narrower than that.

CHAIR HOLTZMAN: Okay.

LTC PICKANDS: But yes, a strict liability offense so it would prohibit all sexual act or contact between someone responsible for the training and care of initial entry training troops, and those troops.

CHAIR HOLTZMAN: And how would the rest of the panel feel

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about that?

MAJ ROSENOW: Ma'am, in the afternoon you're going to hear from Colonel Michael Lewis who's going to speak at length about the Air Force's concerns. I would just -- I would say that as a prosecutor, exactly like Lieutenant Colonel Pickands pointed out, we can absolutely treat these offenses. It's a policy question. We have to look at it --

CHAIR HOLTZMAN: Well, that's what I'm asking you.

MAJ ROSENOW: Yes, ma'am. I think there are cases absolutely where it is such a gross violation of that relationship, having been assigned to Joint Base San Antonio Randolph Air Force Base and been involved in some of the prosecutions in some of the MTI cases. That power divide is hard to relate to people who haven't served in the military, how different the concerns for a general population of even like a student and a teacher environment where we seem as a society or in a lot of jurisdictions say you cannot have a relationship. So, I can 100 percent as an individual, and as an officer in the Air Force understand that there is the particular case that needs to be treated perhaps in that way.

LTC PICKANDS: Having been a private in the Army, I can say that that condition is very different than what you find even later in the service. Your cadre determines when you eat, when you sleep, when you wake up, what you do, how much pain do to inflict through calisthenics. They can choose their victims, easily separate them with their authority and their discretion, and exploit.

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CHAIR HOLTZMAN: Thank you. Colonel Thielemann.

LTCOL THIELEMANN: Ma'am, at the initial training level, yes, it should be strict liability.

CHAIR HOLTZMAN: And Lieutenant Commander Stormer?

LCDR STORMER: Yes, ma'am. I recognize that that can, in fact, be there. My opinion would be I think we can prosecute these cases under the current Article 120.

CHAIR HOLTZMAN: So, you think it's unnecessary.

LCDR STORMER: Yes. Yes, ma'am.

CHAIR HOLTZMAN: Okay. One other question about tweaking the law. I believe it was Ms. Scalzo said that there was a problem with not covering objects in the statute. Do you agree with that? Did you hear her testimony?

MAJ ROSENOW: Yes, ma'am.

CHAIR HOLTZMAN: Does anybody disagree with her comment about that? Okay.

Let me ask you another question, since there's a lot of concern about the fact that any -- or we've heard concern about any changes being made and the consequences they would have for stability, and disruption, and so forth. Do you think changes with regard to -- that have been proposed here with regard to definitions of impairment, definitions of capacity, the use of an object would be so threatening to the stability of the prosecution of Article 120 cases, that it would have a

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major disruptive effect?

MAJ ROSENOW: Ma'am, not the ones that you listed there, not the capacity, and not the use of another object. It's very interesting the sexual contact, you can actually cause another person to touch, and that's an offense. So, if you use another person's body and I've prosecuted those cases where somebody is manipulating another person's body as the object, it still is a sexual contact. But if you're using an object, you know, a broom, whatever it happens to be, so no, I wouldn't say those would threaten what we're doing here. Those are filling in some gaps we have.

LCDR STORMER: Not at all.

LTC PICKANDS: No, those are clarifying changes, ma'am.

CHAIR HOLTZMAN: Okay. I don't have other questions. Thank you again for your testimony. We'll hear from our next panel. We really appreciate the time you spent.

I want to thank all the panel members for appearing. This is the second set of officers that we'll hear with regard to the issue of prosecution and defense under Article 120. These are all persons with experience in the defense of these cases, and we'll begin with Colonel Terri Zimmermann, U.S. Marine Corps Officer in Charge, Reserve, Defense Services Organization.

COL ZIMMERMANN: Good morning, and thank you, Your Honor, and distinguished panel members. I'm very honored to be here today. Can

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you hear me okay?

CHAIR HOLTZMAN: Yes. Well, maybe you should move that mic closer to you. Great.

COL ZIMMERMANN: I'm not generally regarded as soft-spoken but, you know, I'm nervous. I serve as the Reserve counterpart to the Chief Defense Counsel of the Marine Corps. I've been a Marine Corps Judge Advocate since 1993, and I've served in positions such as investigating officer, review officer, trial counsel, defense counsel, appellate defense counsel, and appellate military judge.

In my civilian practice, I represent citizens accused of crime in state, federal, and military courts, as well as -- and I represent them at the trial, appellate, and post-conviction levels. I also handle administrative matters in the military such as administrative separations and discharge upgrades.

I'm board-certified in criminal law and criminal appellate law by the Texas Board of Legal Specialization, and I'm a board certified criminal trial advocate certified by the National Board of Trial Advocacy.

Recently, in my personal practice I have defended Article 120 cases at pretty much every single level of litigation, from investigation, trial, clemency, appeal, and administrative separations.

I really think it's important to say starting as the first defense speaker that nobody in this room, the people at this table included, think that it's ever

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acceptable for somebody to sexually assault, or assault in any way another human being. The fact that we represent people accused of this, I think it's important for you to understand, nobody thinks that it's okay to do that.

Sexual assault, in particular, when one service member sexually assaults another, violates every value that we cherish. And we all believe that true crimes should be punished, but our mission should be, and our mission is to insure that the process is fair, and that when people are properly convicted that the punishment is fair.

And in that regard, our highest military court has repeatedly emphasized that our courts-martial have to not only actually be fair, but they have to appear to be fair to the American public. It's very important.

Because of the recent rapid and what I would consider sometimes ill-considered legislative changes to military legal practice, I think that the system has become dangerously out of balance. This is of particular concern in these kind of cases where the consequences are so severe.

Sexual assault convictions carry -- I mean, lifetime confinement as well lifetime sex offender registration. So, my mission today is to give you some insight from my personal experience regarding the practicalities of litigating these cases in the Military Justice system in today's legal and political climate.

And I think that, unfortunately, in the rush to take action against what some people perceive as a crisis, we've shifted from a pursuit of the truth to a

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pursuit of conviction. Legislative changes have become result-oriented, supporting not a presumption of innocence but a presumption of guilt in many cases.

Now, this hurts not only service members who are wrongly accused, but it also hurts true victims, and it also hurts the Military Justice system as a whole. I think trials have become a highspeed expressway from allegation to conviction. The speed limits and off-ramps that used to be there in previous years, which gave Commanders discretion to take other actions and dispose of obviously contrived or difficult cases, those options are now off the table.

Commanders now are left to rely exclusively -- to put their trust in the fairness of the system, and while I'd like to think that that trust is well-placed, I'm afraid that it may not always be well-placed in today's environment. The civilian and Military Justice systems are manmade and, therefore, by definition they're going to be imperfect.

Three decades of DNA exoneration research has demonstrated that flawed scientific testing contributed to nearly half of the convictions of people who were found to be factually innocent. One-third of the known exonerations involve rape charges. Even confessions are not conclusive proof of guilt in every case. In fact, one in four of those exonerated actually confessed to the rape or the crime, and one in ten pleaded guilty. So, we know that systems can be flawed, and that some innocent service members will be accused and tried for crimes that they did not commit.

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We must do our best to ensure that wrongful convictions do not result.

You've heard from the previous panel that these cases are hard to prosecute. And I agree, I've been a prosecutor prosecuting 120 cases, but they're also very hard to defend. I could talk all day about why that is, and I don't have all day, lucky for you. Some of the biggest challenges, though, that I want to discuss with you to fairly litigating these cases include a lack of the precise definitions that I won't belabor because you've heard a lot about it already, over resources of government in terms of investigators, highly qualified experts, and complex trial teams, and the defense's lack of fair access to evidence through subpoenas and the use of expert witnesses.

Also, I have to mention that changes in Article 32 and the Commander's discretion in charging and clemency decisions, plus provisions such as mandatory minimums further demonstrate that the pendulum is just swinging out of control.

So, what are some solutions we can consider? First of all, again, I won't talk about the definitions, so I just want to mention that it's important to remember, especially if we've been talking about strict liability just five minutes ago, it's important to remember that our criminal justice system is intended to punish people who intentionally violate the law. So, let's move on to the second point, which is investigators.

Defense counsel in the Marine Corps and probably in the other

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services, as well, have a meager staff, and neither the counsel nor their staff are adequately trained or equipped to be investigators. We wholeheartedly agree with the recommendations and findings of the Comparative Systems Subcommittee to provide independent, deployable defense investigators. Specifically, Finding 37.2 acknowledges that defense investigators are such a basic and critical defense resource they are required for all types of cases, not just sexual assault cases. The CSS conclusions clearly set the bar for constitutionally adequate representation. Failure to properly conduct a defense investigation can have really costly consequences for all parties.

In one California study, 44 percent of the ineffective assistance of counsel claims that were granted involved a failure to investigate. The financial cost of retrial to the government, the impact of incarceration and discharge on the accused, and the lack of finality for the complainant are heavy costs associated with constitutionally inadequate pretrial investigation.

Finally, these investigators that I'm asking for must come from the civilian sector. Government law enforcement agencies are simply unwilling to assume these additional duties. A staff of dedicated defense investigators is not a luxury; it's an absolute necessity.

Now, thirdly, let's talk about expert witnesses. Sexual assault cases are very complex and difficult for both sides, and they often require substantial involvement of medical, psychological, and other expert witnesses for both sides.

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Recent federal case law has made it clear that failure to investigate and use defense experts to present defensive evidence and meet the prosecution evidence falls — if the defense counsel fails to do that, they fall below the standard of care required to provide effective assistance of counsel. And, again, the CSS got it right when they found that the current system is faulty.

I invite you for a moment to imagine the outcry that would result if the trial counsel tasked with prosecuting a sexual assault case had to apply to the defense counsel for the selection of an expert witness, had to explain what that expert witness was going to say, or what topic he was going to consult on. And if the defense counsel could have that requested expert summarily rejected and instead substitute another expert of the defense counsel's choosing, well, that's what happens in the reverse right now.

I'd like to tell you, though, that there is an effective and simple solution. It's widely used in civilian systems, and that solution is to provide a dedicated expert budget for the Chief Defense Counsel to administer based on the particular needs of each case. Many state and federal public defender's offices have successfully employed this model.

Next, let's talk about subpoena — CHAIR

HOLTZMAN: Excuse me.

COL ZIMMERMANN: I'm sorry.

CHAIR HOLTZMAN: I think we have a restraint on time

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because we have four witnesses and we have to question, so can you try to wrap up in a minute or two, please?

COL ZIMMERMANN: Yes, ma'am. I certainly will. I just – on subpoenas, we agree with the CSS that the current subpoena process is unworkable and faulty for many of the same reasons I just discussed with expert witnesses.

The final issue that I'd like to address is one that I've seen. I have significant concerns for my own observations in cases that I've personally handled, and that is the issue of unlawful command influence, especially in sexual assault cases.

You know, there's various flavors of UCI. There's influence on Convening Authorities, there's influence on members, and there's influence on witnesses. Each of these, as CAAF has so rightly observed, is a mortal enemy of Military Justice, where our leaders make statements about cases positions and the NDAA requires higher review of charging decisions, it causes — it can cause Convening Authorities to feel pressure to refer cases to trial rather than take some action that might be just under the circumstances. Members of the court-martial panels might feel pressure to convict, and even witnesses might not want to cooperate or provide evidence to defense for fear that their personal or professional lives will suffer repercussions.

Under any of these circumstances, the system is not actually fair,

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and it doesn't seem to be fair. So, to conclude, our system must commit to the core belief that these young men and women who have --- first of all, they're innocent until they're proven guilty beyond a reasonable doubt, but they've taken an oath to risk their lives to defend the Constitution, and they deserve the protections of that Constitution. They deserve a fair system. Thank you.

CHAIR HOLTZMAN: Thank you very much for your testimony. Our next presenter is Lieutenant Colonel Julie Pitvorec. I hope I'm pronouncing it correctly. U.S. Air Force Senior Defense Counsel.

LT COL PITVOREC: Yes, ma'am.

CHAIR HOLTZMAN: Thank you.

LT COL PITVOREC: Thank you. Good morning, Chairman Holtzman, members of the panel. Thank you for this opportunity to speak to you about the practical applications of the current version of Article 120.

As you said, my name is Lieutenant Colonel Julie Pitvorec, and I have been in the United States Air Force for just over 24 years, and an Air Force Judge Advocate for the past 15. Are you hearing me okay?

CHAIR HOLTZMAN: Yes, ma'am. Thank you.

LT COL PITVOREC: I am currently the Air Force Chief Senior Defense Counsel for the Eastern United States, European and Central Command AOR region. I was previously both an area defense counsel, and a circuit defense counsel, and both tried and defended cases under the pre-2007 and 2007 versions of Article

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120.

I currently supervise approximately one-third of the Air Force Defense Counsel, who are responsible for providing zealous, ethical, and professional defense services for our Air Force members. And the vast majority of those -- both area defense counsel and senior defense counsel -- have a robust practice in dealing with those accused of sexual assault, or rape under Article 120.

Although in my current job I am not actively defending military members in trials by courts-martial, in preparation for this hearing I spoke with nearly every one of the Air Force's 19 senior defense counsel who are currently actively doing just that.

Their practical applications or issues with the 2012 version of Article 120 range from a complete rewrite, to no changes at all, but the vast majority focus on the issues that we've talked about already today surrounding the lack of accepted definitions in terms of incapable of consent, impairment, constructive force and bodily harm. The lack of clarity in these definitions have caused over-charging, as well as inconsistent application of law as it's currently written.

Without changes and clarity in the definitions, those accused of sex offenses play judicial roulette, not knowing exactly which definitions and instructions the military judge will apply to the case at hearing. It's difficult to defend a case when the law is ambiguous.

I share my colleagues' concern with legislative changes that could

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prove unworkable, or add confusion to the issues. The fixes, if you will, could be more aptly made through changes to the Military Judge's Benchbook, through more detailed instructions and definitions, or through Executive Order. Thank you for this opportunity, and I look forward to your questions.

CHAIR HOLTZMAN: Thank you very much, Colonel. Commander Jason -- our next presenter is Commander Jason Jones, U.S. Navy Defense Service Office. Thank you very much.

CDR JONES: Thank you, ma'am, and members of the panel. My name is Commander Jason Jones. I'm currently the Officer in Charge of Defense Service Office, West Detachment Bremerton, which is outside Seattle, Washington.

I've been a Navy Judge Advocate since 2012. My initial tour I was stationed in San Diego as a defense counsel for the majority of the time.

2004, I was sent to the Naval Criminal Investigative Service, where I was in-house counsel for them in the General Crimes Department, and also taught at the Federal Law Enforcement Training Center, where we focused -- while I didn't litigate these cases, we focused heavily on the investigation of all crimes at NCIS, was investigating, including a large percentage at the time of sexual assaults.

2006 and 2007, I was sent on an IA with the Marine Corps, 1st Marine Logistics Group 4th. I was a senior trial counsel for the Marine Corps in Iraq during that time when we prosecuted cases in theater.

2007 and 2008, I was at the Navy-Marine Corps Court of

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Criminal Appeals, where I was a personal law clerk for two Chief Judges.

In 2008, I was sent to the southeast, to what was then called a region defense counsel with a trial defense command pilot project, where my executive officer was -- is Captain Crow, who will testify later. I did two years as a defense attorney there. Then, I became the Navy's senior trial counsel at southeast in Florida, where I operated three prosecution shops in Jacksonville, Mayport, Pensacola, Florida, where I worked with Ms. Scalzo, who has testified previously.

In 2012, I was sent by the Navy to Temple University, where I got LLM in trial advocacy, trial law. I was also stationed in the Eastern District United States Attorney's Office where I was a federal prosecutor for a year.

Currently, I'm the Officer of Charge at DSO West in Bremerton. I report to parent command in San Diego. We defend sailors, Coast Guardsmen, and some Marine Corps from about San Francisco north into Alaska. I'm part of the Navy's military justice career litigation track.

Well, I'd echo a lot of what has been previously said by my colleagues. The defense bar is woefully, inadequately funded. It has little experience and little availability to get help from the government, who is actively fighting you basically every step of the way on the other side.

The changes that have come out with the new 120, I also echo what Lieutenant Commander Stormer has said. The Navy Defense bar has not really faced a lot of constitutional issues in the current 120. The ones that we have tried at

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times have been unsuccessful, and so people have gone on and tried on other issues within the statute, the bench book, the definitions themselves.

As you can imagine, lack of clarity at times often plays into the defense hands. So we often do not attempt to clarify things incredibly. We are seeing though, unfortunately, in the prosecutions of 120 things that I think the other people do see, which is unlawful command influence, the political fear that if a command does not send a case forward, they themselves will suffer some sort of career-threatening or career-ending action by the Navy, even if not direct, some sort of other way.

We have litigated these cases in my parent command in San Diego and won them, where commands have -- commanding officers have said I must do this, and we all know why, and those cases have turned out poorly for the government.

I think you are also seeing with the current military justice structure sexual offender laws that all our clients care about almost more than jail, more than anything else. And so what you see in a lot of our practice that we see is forcible charging, overcharging, putting things in the 120 that are at times inane or low level touchings or not penetrations, and as soon as that hits our desk comes in a plea to 120(a) where no one thinks this is an actual sexual assault.

It's forcible charging that forces him to charge bargain at a special court-martial. We all know that the lifelong offenses of sexual offender registration

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are much more damaging than the actual time in jail that a person usually suffers.

I also want to say that unfortunately in our practice in the Navy we are starting to see a subtle, yet easily identifiable, trend of shifting 120 cases to trial by military judge. And when you talk to sailors about why this is happening, the unfortunate part that you hear sometimes from the accused himself in your office is that because they themselves on the deck plate level, even at a very junior grade, realize that this has a political tinge to it, that it is being forced down through at times good training, and at other times probably bad training, at other times seeing what happens to people, that you see a fear and distrust of their own service members that they themselves may not want to be tried by them, and they will take their chances with the military judge, hoping that someone who is trained in the law can ignore the emotions and can ignore the politics and can go beyond a reasonable doubt in front of one person, who is theoretically inoculated from those types of pressures.

And you've seen that in our system; you've seen it also be very successful in the Navy at times, and I think that will be a definite trend that we will see away from panel members in the Navy to military judge to the bulwark against the pressures of UCI and the fear that individual service members have of the system itself when it goes against them.

I look forward to your questions.

CHAIR HOLTZMAN: Thank you very much for your presentation. Our next presenter is -- I don't know what the initials stand for -- MAJ.

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Sorry.

MAJ KOSTIK: Major.

CHAIR HOLTZMAN: Major, okay, Frank Kostik of the U.S. Army, Senior Defense Counsel. Thank you, Major, for coming before us today.

MAJ KOSTIK: Madam Chairwoman and members of the panel, it is my honor to be able to -- to be asked to testify here today and to present the views of Article 120 from the field. As many have said, these are my views and not the views of the Army or the Judge Advocate General.

As stated, my name is Frank Kostik. I'm the Senior Defense Counsel for Fort Leavenworth, Kansas, and I'm the Acting Senior Defense Counsel for Fort Leonard Wood, Missouri. I practice as a prosecutor, a defense counsel, an appellate attorney, and have supervised both trial counsel and defense counsel.

I have also served as an administrative law attorney where I frequently advised Article 32 investigating officers.

I was recently awarded an LLM in military law with a specialty in criminal law from the Judge Advocate General's Legal Center and School, Charlottesville, Virginia. As a senior defense counsel, I both represent soldiers and supervise counsel doing the same. Many of our cases include at least one Article 120 events and are generally contested courts-martial before a military judge or a military panel.

Currently, I am defending or supervising the defense of over 25

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service members in various stages of prosecution for allegedly violating Article 120. While my field of vision is not as wide as many that have already testified today, we wrestle with the application of the statute every day in the defense of our clients.

The following are a few issues that we have observed and would recommend consideration by the panel to recommend changes. In short, as has been stated, "incapable of consent" needs a definition. Two, "consent and mistake of fact as to consent" should be added back into the statute. And the definition of "sex act" should be amended to reflect the federal statute, specifically with reference to penetration of the mouth by any body part.

We also anticipate several issues with the new Article 32 and are concerned that changes are going to substantially extend the time it takes for a case to get to trial. This affects our ability to defend our clients and to defend without additional resources, and is going to require additional resources like investigators.

To touch on those topics in just slightly greater detail, currently there is no definition of "incapable of consent." From where we sit, this causes a problem when combined with the word "impairment" in Article 120(b)(3)(A). This raises real issues in the field when the training -- and some of it is very good training -- from our SHARP program is sometimes inartfully taught by the instructors.

And so recently I sat in a SHARP training, and they instructed that a person cannot consent if they are drinking, or words to that effect. If left to the panel to determine what "incapable of consent" means, without a good instruction

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from the military judge, the defense is up against the wall to retrain people who are susceptible to receiving and executing training.

A good example of what I am talking about is recently there was a Navy-Marine Corps case that was decided in August where the military judge applied his common sense and the knowledge of human nature to the ways of the world when determining what "incapable of consent" means, and I can only imagine what a panel might do if they were given that instruction to determine what "incapable of consent" means.

And, therefore, I believe it needs to be reviewed to determine an appropriate definition, and my recommendation for appropriate definition would be something similar to the 2007 version of substantial incapacitation.

"Consent and mistake of fact as to consent" should be added back to the statute. The defense was removed from the statute and only remains as an affirmative defense in RCM 916 for the 2007 version of the statute. And this has led to confusion among my counsel as to whether the "defense" applies.

Currently, the general mistake of fact defense applies in the 2012 version, and we have used that. We also believe that it exists in our common law.

We have heard today, and I have read in some of the written submissions for today, that arguments have been made that even with the removal, consent and mistake of fact as to consent still exists using the definition of "unlawful force", which some have argued means without legal justification or excuse.

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If that is the case, then what is the harm in adding it back to the statute and making it clear for our prosecutors and defense attorneys as to where the defenses sit and reduce needless litigation?

Three, the definition of "sex act" should be amended to be consistent with the Federal Code. Specifically, the penetration of the mouth by any body part -- by any part of the body with intent to abuse, humiliate or harass. The change would eliminate potential convictions for non-sexual insertion of the finger into the mouth when done to humiliate, harass, or abuse rather than to gratify some sexual desire.

We can imagine some sort of scenario in which someone may put their finger in the mouth of another to abuse them or even harass them in front of a group of soldiers or even in the barracks, you know, horse playing, but it doesn't rise to the level of a sexual assault.

Amending the statute in this way is going to help the defense bar, and the Army, really, get to pleas in some cases because sexual offender registration wouldn't be on the table because it would just be an assault.

And, lastly, we anticipate issues with the Article 32. Now, the new Article 32 hasn't taken effect and won't until December of this year. However, we believe that with the new 32 rules the alleged victim is not likely to testify at the Article 32. Under the current deposition rules, we also believe that we are going to have a hard time getting depositions of those complaining witnesses prior to trial,

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although there is some argument that the comments section would give us a basis. However, I, for one, do not want to rely on the comments section of an RCM to defend my client.

This litigation is going to extend the trial process, adding more litigation, perhaps giving victims less access to justice. And, of course, as time goes on, memories fade about the facts, thereby possibly harming the accused in his case and the defense.

Lack of a real investigation at the Article 32 is a problem as well. It is no longer an investigation, but, rather, simply a hearing to determine probable cause in which key players don't have to testify. This additional time places more pressure on the accused and really does impact the discipline when the accused, who is accused of a serious sex offense, is sitting in a unit waiting for a trial to happen while his defense counsel and perhaps investigators, if they are granted to us at some point, are investigating the case, so we are not ineffective at trial.

And, lastly, I'll end on why this is so important. As I sit behind a desk and talk to soldiers every day, I hear them talk about their combat experiences and the effects of post-traumatic stress syndrome that they have, and suicide is a real concern. We have gone to giving a specific counseling to all court-martial clients, and soldiers who have committed suicide have a tendency to also be facing UCMJ actions.

And so when we lengthen this process, and we increase the

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burden on access -- on the accused because of their access to justice while we do our jobs to defend them, it's a real concern. And my defense counsel in both installations have had soldiers both make gestures, and we have escorted soldiers right over to mental health.

And subject to your questions, that's all I have.

CHAIR HOLTZMAN: Thank you very much for your presentation.

Mr. Taylor?

MR. TAYLOR: First of all, thank you very much to all of the members of the panel for your contributions this morning as well as your service in general. Colonel Zimmermann, I'd like to ask you to follow up a little bit on your idea that somehow the system is vastly out of balance.

And, specifically, I'd like to focus on your comments about over-resourcing resources to the government compared to the training and the resources that the defense receive. And in that context, maybe you could focus on the resources that you cannot remedy through the system.

For example, I assume that if there is a question regarding the availability of an expert witness or the availability of a subpoena, and certainly a referral to a case where you think there has been unlawful command influence, then I assume you would agree that the system provides some way for you as a counsel to address those issues. Is that right?

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COL ZIMMERMANN: Yes, sir, it does. However, it doesn't -- it provides a way to remedy, but it's not an effective way. And I'll start with the last question first, if I may.

Here is how it works. I, as the defense counsel, have to ask the trial counsel to please produce these witnesses, whether they're fact witnesses or expert witnesses. And I have to say, "This is what the witness could say," why they're relevant and necessary, and then it's up to the trial counsel to say, "No, I don't want to give you that witness."

And so if this is prior to referral, there is no military judge I can go to. If it's after referral, then I've got to file a motion and ask the military judge to order production of that witness or order appointment of that expert. Actually, I've got to wait for a court date.

And it really is a very inefficient way of doing business because counsel for both sides, and the military judges, are spending a whole lot of time litigating these access to resource issues when they could be working the cases.

So technically, yes, the system does provide a remedy, but as my counsel -- my colleague said, that delay hurts both the government and the defense, especially in our mobile environment in which we operate, where military service members transfer all over the world. So witnesses who are here when things are fresh in their mind and everybody is available, you have to wait to litigate whether they are going to be produced at trial. You've got to wait months and months and

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months. They're gone. They're in Afghanistan, they're in Africa. So I don't think it's an adequate way to manage this.

So if we had our own access to investigators and expert witnesses, for example, we could do our jobs better and it would save a lot of time for everybody.

MR. TAYLOR: So, then, to the larger question that I --

CHAIR HOLTZMAN: May I just interrupt one second and just say the whole issue of resources was addressed by the response panel, and recommendations were made on exactly some of these points.

MR. TAYLOR: Okay. Well, thank you.

I'm sorry to ask this question, but did that include detailed training as well for trial counsel and defense counsel? Because that was going to be my next question is about training.

CHAIR HOLTZMAN: No, I don't think so.

MR. TAYLOR: So --

CHAIR HOLTZMAN: Maybe some training of trial counsel. We did something on training.

MR. TAYLOR: Okay. So if I could just pursue that for a moment, since you specifically mentioned not only lack of resources but lack of training, so what is the basic training that a Marine lawyer would expect to receive, and why do you think it's inadequate?

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COL ZIMMERMANN: Well, there are several different phases of training, from the initial -- we all have to graduate, just like any Judge Advocate, from an accredited law school and go to initial training. But then, once you become a defense counsel, there is a new defense counsel course. There are various courses offered throughout the year.

We have -- each region -- we, too, are divided into regions like the trial counsel are, and each region holds a one-to two-day CLE every quarter. And then there are one or two sexual assault-specific CLEs that some counsel get to go to, not everybody gets. There is just not funding or space for everyone to get it every time.

And I don't know how -- honestly how the training opportunities defense counsel have compared to what the trial counsel have, because I haven't looked at the curricula for both sides. But what I meant was, I mean, as Colonel Thielemann testified, there is already three highly qualified experts supporting a trial counsel in the Marine Corps. We have one. We received permission to hire a second one, but we haven't hired her yet, or him.

So, I mean, right there that's a three to one. And then, with respect to investigators, when I was a trial counsel, all I had to do was pick up the phone and call NCIS or CID and say, "Can you go talk to Private Smith?" Well, as a defense counsel, I don't have anyone I can call unless my client is independently wealthy and can hire his own private investigator. But Lance Corporal Smith doesn't

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have those kind of funds.

So that's what I mean by over-resourcing. They've got these complex trial teams now. And they've got beefed up funding for training, and we have had some funding for training as well. But just generally there is an imbalance, and I think the Judge is correct, that that is -- a lot of those issues are addressed by the CSS, and we agree with those evaluations.

MR. TAYLOR: Okay. Thank you.

Commander Jones, I would like to ask you to follow up, if you would, on your observation that there have been more cases in which the focus has shifted from trial by panels to trial by judges alone, because of what you think has to do with the emotions and the subtle pressures perhaps that service members would feel. Can you comment more about that, please?

CDR JONES: Yes. We have seen it both with junior enlisted who are being tried, fearful after going through themselves some level of training or some -- or at least talking to at times, you know, a drink means no one can consent irrespective other actions, and just -- we have had it with officers.

We tried -- the latest Naval Academy rape allegation was tried last month before a military judge solely because part of the concern was the allegation itself happened in Bancroft Hall at the Naval Academy, and how are people going to view this, and what has been played in the press before about this.

So you'll see people have a fundamental distrust at times of what

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is going to happen to them at trial because you have so many competing factors brought into the trial outside of a military judge's instruction to them about what the law may be. And I think that is something that we in the Navy defense bar have seen also somewhat successful, taking these cases before military judges and trying them, too.

So it has been a repeated pattern that we are seeing. Part of it certainly has to do with the strength of a case, as others have said. These cases at times are very difficult to prosecute, and it may be at times a good call for the defense to do this, too. But, unfortunately, part of it is driven by our own clients' fear of the others training them or judging them based on political aspects of a case, pressures brought to bear.

The Navy does publish all accounts of trials, the results of trials, and so there is a large amount of pressures today that weren't there five years ago or when I started under the original statute in 2002. So there is a subtle shift in the mind-set of people that people are wary of. And the idea that a judge who is kept away from these things, who has experience, often in the Navy on both sides with our military career litigation track that we have, we're able to keep those away. And that's something that we see repeatedly.

MR. TAYLOR: Thank you very much, Madam Chair.

CHAIR HOLTZMAN: Admiral Tracey?

VADM TRACEY: Thank you. Do you know whether data to

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this effect has been collected and is being monitored on both requests for a trial by military judge and the increase in the numbers of cases actually going to trial? Are you in a position to know whether that data is being collected?

CDR JONES: I don't believe it actually is collected -- the defense bar is pretty decentralized to some degree. We report to a Chief of Staff for Defense Services Office. But while we report our results, I do not think that we are required to report the form itself. So I cannot point to a specific study that we would have that would say this. What it comes from is every so often all the defense counsel talk, either at conferences or commonly.

VADM TRACEY: Do you know, Colonel?

COL ZIMMERMANN: Yes, ma'am. The Marine Corps does track what form is used for each case.

VADM TRACEY: Related question. Do you have a structure similar to the trial counsels, where there is an opportunity for someone at your level, for instance, to advise defense counsels who are trying 120 cases?

COL ZIMMERMANN: Yes, ma'am. That's part of my job description as the reserve chief defense counsel. My goal is to help train and mentor the active duty counsel, and I travel around the country periodically and give classes to them. And they all have my cell phone number, and they can call me and they do call me.

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We also have Kate Coynes in the audience here. She is our sole highly qualified expert for the defense in the Marine Corps. She is available to them as well. So there are some opportunities for these very young, very inexperienced, very enthusiastic but, nonetheless, inexperienced counsel to get some help, but they don't get as much help or have as much resources available to them as the government does.

VADM TRACEY: Last question, if I may. It sounded as if for trial counsel there is some mandated oversight of Article 120 cases in particular. Is that true for defense?

COL ZIMMERMANN: My understanding -- and, again, I'm a reservist, so I am not there every day -- but from my travels and my exposure, my understanding is that each case is evaluated when it comes in the office. And if it is a 120 case or any other serious case, there is going -- the senior defense counsel will appoint at least two lawyers, will detail two lawyers to that case, and those cases are all tracked.

So the senior defense counsel, the regional defense counsel, and the chief defense counsel are all aware of the cases that are pending.

VADM TRACEY: True in the other services?

MAJ KOSTIK: Ma'am, it is not exactly for the Army. In the Army, as a case comes in, I evaluate it and I base my decision on who to detail based on the experience of each counsel I have in the case. If it's a particularly serious case, I

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will often detail myself as the detail counsel, along with one of my junior counsel, so they are sitting right next to me through the entire process.

We also try to detail two members, two defense counsels to every case in which we believe it is going to be contested, whether it is going to be a military judge alone case or a panel, as well as each region has regional defense counsel that senior defense counsel often reach back to, and typically our regional defense counsel are true experts in criminal law.

So while we don't have a formal program for oversight of 120 cases within the Army defense community, we have various stages of reach back and assist, including our defense counsel appellate program. And you heard from some of those folks earlier this morning.

VADM TRACEY: Thank you.

LTCOL PITVOREC: For the Air Force, I am the detailing authority for the Eastern European regions. And for every 120 case that is set to go to an Article 32 investigation, we do include a senior defense counsel on that case. Right now, the landscape is just so complex that we really do need the experts sitting in the courtroom for every piece of litigation that goes on.

CDR JONES: Ma'am, for the Navy, the Navy has a military justice litigation career track now, which usually has one officer at each detachment, maybe two at a parent command, whose sole career now, like myself, is just to do criminal litigation. We don't have a formal structure about 120s, but the Navy does

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not allow first tour judge advocates to be defense counsel at trial, at courts-martial, so no first tour judge advocate is faced with a 120.

We have more senior people, usually second or third tour lieutenants doing it, under supervision of someone who is in the military justice career track. We also have a defense counsel assistance program, like the others do, for assistance. So you're not going to be alone as a first tour on a 120. It would either -- in my office it would either be myself with the junior -- a junior attorney with them, or two lieutenants together, second or third tour lieutenants, with my assistance behind the scenes.

VADM TRACEY: Thank you.

CHAIR HOLTZMAN: Mr. Stone?

MR. STONE: Lieutenant Colonel Pitvorec, you had mentioned at the end of your testimony four terms that you thought needed more definition, and one was impairment, one was incapacity. What were the other two?

LTCOL PITVOREC: Constructive force and bodily harm.

MR. STONE: Okay. And this question is for Commander Jones. You were talking about how these cases are handed. At what stage do the defense counsel get to try and negotiate a plea? Is it before it goes to the commanding officer? Is it after it goes to the commanding officer? Does the commanding officer have a veto if the prosecutor then wants to plead the case out to a lesser offense? How does that work exactly?

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CDR JONES: Yes, sir. It is somewhat personality driven by the offices that you're in. For example, at my office I know the senior trial counsel very well, and so we have a pretty good open line of communications. When a case first hits my desk and we start to assign it, oftentimes if the government is seeking a lesser deal, we often have these 120 offenses for touchings over the clothing. We call them, you know, "butt grab cases", which will result in offender registration.

Almost the day that case hits my desk my phone will ring and the government will offer battery to avoid the sex offender registration. So that will happen very quickly.

The much more egregious, more serious cases usually don't start getting into any sort of plea negotiation until after an Article 32.

MR. STONE: But they could.

CDR JONES: They certainly could. And, obviously, the more egregious case there is, the less concerned you are with sex offender registration versus an incredibly long time in jail, so the balance shifts. So if we have had extremely egregious cases at the time -- we took an 18-year deal not too long ago -- those kind of plea negotiations start early and often where we will whittle down to what we are actually going to do.

MR. STONE: Have you had a case, or is there authority for the convening authority or the commanding officer to negate the deal that you have made with the prosecutor?

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CDR JONES: Absolutely. The talking with the prosecutor usually are done informally with our general knowledge based on our working relationship, because once you get in the military justice career track you usually know the people around you, because you are dealing with them your entire career.

MR. STONE: Sure.

CDR JONES: For example, I know Ms. Scalzo. I know Captain Crow. These people are speaking generally on behalf of the convening authority. And so if you tell me it is going to be two years and you come back later and tell me it's going to be three years, that will injure that working relationship enough that that won't be a system that goes on.

So we often have to rely upon the good working between them, but obviously nothing matters until the final pen to paper.

MR. STONE: What I think I'm hearing is that the convening authority or the commanding officer doesn't typically veto the deal that that prosecuting authority is ready to make with you. Is that right?

CDR JONES: Correct. Not typically. Only on very large cases where there are bigger picture issues or sometimes we have children involved and things like that, which are high profile.

MR. STONE: Okay. And, Major Kostik, you got into some discussion about the Article 32s and the fact that after December, you won't have the right to put those victims on the stand and cross-examine them or perhaps get

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depositions.

I have to say that I think the Department of Justice prosecutors that I know were horrified at the 22 hours of cross-examination that the victim got in the Naval Academy case. And the vast majority of victims that I have dealt with in 40 years would never have been subject to anything like that, cross-examination or deposition, in any kind of federal prosecution in any federal district, which means the entire country.

And so I guess what I'm -- since you are lamenting the loss of that, and perhaps the loss of the right to depose victims, rather than just get their sworn statement before trial, I'd like to know if there is some federal case or precedent that you are relying on when you seem to suggest that that's either unfair or unconstitutional.

MAJ KOSTIK: Sir, I'm relying primarily on the military's practice. So since the establishment in the code, that has been a right of the accused, which has now under the NDAA of 2014 been removed. So I am not comparing it to our federal system. And our case law has called the Article 32 investigation "an important right of the accused".

And so without this important right of the accused, I am suggesting that there are going to be other things that are going to have to fill that vacuum, perhaps defense investigators. Perhaps the trial process gets lengthened, which isn't good for good order and discipline.

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MR. STONE: But the victims don't have to speak to the trial -- to the defense investigators. They don't in federal cases. So why do you think it's going to lengthen anything? Most of them -- if it -- conceivably, like the Naval Academy case, the woman is going to probably decide on her own, which she is free to do, but she is probably going to decide on her own she is not interested in being cross-examined because she has given a long statement.

So why do you think that is going to lengthen the process?

MAJ KOSTIK: I think it is going to lengthen the process because without the -- without that testimony, the defense, in order to effectively defend their client, is going to have to prepare for trial in some way.

So even if the alleged or the complaining witness, whether male or female, decides not to participate and not to communicate with the defense counsel, we are still going to have to look at the sworn statements, look at the trial counsel, investigate, you know, all of the witnesses that are at a party. For example, in a very common scenario, a party equals, you know, drunken sex.

MR. STONE: And that is stuff you don't do now?

MAJ KOSTIK: It is stuff we do now, but it's stuff we do now in a two-day process or a one-day process in an Article 32 investigation. We literally can go through an Article 32 in one day, get almost everything we need for trial, and then a few weeks later, you know, the judge has docketed the case for trial, we have handled motions, and the case is executed.

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And that achieves that dual purpose of the military justice system to achieve good old earned discipline, which perhaps the civilian sector and the federal side don't have that same twin aim. And so I'm just suggesting that that length and period of time, perhaps your question -- the premise of your question is correct, it won't affect.

But where I sit, I think it will, and I will, as a defense counsel, advise my junior counsel as well to -- we've got to make sure that we're still crossing our T's and dotting our I's. Just because the complaining witness hasn't testified at the Article 32, although she gets to sit in the Article 32 and listen to all of the other folks testify about the case, and perhaps sway her or his testimony in one way or another for trial, they still have to do a complete investigation.

CHAIR HOLTZMAN: Okay. Colonel Pitvorec, I just want to go back to your statement about the need for clarity with regard to two of the terms that we haven't heard before. We have heard from a number of people that "impairment" and "incapacity" are terms that need clarification. But we haven't heard very much about "bodily harm" and "constructive force" until you mentioned them. Could you elaborate on what the problems are as you see it with the term "constructive" -- or with the -- with "constructive force" and with the definition of "bodily harm"?

LTCOL PITVOREC: Yes, ma'am. Bodily harm -- excuse me, I have my notes from everyone. All 19 people. I have tons of emails. In essence,

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the issue with bodily harm is that the definition of "bodily harm" is an offensive touching. And then, an offensive touching means without consent. So there is question about whether or not there is consent -- that it was intended to be part of that definition or not.

And so as you are preparing for trial, if you are operating under this kind of contrived term "bodily harm" and trying to figure out exactly what it means, and the other thing is is that it is used by prosecutors in charging in various different ways.

So there is just no real definition of "bodily harm" that actually lends itself to be easily defended when it is used in terms of incapacitation or with alcohol. It is used in various different ways. And because of that, it is hard to articulate what exactly "bodily harm" means. Does it include a definition or does it include the term "consent" or not? And so that's one of the issues that my folks are having.

And then, I mean, I can read directly from that. It says, "When the new 120 came out, there was nothing regarding the lack of consent when the alleged assault was a result of bodily harm. But fundamentally a touching cannot be offensive if you consent to it."

So there seemed to be some recognition that consent played a role in a bodily harm case.

And then, there was a case of -- United States v. Neal found that

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consent was not an element, and this is under the 2007 version, but it was still relevant to the element of force. So the term "bodily harm" needs to have a definition that is actually workable. And, again, I think it goes back to the -- what we have talked about before, consent and to the mistake of fact as to consent is whether or not those are part of the definition or whether or not those are viable defenses under the current law.

CHAIR HOLTZMAN: Can that problem be addressed by executive order, or can that -- does that require a statutory change?

LTCOL PITVOREC: I believe that it can be done by executive order, and I think it can also be done by an iteration of the judge's bench book that actually goes to the instructions that the judges give, because I think that's where ultimately this comes down is actual trial practice, what is -- what are the instructions that the judge gives, and what are the definitions that the judge employs when explaining to the jury exactly what the charged offenses are and what those definitions include.

CHAIR HOLTZMAN: Could you also focus on the issue of constructive force?

LTCOL PITVOREC: Yes, ma'am. One of the issues that has come up is that -- and I know I'm going back to my -- we'll say the old, old days, pre-2007, where, you know, sexual assault or rape was by force and without consent. And there is -- and I think it also goes to part of this whether or not there is an interplay

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in rank that applies to constructive force.

And I think that's one of the definitions that is being used is that whether or not -- just by virtue of a rank disparity, whether or not that constructive force is used in order to compel someone to submit to a sexual act.

CHAIR HOLTZMAN: And I don't see -- can you guide me with regard to where the rank disparity would come in there?

LTCOL PITVOREC: I'm not saying that it's part of the regulation or part of the law. I guess my point is that that constructive force language is being used in order to prosecute cases where there is a rank disparity, whether or not there was actual consent.

CHAIR HOLTZMAN: But that wouldn't be under the new Article 120; that would be under the old Article 120.

LTCOL PITVOREC: Let me get back to you on that, ma'am.

CHAIR HOLTZMAN: Would you mind? I'd appreciate understanding that, because I think one of -- we have been charged with trying to identify the problems with the new statute, and we'd like to know about that, and I would appreciate your help. And if anybody wants to clarify their testimony or give us any additional examples, you should feel free to do that.

LTCOL PITVOREC: Yes, ma'am.

CHAIR HOLTZMAN: I think -- and that goes to all the members of the panel. Thank you very much.

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I haven't addressed the issues that Colonel Zimmermann raised and that others have raised with regard to disparity of resources and undue influence, because we addressed that in the response panel at great length, and we are very troubled about these issues.

But I want to thank all of the members who have come here to testify today and to present to us. Thank you very much.

We are ending on time. Thanks.

(Whereupon, the above-entitled matter went off the record at 12:00 p.m.)

A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

(12:39 p.m.)

CHAIR HOLTZMAN: Thank you very much. We are very fortunate to have two very distinguished members of the United States House of Representatives, Representative Lois Frankel and Representative Jackie Speier, with us this morning, as well as a person who can speak from her own experience about -- sadly, her experience as a victim of a sexual attack.

I'm going to begin first with Jackie Speier out of protocol. Jackie has a very distinguished biography. All I'm going to say -- there's no need for me to read it to you. I'd just simply say that all of us are in her debt for her vigilance, her leadership, her bulldog determination, to do something about the issue of sexual assault in the military. We wouldn't be here today without your leadership on this.

So, Representative Speier, please. We are glad to have you, we are honored to have you, and thank you for appearing. We'd like to have your testimony now.

CONGRESSWOMAN SPEIER: Madam Chair, Congresswoman, and members of the panel, it is my -- is this on? Can you hear me? It's on.

Let me first say that as a brand-new young staffer to the House of Representatives in 1973, the youngest woman ever to serve in the Congress of the United States was elected that year, if I recall correctly. So it's a great privilege to be with you, Congresswoman and Chair of this subcommittee, and all of you members as

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well.

I am here, as is my colleague and her witness, to speak on the issue of consent in the military training environment and how best to protect our trainees from sexual victimization by their instructors.

In October of 2012, I went down and spent the night and the next day at Lackland Air Force Base. As you all know, that was the place where the whole issue erupted around military training instructors and their trainees, and the real travesty that was uncovered as a result of that.

I was initially briefed by General Rice and his subordinates on the growing scandal. What had initially been perceived by commanders as several untrue allegations of sexual assault had snowballed into a systemic and pervasive problem.

What was more telling than the briefing was the opportunity I had at lunchtime to go into the mess hall and have lunch with a number of young trainees. And it was a pretty astonishing experience. They were 17, 18, and 19 years of age. They were from places across our great country. They were obviously young, they were naïve, and they were earnest.

And as I sat there having lunch with them, I had this revelation. Oh my God, these girls are the same age as my daughter. And I realized that my daughter would be no more capable of telling a military training instructor no than these young women.

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As the investigations unfolded, most of the perpetrators did not deny that they had engaged in sexual misconduct. They simply contended that the sex was consensual. This was also the common defense in many of the subsequent trials. Now, I had one of my staff members, my legislative director, fly to Lackland and spend a week there listening to the testimony that transpired.

The proceedings were dominated by the question of consent. The victim contended that she felt intimidated and had no choice but to comply with the MTI's orders to have sex with him in a coat closet. Although convicted of lesser charges, the MTI contention that the sex was consensual prevailed and he was found not guilty of sexual assault.

Now, there have been story after story at Lackland that would make my natural curly hair curl even more. But what was most telling was the fact that there was no question that when you get an order from an MTI that you follow it, that you obey every command. That as one trainee put it, there is no question mark at the end of an order.

Now, when over the loudspeaker a trainee was asked to report to the storage closet or coat closet, whatever it was, she did what she was told. And what transpired in there was not with her consent, and yet that was the case that was made by the defense.

The basic reality is that the Uniform Code of Military Justice or Article 120 that governs rape and sexual assault does not take into account that when

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you are in a military training environment that consent is not a mitigating factor. I believe there should be strict liability.

Eventually, 35 instructors were implicated in this rape, sexual abuse, harassment, and other mistreatment, of 69 recruits -- 69 recruits. Now, what is most remarkable about this, not one -- not one of these 69 trainees came forward and reported it.

And if you spend any time with these young women, as I did at Lackland, you would understand why. The fear of intimidation, the fear of reprisals, the level of intimidation that pervaded Lackland, and the dynamics of basic camp precluded the victim from coming forward. Instead, these allegations in the end came from MTIs.

Now, this is what was pretty remarkable. When we were there, we did in fact speak to the MTIs that actually blew the whistle. The irony was, of course, that the first MTI -- first two MTIs that went through the chain of command to report one of these -- one of their colleagues was told by the chain of command, Oh, that couldn't possibly be true. He is such a good MTI.

And it wasn't until a third MTI, who didn't know that the other two MTIs had reported it, had reported it to the chaplain who ironically was out of the chain of command, that finally there was a recognition, well, maybe there is something there. But had it just been those two MTIs, nothing ever would have happened.

And what was most compelling after listening to these three

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brave MTIs, they are all suffering like the victims now, being ostracized. One of them said to me, you know, I have been in for 12 years, but I don't think I can take it anymore, and was thinking of retiring or resigning.

The victims often don't speak out or complain because if they do they know they will be recycled, to go through basic training all over again, and that is the last thing they want to do. After I went to Lackland, I introduced H.R. 430, the Protect Our Military Trainee Act, which would amend Article 120 of the UCMJ to acknowledge the power imbalance between trainer and trainee and recognize that sexual contact between them for what it is -- a crime.

The bill narrowly applies to this unique training environment targeting military instructors who engage in sexual acts or sexual contact with a trainee during basic training and for 30 days afterwards. An investigation would still be conducted, a case would still be built, and guilt, innocence, and punishment would still be determined by a panel.

This bill simply recognizes the reality that there is no such thing as consent between an instructor and a trainee. It is important to note that the military already understands the impropriety of these relationships. The Air Force Instruction 36-2909 prohibits instructors and trainees from engaging in unprofessional relationships.

However, this instruction goes both ways. When a trainee is taken advantage of by their instructor, they, too, can face disciplinary action if the

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commander so chooses, another reason why a trainee is not going to come forward. To quote the Air Force's own internal report on Lackland, quote, trainees are afraid any relationship with an MTI will be construed as consensual, and they themselves will be charged with violating the UCMJ. And that is why they don't report.

Even after Lackland, this issue remains unresolved. This framework utterly fails to recognize the power trainers hold over trainees, discourages reporting, and forces victims to rely on the mercy of a chain of command that has already failed them.

As we have seen, holding both the perpetrator and the victim culpable for a sexual offense simply does not and cannot work. In a number of states, including Washington, Connecticut, Ohio, Illinois, Kansas, and North Carolina, it is a felony for a teacher to have a sexual relationship with a student, even if that student is above the age of consent, and even if they have consented.

During basic military training, this power imbalance is only magnified, and yet trainees lack even the basic protection of having the law on their side. It is time to take action and correct this injustice.

In addition to appropriately updating Article 120, the bill creates a clearer, fairer military justice process. For instance, these cases would now all be investigated by specially trained criminal investigators rather than by an often-biased and untrained chain of command.

Furthermore, just last year Congress mandated the creation of

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the Special Victims Counsel Program for victims of Article 120 offenses. While each of the service branches have the option to extend this protection to entry-level personnel victimized by instructors, most have not.

This bill would address the staff and the law and ensure victims receive legal support. It has been argued before this panel that, while imperfect, Article 120 is good enough. Further changes would complicate the prosecution of cases and interfere with the development of case law. I understand this reasoning and agree that both sexual acts and sexual contact within Article 120 should remain criminalized.

However, I remain concerned that for service members at the most vulnerable time in their military careers, the law has yet to catch up and offer them the protections they deserve.

I would also like to briefly comment on Article 120 reforms passed by Congress in the mid-2000s. I think Colonel Christensen, now the Chief Prosecutor in the Air Force, said it best in a 2011 interview, quote, if you had 100 monkeys with a typewriter, they would probably come up with something like this, unquote. It's a great visual, isn't it?

Congress has received a lot of criticism for creating this flawed language, and we deserve plenty of blame for passing it. But it should be noted that the Joint Services Committee primarily drafted this language and handed it off to Congress. So it was in fact a creation of the very institution that then, you know, was

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questioned for the constitutionality of it.

Several concise sentences mutated into 100 pages of unartful, contradictory, and unconstitutional legalese. The result was courtroom confusion, judicial frustration, and constitutional conflict. One of the many problematic provisions of the 120 language was T-16, which shifted the burden to the accused to prove that there was consent rather than the prosecution having to prove there was not consent.

This was, I believe -- was correctly found to be unconstitutional. This approach, however, differs greatly from H.R. 430, which narrowly applies to basic training environments and takes the question of consent completely off the table rather than shifting the burden. It is also consistent with many state laws that I referenced earlier.

I urge you to recognize this reality and to help ensure justice for the thousands of men and women who make the choice to serve our country each and every year.

Thank you for the opportunity to be with you today.

CHAIR HOLTZMAN: Thank you very much, Representative Speier.

I would just -- we are going to withhold questions until everyone on the panel has spoken.

Our next speaker is The Honorable Lois Frankel from the great

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state of Florida. We won't mention, of course, that she is from the great state of New York as well.

CONGRESSWOMAN FRANKEL: The accent will give it away.

CHAIR HOLTZMAN: But we really appreciate your appearance here. Congresswoman Frankel has had a stellar record in Congress, and actually is responsible for getting the Judicial Proceedings Panel focused on this whole question of abuse of power, for which I am extremely grateful, and I think it's a very important contribution, as is the contribution of Representative Speier.

So if you wouldn't mind proceeding, we would very much appreciate your testimony.

CONGRESSWOMAN FRANKEL: Thank you. And it is an honor to -- is this on? It is on. Okay. It is an honor to be here with my colleague, Congresswoman Speier, my guest who you will meet in a moment, Elisha Morrow, and this very distinguished panel.

So I wanted to first start by saying that I am the very proud mother of a United States Marine war veteran. And when I think about his eight-year career in the Marines and the things that I remember the most, it is not he went to two wars and he came home safe. Of course, that was a very big day for me. I was in awe that he was willing to risk his life and his limb for the nation.

But I'm going to tell you what I remember the most about his service, is how proud he was to wear the uniform of the United States. It was like a

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halo around his -- he just felt so proud about having been a United States Marine. I guess once a Marine, always a Marine.

So when I heard the story of Elisha Morrow, which you will hear in a few minutes, I was so sad and I became so angry I knew that I had to do something about it. And I really thank Congresswoman Speier because she has led the way on all of this.

Elisha Morrow joined the Coast Guard at age 22. She started boot camp full of expectation and self-respect, believing deeply in their mission to save lives. She reminded me of my son, how he felt when he went into the service. Her self-confidence turned into humiliation when her company commander sexually harassed her with innuendos and advancements night after night. And she will give you those details.

She reluctantly left the Coast Guard and now she is actually a member of one of the police departments in my home area.

But the story doesn't end there. When Elisha learned that the same commander had a pattern of sexually harassing other female recruits and then learned that he had sexually assaulted one of them, she took the matter to the Coast Guard authorities. And an investigation showed that the commander had forced himself upon one of the recruits using boot camp tactics, wearing her down and then ordering her to have sex with him.

But because he had not used physical force, he hadn't drugged

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her, he hadn't put her in fear of her life, he was charged with a lesser crime of maltreatment of a subordinate and adultery and sentenced to one-year confinement.

So you may surmise that in the eyes of Elisha and the other victims of the commander they were abused not once but twice, first by the offender and then by the justice system.

So this very, very brave young lady decided to take her plight to Congress, and that's how we connected, which led, really, me to file an amendment to the 2013 National Defense Authorization Act, which brings us here today because Congress did direct this independent panel to conduct an assessment of instances in the armed forces in which a member of the armed forces has committed a sexual act upon another by abusing one's position in the chain of command of the other person to gain access or coerce the other person, and then to do an assessment of the likely consequences of changing the law.

So I am here to propose a different -- or an addition to the definition of rape. And not to counter -- I support Congresswoman Speier's discussion here today. I'm focusing on the definition of rape and making a suggestion -- do we have these papers? Can we give you these papers? It will be easier to follow.

Okay. So, and just to tell you where we got this from, it's from -- this language was suggested to us by the JAG officer who works in the CRS, in the research arm of the Congress. That is where we got the language from.

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So the definition of rape, which now has five -- five subsections to it, so any person subject to this chapter who commits a sexual act upon another by -- one says unlawful force against the other person, and then you will see there is two, three, four, five, six, would be the new language, which would be using their position of authority -- is guilty of rape and should be punished as a court-martial may direct.

And then you can see that same change is used throughout the 120 language. We add a definition at the end, which is Subsection 9, which defines position of authority. The term, position of authority, means superior in rank to the other person.

So, now this is one way possibly to go. This is not a strict liability, because this is -- this would require trial and proof, and so forth, where obviously a consent defense could be used. But that's just one way to go. I'm not saying that's the best way to go, but I offer that as a possibility.

But the most important -- I think most importantly I would like you to hear from Elisha, because she was there and she can give you really good insight. And I just want to say again -- to thank her because she told me she went from the lowest point in her life with what she went through and where she thought nobody would ever listen, and I know it must be absolutely a thrill for her to be in front of you all today. So I thank you.

And I just want to add what I told Elisha is that our -- when our

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sons and daughters, they put their uniform on to protect us, and we must protect them.

And I hope you can help us do that. And I thank you.

CHAIR HOLTZMAN: Thank you very much, Congresswoman Frankel. I appreciate your testimony, your being here, and your constructive suggestions.

And now we will hear from Elisha Morrow. Thank you very much for coming. I know it can't be easy for you, but we very much appreciate your doing this.

MS. MORROW: I really appreciate the opportunity to be here today. It is very difficult, but, as the Congresswoman said, it is also very empowering to see that, you know, when you have an issue like this people do actually listen.

Before I begin, I will give you a little background about myself. I live in Lake Worth, Florida. I'm a constituent of the Congresswoman, where I live with my husband John Paul. I am a police dispatcher for the city of Palm Beach Gardens where I have worked for three and a half years. And I'm currently in the Police Academy to become a law enforcement officer, so I'm actually a recruit once again.

When I was 22 years of age, I joined the Coast Guard because I wanted to serve my country. I was so excited to put on the uniform that the men and women before me had and serve our great country. But what I found there was an enemy in the ranks that I never expected.

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As a military recruit, every moment of every day is led by those in charge of you. They control when you sleep, when you eat, when you shower, when you receive medical attention, when you go to the bathroom, when you see a priest. Everything.

In the environment of instability that boot camp, by design, creates, you are completely vulnerable. The fact of the matter is that being a recruit is as akin to being a prisoner as you can possibly be. From the moment you step off the bus at boot camp, any branch, you follow any order that you are given. And as she stated, there are no question marks, ever.

So if the commander tells you to come into his office after taps, you do it. No questions. If he says to close the door behind you, you do it. If he spreads his legs and tells you to scrub the floor between them, you do it.

Shortly after arriving to basic training in Cape May, New Jersey, I was hand-chosen by our lead company commander, Carlos Resendez, to be the house mouse, meaning I was required to clean his office after taps every -- after everyone else had retired for the evening.

It didn't take long before his abuse began, with him constantly making sexual comments, innuendos, acting inappropriately, watching every move I made, walking uncomfortably close behind me, having me take my hair down, which was a huge violation of uniform policy, and asking me about my relationship status.

He soon also turned his attention to my fellow recruit, Tiffany,

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who, just like me, was a young blond with blue eyes. Resendez would juggle his time between being alone with me in one office one night and having her clean a separate, unoccupied office next door.

His sexual and verbal abuse continued and progressively worsened for eight weeks. We had nowhere to turn that felt safe, no reporting option, again, that felt safe. That's the key word; nothing felt safe.

If simply walking away had been an option, we all would have. I would have walked home 1,000 miles from Cape May just to get away if I could have, believe me. It wasn't an option.

He soon — in the isolated environment, 100 miles from your family and friends, when calling 911 goes to the base fire department where your commander's friends work, where do you go? If you did reach out to another company commander or staff member, who is to say you would be believed? Who is to say they wouldn't have just turned around and told the person that was abusing you?

As a recruit, everything that you do is wrong. Is it really a safe bet to put your word against someone who has a decade of service in the military?

Somehow, with the support of our shipmates, Tiffany and I survived Cape May and tried to move on with our careers, thinking that silence was the only option. We graduated Cape May, went into the fleet, and another company moved in. Another chance for another victim. Resendez chose another young

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blond hair, blue-eyed female. Her name was Megan, and she was 19 years old.

Her abuse started, not unlike mine and Tiffany's, but it didn't stop where it had with us. I believe emboldened by our silence, he took his abuse a step further. He began exposing himself, insisting that she watch, and pressuring Megan for sexual favors. She was terrified, but, like us, she had no idea where to turn.

Doing everything she could to try to appear less attractive to her abuser, she stopped shaving her legs thinking, maybe he'll leave me alone. She wanted nothing more than an escape from the abuse that she was enduring, but there was none.

After several weeks, he asked her if she used birth control. Shaken, she asked him why he wanted to know. The following night she found out. Doing as she had been ordered, she removed her shorts in his bathroom and was sexually assaulted. Just like those before her, Megan left boot camp and did her best to try to forget what happened, and his abuse continued.

It wasn't until 2010 that I received a phone call from Tiffany. She explained that she had met another recruit, Paige, who had newly -- who had recently graduated from boot camp and had been a recruit of Resendez. Her abuse had been nearly identical to ours.

It was at that time that Tiffany and I made the decision to contact Coast Guard Investigative Services and break our silence. An investigation ensued, and in the fall of 2012 we attended the sentencing trial of our former company

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commander. Sitting side by side, the four of us who look more like sisters -- we were actually mistaken for a group of sisters at one point -- listened as the judge issued his ruling.

Resendez was charged with multiple counts of maltreatment, failure to obey an order, and adultery. These are the most serious crimes he could be clearly convicted of. Under the current specifications in UCMJ Article 120, it could not be clearly proven that he was guilty of his most serious offense -- rape.

This man raped one of my shipmates and harassed the rest of us and he got by with a slap on the wrist. Why?

Currently, the article states that in order to commit the act of rape the offender must meet the following criteria. By use of force against the other person; by threatening or placing that person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping; by causing grievous bodily harm; by rendering the victim unconscious; or by administration of drug, intoxicant, or similar substance.

However, this article does not include sexual activity that occurs under coercion or order of a superior. Due to this loophole, he was not tried for sexual battery, as he should have been, even though when asked if the sex between he and Megan had been consensual he replied, I hope so.

In the Article 32 hearing that preceded our perpetrator's guilty plea, the convening authority said, it is my opinion that the accused created a trap to

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snare Megan, and that over time he wore down her resolve and any opportunity that she may have initially had to evade him.

From her confused perspective, she talked about how one night she finally had to have sex with her -- with him because she had run out of excuses, yet all the while her military duty required her to be at his office after taps.

Resendez served roughly nine months of a one-year sentence. It is the worst kind of injustice to see a man like this get off with such a light punishment. He didn't just harass and assault, he changed the way we felt about the Coast Guard. He cut short military careers. He took away all of the pride that I had the first time that I put on that uniform. That's why I went and sought out the Congresswoman, to see that we made this change, and I hope that we will.

And if everything else that I have said means nothing to you, I would ask you to consider this. Due to the current state of this law, Carlos Resendez was not convicted of sexual assault. As such, he is not a registered sex offender. Does that scare you? He could live in your neighborhood. He could be your children's soccer coach. He could go to your church and you wouldn't know.

As someone who is on the front line of law enforcement, taking those first calls, I can tell you that it should terrify you that this man could be among you and you would never be the wiser.

I thank you again for giving me the chance to be here. I can't tell you how helpful this is.

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CHAIR HOLTZMAN: Yes. Thank you. I know how difficult it has been and is, but we are very, very grateful that you took the time and the trouble to come.

Mr. Taylor? Members of the panel will now get an opportunity to question. Mr. Taylor?

MR. TAYLOR: Yes. Thanks to each member of the panel for being here, and thank you especially, Ms. Morrow, for sharing what has to be a very difficult story. Thank you so much for your courage and for sharing that with us today.

Congresswoman Speier, thank you for your leadership and all your work in this very important area. You mentioned during the course of your testimony that other states had adopted laws somewhat similar to that which you had proposed in the bill that we have had a chance to look at. Do you have any idea how that is working in the states that have adopted the strict liability approach?

CONGRESSWOMAN SPEIER: My understanding is that it's working admirably. I have no reason to doubt it. I could research it some more and give you some additional feedback, but I don't have any feedback that would suggest that it's been problematic.

MR. TAYLOR: One of the things that we are interested in, of course, is best practices from other jurisdictions. So if that were possible, and if you would be inclined to do --

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CONGRESSWOMAN SPEIER: I would be happy to.

MR. TAYLOR: -- so, I think that would be helpful to the panel.

CONGRESSWOMAN SPEIER: Be happy to.

MR. TAYLOR: Thank you.

Congresswoman Frankel, thank you also for suggesting that our panel consider this important topic. And even though, of course, I have just had a quick chance to glance at the proposal that you put before us, I do have a question about it.

The operative words seem to be added, using their position of authority. And yet when I went to the definition that also was added, the definition, position of authority, means superior in rank to another person. There are situations in the military, although somewhat rare, where someone may actually be superior to the person they are supervising or inferior to the person they are supervising.

In the medical community, for example, you might have a Major who is actually in a supervisory position over a Lieutenant Colonel, because he or she is a more experienced cardiologist. So I assume it wouldn't do any violence to your definition if we tweaked that, if someone wanted to tweak that to say, using their rank or position of authority, because it could be either in a military context. Am I correct?

CONGRESSWOMAN FRANKEL: Mine is only a suggestion, but I really leave it to you to figure out what exactly would be the proper wording, and I think it's the gist of it, which is I think Elisha really described it -- the situation the best.

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MR. TAYLOR: Someone who is in charge of another person.

CONGRESSWOMAN FRANKEL: Yes.

MR. TAYLOR: Has responsibility over them.

CONGRESSWOMAN FRANKEL: Yes.

MR. TAYLOR: Okay. Thank you.

Madam Chair?

CHAIR HOLTZMAN: Admiral Tracey?

VADM TRACEY: Thank you. And, Ms. Morrow, thank you for being willing to serve, and our apologies for how it transpired.

Congresswoman Speier, did you have a chance to consider whether there are other circumstances that while not as confined perhaps as the training environment is, as you have described it, might present a similar sort of no way out kind of a circumstance for a victim? You know, shipboard duty, forward deployed operations where there isn't a way to be gone even for the day, where you are confined to a location?

CONGRESSWOMAN SPEIER: You know, I have not, because Lackland was such a glaring black eye that I thought needed to be addressed. There probably are, you know, other circumstances where no way out applies.

But, you know, when we look at sexual assault in the military, the likelihood of it happening typically is when you first become a member of the military, so it's in the early years, or it's at the end of your career, and your interest is just about

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getting out.

So those are typically the times that predators prey on individuals within the military.

And if I could just say, Elisha, your story was so compelling, and your presentation so great, and it underscores the damage that is done, because I think in probably all three of these cases, these three fine, well-trained young members of the Coast Guard left. They are no longer in the Coast Guard.

And many of these young recruits and trainees are applying because they want to make a career out of the military, and then their dreams get wiped out because of these experiences. And that's, I think, one of the greatest tragedies, not to mention, you know, the absolute horror of the experience.

CHAIR HOLTZMAN: Mr. Stone?

MR. STONE: Yes. I also want to thank you all for being here. This has really been helpful.

I guess the question I have, Congresswoman Speier, is, would you like us to be just addressing your bill? Or would you like us to independently include it even in our other responsibilities?

CONGRESSWOMAN SPEIER: Well, I certainly want you to consider my bill. But if you want to go beyond that and look at other circumstances that create an environment where there really is no way out, you know, I would be happy to have you, you know, contemplate Congresswoman Frankel's ideas as well.

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MR. STONE: And for Congresswoman Frankel, I was going to say what I thought was based on the -- all of the testimony, which might be difficult with the word, using their position of authority, because I think that in some of these instances like we just heard some of those offices are going to say, oh, I didn't use my position of authority because I never ordered her to do anything.

And so I wondered if it should say something like, using explicitly or implicitly their authority, because I think most of these are going to be implicit, and you are never going to be able to -- they are not crazy enough to -- well, maybe some of them are, but once they see the statute, they are just going to imply that bad things are going to happen, and I think that's enough for these 17, 18, and 19-year-olds to be pretty scared. So I just wondered if --

CONGRESSWOMAN FRANKEL: Right. I think you make a very good point, and I -- here is where I think -- one of the reasons I think it's very important to change this statute on rape is because you don't want to have -- you want to have the situation where it was not consensual. The victim will come forward.

You may have a situation where you had a consensual situation where the victim does not want to come forward and testify, and sometimes when the -- if a punishment is too great, or in certain cases if it was -- if you only had situations of strict liability, that's why I think you need both situations, because you want to have that situation where someone who is truly in a non-consensual situation to be -- where the offendant will get the most severe -- is subject to the most severe

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penalty.

MR. STONE: I guess --

CONGRESSWOMAN FRANKEL: I'm not sure if I --

MR. STONE: I think you expressed it, but I'm still worried that a person who was in Ms. Morrow's position, she may say that one of the friends consented because she thought she had no choice, and that person might even say on the stand, I consented, but it's because I was worried. And I think that's still going to give the prosecutors a difficult time to figure out what to do with that. So I don't know if we need to think about addressing that just to --

CONGRESSWOMAN FRANKEL: Well, let me just say this. This was -- this language business was suggested, but it's not -- may not be the perfect language. I mean, I'm glad that you have these thoughts. Elisha came and presented a predicament that obviously there needs to be -- I mean, it's -- to me, it's just quite ludicrous that they have to charge this man with adultery --

MR. STONE: Yes.

CONGRESSWOMAN FRANKEL: -- to punish him. That in itself is quite ludicrous. So, you know, maybe you can come up with some better language.

You know, look, one of the options is just -- if you just go with strict liability, but sometimes the problem with that is that somebody may not even come forward. That's the other --

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MR. STONE: Yes.

CONGRESSWOMAN FRANKEL: What is your penalty under -- with this -- may I ask, what is your penalty with the strict liability? Is there a --

CONGRESSWOMAN SPEIER: Well, the penalty -- see, here is the problem. Because we don't have sentencing guidelines in the UCMJ, the penalty can run the gamut. But what we are trying to fix here is the fact that there is no opportunity for consent in that training situation. And if you make it strict liability, so then at least they -- there is not the mitigating defense that one consented because it's absurd to think that they do.

CONGRESSWOMAN FRANKEL: Well, this goes -- this is not just in the --

CONGRESSWOMAN SPEIER: Yours is more --- is broader.

CONGRESSWOMAN FRANKEL: -- mine is a much broader context, not just in training.

MR. STONE: I guess the other question that I would be happy if anybody addressed was I kept hearing how in one situation two people came forward at Lackland Air Force Base, but it wasn't until the third one came forward that something happened. And in Ms. Morrow's case, she kept explaining how they felt like they had nowhere to turn.

Now, she is training in a police -- as a police official now, and I know they have an Internal Affairs Bureau, which is separate from the normal reporting

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situation. And I'm just wondering if there needs to be a separate way, so that even if we change the statute, if the young women don't come forward, because they are still worried, regardless of the fact that it may be easy to get a conviction, if they are still not going to come forward, feel like there is somebody to talk to -- that they can -- who is going to take it seriously, I think we are still -- we are not really addressing the problem.

And I just wonder if there needs to be -- I don't know who that person is, but some other kind of reporting official who is available to them, either by hotline or whatever, so that they can lodge a report that gets taken seriously like at Lackland for awhile it wasn't. And I don't know if you have any thoughts about that.

CONGRESSWOMAN SPEIER: Well, Mr. Stone, it's important in the Lackland situation to recall that not one of the victims ever came forward. These were MTIs who had had enough observing this other MTI, and then you found out that there were 32 MTIs that were engaged in it.

So, I mean, I have very strong feelings about the importance of taking it out of the chain of command. And until victims know that there is some external review that is going to be fair and not subject to the -- you know, just the vagaries of a chain of command that knows the perpetrator is the perpetrator, you know, I don't think we are going to change it.

Now, we have actually elevated the review to I guess an O6 now. But I am not convinced that's going to have the result that we need. It really needs -- and that's the larger question, taking it entirely out of the chain of command,

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so that victims feel confident that there is going to be an external review that is indeed independent.

Right now, it's the convening authority that makes the decision and makes the decision whether or not to investigate it in the first place. And then, even after it's investigated, makes the final decision as to whether or not it is going to go to court-martial.

MR. STONE: So do you think these sexual assaults per se need to be reported -- able to be reported to, say, an Inspector General or somebody who is -- somebody, you know, or Internal Affairs Unit that is not in the chain of command?

CONGRESSWOMAN SPEIER: Absolutely. Yes.

CONGRESSWOMAN FRANKEL: I don't know if Elisha mentioned this, but her -- the commander was in charge of the --

MS. MORROW: No, I did not. I'm glad you brought that up. He actually was responsible for teaching our sexual harassment class. I believe we were on -- I mean, probably the second or third day with him as his recruits, he stood up, he did a PowerPoint, and he said, if you guys ever have any issues with this, you come to me, because nobody is going to mess with my recruits.

So, you know, initially I was like, great, you know, we've got a good guy here, and then, you know, it just spiraled out of control.

CONGRESSWOMAN FRANKEL: If I might, I -- my staff suggested some language listening to -- on this definition. I don't know if this is any

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better, but it takes into account some of what you said. Instead of using their position of authority, it would be explicit -- implicitly or explicitly using their position of authority coercively. Is that --

CHAIR HOLTZMAN: Well, let me just say that it's not a good idea to write legislation right here. I once wrote it in a telephone booth, and it withstood the Supreme Court scrutiny, but it's not the right way to do it.

CONGRESSWOMAN FRANKEL: You got the idea.

CHAIR HOLTZMAN: But let me just ask a few questions here. First of all, I think these suggestions are really important, and I'm glad that you've elevated it and required us to take a look at it. First, Congresswoman Speier, let me ask you this, because I haven't really studied this, but I can see the attacks coming.

Of course, there is always the issue of we don't want to change the system and stability, and so forth and so on. But if you -- your ears should have been burning, because there was at least one person who testified earlier who said there should be strict liability here, somebody who was from the military. He wasn't speaking for anybody but himself, but that was his view.

Let me just ask you this. Does removing consent create -- in other words, having strict liability and removing the issue of consent, does that create any constitutional issues? Have you looked at that?

CONGRESSWOMAN SPEIER: Well, I think that you can rely on the fact that other states have passed laws that have created strict liability with the

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teacher-student relationship. The constitutional question that was raised in the original had to do with the fact that you just shifted the burden, and in this case it's --

CHAIR HOLTZMAN: Okay. So nothing that you understand would create a constitutional --

CONGRESSWOMAN SPEIER: Right.

CHAIR HOLTZMAN: -- problem with this. My second question has to do with whether you think -- this is not a very well-drafted statute altogether -- whether you think that there is some way that this problem can be addressed, maybe not getting to strict liability, but getting a little bit to the point that Congresswoman Frankel made, that maybe it -- tweaking either through judicial benchmarks or through executive order, whether some of this conduct could be covered under the existing statute.

Specifically, looking at the term, threats, threatening or placing another person in fear. The way the statute's written now is not good. But because it's not -- if you -- I don't know if you have -- if you look at Ms. Frankel's bill, on page 3 -- well, the end of -- bottom of page 2, beginning of page 3, threatening or placing another person in fear could potentially cover this, although the language is really not good.

I'm sorry to -- I don't mean to spring this on you, but if you have any thoughts as to whether executive -- an executive order by the President could clarify this and make it applicable to situations where the wrongful act would be the

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sexual act itself, and so that that could cover this kind of a case and the kinds of cases that, Congresswoman Speier, you were raising.

I don't have an answer, but I just throw that out for your consideration and your thoughts and your suggestions to us. I'm not saying it is better than a statute. But if we can't get a statute, would some kind of executive gloss on this language help?

CONGRESSWOMAN SPEIER: I guess my only concern there would be it's already in the statute, right? It's --

CHAIR HOLTZMAN: Right. But the statute, the way it's written --

CONGRESSWOMAN SPEIER: It's threatening or placing that other person in fear.

CHAIR HOLTZMAN: Subject to the wrongful action contemplated by the communication or the action. I'm just asking whether there is some way of creating a gloss or an interpretation through executive order that would make that provision useable in this context. I'm not saying it's as good as. I'm not doing that. I'm just saying, could that be tweaked in such a way? I don't mean legislatively, but through executive order or otherwise, to make it useable in helping to protect people who are subjected to this kind of abuse.

CONGRESSWOMAN SPEIER: Well, I guess --

CHAIR HOLTZMAN: And if you don't have any thoughts now,

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that's fine --

CONGRESSWOMAN SPEIER: Okay.

CHAIR HOLTZMAN: -- on this point. But if you have -- I don't mean that. That didn't come out the right way. If you have at some later point some thoughts about how we could look at that -- that way of addressing the problem, I would appreciate that.

CONGRESSWOMAN SPEIER: Okay. We'll look at it.

CHAIR HOLTZMAN: That's in no way to diminish the importance of your suggestion or the desirability of solving these problems from a statutory point of view, which is generally the best thing to do.

I don't have any further questions, but I just, again, want to thank you for raising this really critical issue and a major gap in the statute. So thank you very much.

CONGRESSWOMAN SPEIER: Thank you very much.

CHAIR HOLTZMAN: And thank you, again, Ms. Morrow, for your testimony.

MS. MORROW: Yes. I just want to present to you guys -- I do have the Article 32 document that contains all of -- or a good portion of the information about our case --

CHAIR HOLTZMAN: Good.

MS. MORROW: -- if you'd like to review it at a later time.

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CHAIR HOLTZMAN: Sure. We would appreciate it. We'll take it for the record, and it will go on our website.

Thanks again very much.

Can we just take a five-minute break?

(Whereupon, the above-entitled proceedings went off the record at 1:32 p.m. and resumed at 1:42 p.m.)

CHAIR HOLTZMAN: Thank you very much. We have a new panel of presenters who are going to be discussing the issue of prosecuting abuse of power offenses under the UCMJ.

Our first presenter is Captain Steven Andersen, U.S. Coast Guard, Commanding Officer Legal Services Command. Captain Andersen, welcome and thank you for your appearance today.

CAPTAIN ANDERSEN: Good afternoon, and thank you Madam Chairman. And if I may, before I start, reiterate that what happened to Ms. Morrow and what we just heard was horrible, it was terrible, it was criminal.

As a Coast Guard member and someone who wears the Coast Guard uniform, I regret that that happened to her. And I too admire her courage. And there are several changes within the Coast Guard in addition to the provisions in law affecting the Coast Guard that have come about as a result of that case.

Madam Chair, I've been in the Coast Guard for about 29 years and for about half of that I've been a Coast Guard Judge Advocate. For the past three

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years I've been the Commanding Officer of the Legal Service Command.

In that role I'm responsible to provide legal support, including the court to military justice and prosecutions to the Coast Guard's mission support community. And for purposes of our discussion today, that includes the Commander of the Coast Guard Forces Command, which is the flag level general court martial convening authority that oversees the Coast Guard Training Center.

Although I'm the Staff Judge Advocate for this Forces Command, and my staff prosecutes military justice cases that arise out of our Training Centers, I am not on the staff of that convening authority. My chain of command reports directly up to the Judge Advocate General of the Coast Guard.

I'll get right to the specific questions I think you wanted to know my opinion on. And I certainly appreciate the position from the previous panel.

However my personal opinion is that the existing punitive Articles in the Uniform Code of Military Justice are generally sufficient to capture cases where there is abuse of power in training or in any other environment for that matter. There are always going to be difficult cases and difficult charging decisions.

I will offer one minor suggestion that for your consideration. And that suggestion is that I think in the maltreatment charge, Article 93, currently I believe has a one year maximum penalty, to consider whether the maximum punishment for maltreatment should be increased for cases that occur where there is sexual -- a sexual act or a sexual contact between a trainer and a trainee regardless of

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consent.

So in essence for those cases where the elements of sexual assault are not met, for example, there's not force, there's not constructive force, this would allow use of an existing Article that could be changed I believe via Executive Order to increase the punishment for a certain type of maltreatment.

And I've learned this morning after talking with some of my colleagues that there already I believe is a proposal to do that. That is, might be making its way to the President as an Executive Order. But I think that is something that also should be considered.

Thank you Madam Chair and I look forward to answering your follow up questions.

CHAIR HOLTZMAN: Okay, thank you. Our next witness is Colonel Adam Oler, U.S. Air Force, formerly Staff Judge Advocate, Joint Base San Antonio, Lackland, Texas.

COLONEL KENNY: Madam Chair, I'm Colonel Polly Kenny representing the United States Air Force. That was --

CHAIR HOLTZMAN: Oh.

COLONEL KENNY: That was a prior name that was slated to testify.

CHAIR HOLTZMAN: Well I could see that you weren't Captain -- Colonel Adam Oler, but I thought maybe he was somewhere else on the

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panel. Okay, so --

COLONEL KENNY: I'm channeling him now.

CHAIR HOLTZMAN: Okay, thank you.

COLONEL KENNY: I am the -- I am the Staff Judge Advocate of Air Education Training Command at Joint Base San Antonio, Randolph Air Force Base, Texas. And I have testified before you before at the --

CHAIR HOLTZMAN: Correct.

COLONEL KENNY: Response Systems Panel with my then boss General Edward Rice. And also before one of the RSP Subcommittees at Lackland Air Force Base.

As you know, the portfolio of Air Education Training Command is very broad. We are responsible for all Air Force accessions except the Air Force Academy. All Air Force enlisted basic training. Almost all of the technical training for the Air Force including flying training. And almost all of the Air Force university and education programs.

By way of background, I have been a Staff Judge Advocate four times prior to assuming my current position. I have been in the Air Force as a JAG -- Judge Advocate the entire time for 25 years.

I've advised at my current general court martial convening authority and two other general court martial convening authorities and nine special court martial convening authorities through my career. I've prosecuted and

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defended over 100 cases. I've served as the Chief Defense Counsel for the Air Force, supervising over 100 military attorneys doing criminal defense work worldwide.

I've also served on the faculty of the Air Force Judge Advocate General School in Alabama teaching criminal law and advocacy for three years. I arrived at AETC about 16 months ago. Prior to that I was the second Air Force Staff Judge Advocate.

Second Air Force is in charge of all basic and technical training for the Air Force. To put it bluntly, I've been involved with the basic training issues since before day one.

I was -- I have spent hours with trainees. I had the privilege of being with Congresswoman Speier when she spent time with the trainees. I have advised on the investigations at all levels.

I've served as the legal subject matter expert for the media for the first four or five cases including the most notorious, the Walker case. And in that role I sat in the courtroom and listened to every word of testimony in all those cases.

It was a unique perspective because I was able to back feed to my boss, the Second Air Force Commander and to the 37th Training Wing Commander who controls basic training, information on the spot so that we can make corrective actions as soon as possible as we discovered the gaps that we had there within basic training. And since then I have continued to work through our oversight counsel structure to this day in ensuring that we're establishing enduring change in the basic

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training environment.

The last point I'd like to make before I sort of give an opinion is that I am the primary author and the certifier of Air Education Training Command Instruction 36.2909, which sets forth the standards for -- by which we use Article 92 of the Uniform Code of Military Justice to prosecute these offenses. And I really do look forward to discussing with the panel the prosecution and success of prosecution of the offenses using the current construct of the Uniform Code of Military Justice.

In short, my opinion is that Article 92 does work. And that we have a good history of it working and therefore I would say that as an overall construct I would oppose the changes as set forth by Congresswoman Speier. Interesting changes from Congresswoman Frankel that I would be interested to discuss. Thank you.

CHAIR HOLTZMAN: Thank you. Even if each of you believes that Section -- Article 93 or Article 92 or some other Article is applicable, I would appreciate your addressing in your opening comments whether you think changes are required to Article 120 to deal with the abuse of power.

Okay, thanks very much. Our next -- do you have a comment about Article 120?

COLONEL KENNY: Actually ma'am, yes I do. The -- I tend to like the thought where Congresswoman Frankel was going with the abuse of authority being added in a little bit more clearly into Article 120.

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Three of our cases of the lack -- in the Lackland MTI scandal, for lack of a better word, we attempted to put on evidence. And attempted to prove Article 120 through fear of you know, impacting their military career.

So we tried to use that as the coercion piece under Article 120. We charged the same misconduct under Article 92 also as an unprofessional relationship. We were successful in obtaining convictions under Article 92, unprofessional relationships.

But in those three cases, the jury found the accused not guilty of the Article 120 where we were trying to use fear of impact to the military career. Thank you.

CHAIR HOLTZMAN: Thank you. Our next presenter is Lieutenant Colonel James Varley, U.S. Army, Government Appellate Division. Lieutenant Colonel Varley, thank you for being here today.

LT. COLONEL VARLEY: Madam Chair, members of the panel, I'm very honored to speak before you today. I am currently the Deputy Chief of the Government Appellate Division for the United States Army.

I've served in the United States Army for 31 years. I originally enlisted in Iowa Army National Guard when I was a 17-year old Junior in high school. My parents went down with me, I signed up.

In the summer between my Junior and Senior year of high school, I traveled to Fort Benning, Georgia approximately two months after my 18th birthday

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to undergo basic training. I completed that training that summer and the following summer before my first year of college, I went to advanced infantry training.

I mention that because I have been subject to the type of power that has been described here earlier. And I have a first hand knowledge of what it is like to be a young, junior enlisted soldier in a very strange environment.

It was the first time I'd ever been away from home for more than two days. And my going to Fort Benning was a formative experience in my life. In my case, a very good one. I'm sorry that not everyone's is the same.

Throughout my education as an undergraduate in college, and then later in law school, I continued my service in the Army National Guard as an infantry officer, culminating in my Company Command throughout my three years of law school. Upon being commissioned, or rather leaving law school, I became a Judge Advocate where I've served for 19 years.

Of that 19 years, I've served approximately 16 in criminal law. Two years as a trial counselor or senior trial counsel. Three years as a defense counselor or senior defense counselor at Fort Leavenworth, Kansas. Two years as Chief of Justice at Fort Sill, Oklahoma, which does supervise drill sergeants in initial entry training.

For three years I was a professor of criminal law at the United States Army Judge Advocate General's Legal Center and School where I taught in the area of criminal law. I served a year as the Regional Defense Counsel supervising 23

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defense counsel stretched across Iraq, Kuwait, and Afghanistan defending soldiers in the CENTCOM area of responsibility.

And then spent three years as a Military Judge at Fort Hood, Texas where I was responsible for a number of different Army installations to include Fort Sam Houston, Texas, which also has supervisory responsibility over advanced training of medical corps individuals as well as other trainees.

That all culminating in my responsibilities at GAD where I review the Government briefs in response to defense as signing survey of court-martials throughout the country. I review all of those.

So I feel I'm fairly well prepared to answer questions policy wise regarding what's going on now in the service regarding abuse of power offenses. I have an historical knowledge of them going back to my first days in basic training.

And my considered opinion is that Article 120 does not need to be amended to cover an abuse of power offense, because it is adequately covered by the toolkit available to prosecutors now. I believe that Article 92, fraternization and prohibited relationships provides a strict liability offense for drill sergeants who engage in sexual activity with basic trainees or those individuals involved with initial entry training.

That provides for a dismissal as well as two years of confinement. The prosecutor may also elect to prosecute an individual under Article 93 for maltreatment. Under Article 133 if it's an officer, for conduct unbecoming an officer.

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As well as in situations where there is a threat of something less than bodily harm, of extortion under Article 127, which has a three-year maximum punishment as well as a punitive discharge.

There are other offenses that are also available to prosecutors such as were talked about by Ms. Morrow which included an adultery charge is sometimes available in these cases. In other words there are a variety of currently prohibited conduct that is punishable under various Articles of the UCMJ.

And I think adding another 120 offense, particularly in situations where there is no threat of bodily harm, may wind up -- I would see it as diminishing the importance of Article 120. I think when you're looking at a paradigm, what do we consider a 120 offense and what do we not, getting back to another panel member's suggestion. That we have to be concerned about why we are criminalizing conduct.

I think the crossing of the Rubicon with regard to 120 has to be a threat of some type of bodily harm. I agree with what was earlier mentioned is under the current version of Article 120, the threat of placing the victim in fear, that sub-threatened wrongful action is available to prosecutors.

My observations and my inquiries resulted in a finding that, that is not a subsection of Article 120 that has been used. I've never seen it used except in situations where there is some threat of wrongful -- some type of wrongful bodily harm.

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And I can answer questions a little later in these proceedings as to why I think that it has not been charged and why I think it would be an incorrect application of the law for it to be used.

CHAIR HOLTZMAN: Thank you very much Lieutenant Colonel Varley. Our next presenter is Lieutenant Colonel Michael Sayegh, U.S. Marine Corps Staff Judge Advocate, Training Command, Quantico, Virginia.

LT. COLONEL SAYEGH: Good afternoon Madam Chair, panel members. My name is Lieutenant Colonel Michael Sayegh and I'm from Training Command, I'm the Staff Judge Advocate there.

Prior to that I've served in the Marine Corps for over 19 years, starting in 1995 exclusively as a Judge Advocate. So that's pretty much everything I've done in the Marine Corps.

I've served multiple billets in trial and defense as a counsel -- trial counsel, defense counsel and a supervisory position. I've served in multiple levels of command as a Judge Advocate and such what I'll call unique corners of the Marine Corps such as Embassy Security Group, Marine Security Guard Battalion, served with the Wing and served even for the Reserves for three years, a Reserve Commander.

I sit here today as the Staff Judge Advocate for Training Command. That Command is situated in Quantico, Virginia. However, we have oversight for 64 thousand entry level students every year going through their entry level training throughout the country.

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They are globally disbursed. This presents its challenges as you can imagine when dealing with anything military justice related.

I can tell you that our students are 19 to 21 years old, which means they are coming to us out of boot camp with the same perceptions and bad habits if you will, of what you can perceive or believe to be going on in high schools and colleges. I sometimes refer to myself as a dean of discipline if you will for a college campus that goes coast to coast.

Before I came to Training Command in 2012, I thought I had seen it all. Every day I'm reminded that I've not. I would also like to point out that I am the father of five, three girls and two boys.

And I think that's important when we're talking about matters such as these, because as much as we like to pretend we can come to the office and leave the family behind, it's situations like these that clearly are collateral duties if you will, impact our decisions and perceptions of things.

The issue of Article 120. I would just ask the panel members to consider the complexity of the -- when we use phrases like training and trainee and trainer. It's not as clear as the drill instructor and the boot camp poolee if you will. For instance Training Command does not even get the Marine until after they've gone to boot camp.

And the boot camp environment in the Marine Corps, which is the only environment that I can speak of, is much more controlled then when they get

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to what we'll call their MOS school. When they start their training for what their MOS is.

In fact what we found in 2012, what I found when I got there was a lot of these young adults, the second they get out of boot camp, they go on what we call boot leave. They get about two weeks off before they report to their entry level training school

And they come back to entry level training school, and sometimes you'd think they had never gone through boot camp. For the first time in their lives for some of them, and they come from all over the country, they're away from home, they don't have parental supervision. Liberty is sounded at Friday and they're not due back until Sunday afternoon.

Unbelievably, a number of them immediately, regardless of their age find a way to gather in hotel rooms or in places where they're not supposed to be and drink. And the conditions are set for bad things to happen.

I bring that up only because we recognize at Training Command that this is when they're the most vulnerable to the instructor that will abuse their authority and take advantage of them. And we take even the mere allegation extremely seriously.

Upon an allegation, an instructor is immediately pulled from the platform. And I say immediately, I mean literally immediately. I'm serving for my third Commanding General now, and that is without hesitation the way we approach

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this.

And that is because we've recognized exactly you know, the implications of what you've got there. You've got a young adult, brand new to the military. This is going to be -- set the tone for the rest of their career. And you know, the mission at Training Command is to make fleet ready Marines.

A fleet ready Marine is not one who doesn't trust their leadership, who doesn't trust the Marine Corps. Does it happen? Absolutely. But we're dealing with it.

So I ask that when you look at making changes to 120, you have to be aware that there's differences in school lengths, there's differences in situations. I'll use the example of our language institute out at Monterrey.

Depending on the language you take, you could find yourself training for your MOS for up to two years to learn Arabic. So the instructor may be only one pay grade above you. And you may have known that instructor for years at a time.

So a relationship might build. Now the professional relationship doesn't change. But I'm a little concerned when we talk about strict liability over a period of time when now this entry level Marine that came in at 19 is now 21. And then maybe a sexual contact occurs that was consensual.

We also have follow-on schools. Which you have you know, now the student can be a staff sergeant or a gunnery sergeant. And the instructor

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can be an officer or a senior enlisted. And if we're going to use strict liability, we need to just be aware that every definition of a student to instructor used across the board, may not impact, the spirit of the law may not be what it's intended to be.

And I just want to briefly comment if I could on the suggestion of review outside the military. And I certainly want to be clear that I speak for myself when I suggest that the military justice system was not intended to make a victim whole. Many victims who use the military justice system are not satisfied.

But I would submit that there's probably many victims in the State and Federal system that feel the same way. And I would ask that you take a significant pause, what we call an operational pause and think about the second and third order of effects.

If you start taking something out of a commander's hand and put it in a -- outside of the military review, and what the consequences to the trust and confidence the service member will then have. Even the one who's not involved in the military justice. In other words one that's not involved in the incident.

Those who don't have any issues with sexual assault begin to see that there's some things that a commander doesn't have the discretion to make. There's some things that my commander isn't allowed to make. And how that could undermine and negatively impact military discipline.

Thank you. I stand by for your questions.

CHAIR HOLTZMAN: Thank you very much Colonel.

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Lieutenant Commander Ryan Stormer is back for a second go around.

LT. COMMANDER STORMER: Yes ma'am.

CHAIR HOLTZMAN: A glutton for punishment. As I mentioned before, Lieutenant Commander Stormer is a member of the U.S. Navy, Trial Counsel Assistance Program. Lieutenant Commander Stormer.

LT. COMMANDER STORMER: Madam Chair, panel members, I thank you again for letting me get the opportunity to talk to you about this different topic.

First of all, again, I am the current Assistant Director at Navy's Trial Counsel Assistance Program. And in my position, I have the opportunity to talk to trial counsel pretty much throughout the entire region and throughout the world for the Navy.

And specifically on this topic of prosecuting abuse of power offenses I've had the opportunity to speak to our senior trial counsel, senior prosecutors about trends and things they've seen with this particular concept. Particularly, those senior trial counsel in the high areas where we have a high number of sailors, especially those junior sailors, Great Lakes, Pensacola, Norfolk, Virginia and Charleston, South Carolina.

And based on what I -- my conversations with them, and based on my own personal experiences, I haven't really noticed any particular trends to point out to the panel members. But I would say that we do have the ability in my own

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personal opinion to prosecute these type of cases under the current Article 120 statute.

Some of the conversations from the last session that has kind of gone into this session, have talked about the issue of threat. I would also put forward that in these type of cases, we have the ability to charge an individual with the concept of bodily harm, focusing on whether or not an individual is in fact of consenting or not consenting to sexual acts.

And what I mean by that is that by focusing on the consensual nature of the act, it is my opinion we still can argue the concept of constructive force. And whether that be focusing on the power dynamics of a situation, whether it be focusing on the rank differential and whether it be focusing on the environmental factors, that in and of it by itself, can be a situation where it can put an individual where they cannot consent.

And therefore we can charge those cases and make an argument in those cases as a prosecutor that a person in that situation was non-consensual. And so therefore, I think that in these particular situations, we can in fact prosecute these cases under a bodily harm theory in addition to some of the other things that have already been brought up by other panel members as far as threatening and some of those other concepts that we can use in these particular cases.

And I would like to point out in addition to what I just said, at Navy TCAP, we actually, and part of our training of prosecutors, when we train Article 120, is we do in fact train our young prosecutors, our senior prosecutors, whoever is in

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fact there, we do train them about this issue of constructive force. And while I would agree that it may be helpful to have something maybe in writing that can kind of direct the panel, we believe we can still argue this concept of constructive force. And it's something that we in fact train our prosecutors about, again focusing on power dynamics, environmental situations and things like that.

And that's all I have and subject to your questions. Thank you.

CHAIR HOLTZMAN: Thank you very much.

MR. STONE: Can he answer your two questions about whether 120 should be changed?

LT. COMMANDER STORMER: Yes sir, my opinion, I don't think as far as the statutory construction, I think the way it's currently constructed, we in fact can prosecute these kind of cases under the current construction.

If there was any kind of clarifying statement or something that was added within the instruction of the Benchbook which would clarify maybe this concept of constructive force, I think that would be -- that is something that could be helpful. But I think under the way, the current construction, that we in fact can prosecute these kind of cases.

And it's again, my personal opinion that we do not need strict liability. And we can in fact proceed under the way the current statute is written.

CHAIR HOLTZMAN: Thank you. Our next presenter is Major Melanie Mann, U.S. Marine Corps, Military Justice Officer, California.

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MAJOR MANN: Madam Chair and panel members, thank you for the opportunity to present here today.

I've been in the Marine Corps for about 14 years and some change. I first came in, I first started my practice or started in the legal community in 2003 to 2006 where I was in Okinawa, Japan.

Okinawa, Japan is a fairly unique environment. Often times young Marines will find themselves out in Okinawa, Japan, their first time away from home. With that we had some very unique cases. That's where I first began my practice and in dealing with a pretty significant number of 120s at a very young age in my early -- at least for a junior part of my career.

And so I was working with victims that were very young. And we were also at that point operating on a much different statute was well. That was my first practice was in Okinawa, Japan.

From there I went to Pensacola, Florida. Now Pensacola, Florida is a training base. So it's secondary schools. You're going to have a mixture of young men and women together for the first times.

In the Marine Corps we do not have coed boot camps. So this is their first time away from that scenario, and now they're into an MOS School. And while I was in Pensacola, I had a very high degree of Article 120 offenses that I litigated over the two years that I was there. And that's also where I became a supervisor as well in military justice.

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From Pensacola, Florida I went to Hawaii. And Hawaii was more of your traditional community I would say, because you have an older group of individuals. And so you don't have those constrictions that you're going to have at an MOS school. And you also don't have the seclusion of an island.

And again though, we prosecuted not a significant amount of 120s, but we certainly had a good mixture of child abuse cases as well as rape cases. Now one interesting component though, and that in my experience in Hawaii, is that I first became, or at least at that point, with the number of child abuse cases that I had, I got very well versed in the area of constructive force. And so I spent a lot of time with children and dealing with those factors.

From Hawaii I went to the JAG School, the Army JAG School and I obtained, or I received my LLM in criminal law. I was also screened and certified as a Military Judge. I did not end up going to the bench, at that time the Marine Corps had reorganized their legal community and I was appointed Senior Trial Counsel in Miramar, and that's in San Diego, California at the air station.

Under the reorganization, at that point, our base swallowed up two other bases. And that was the air station in Yuma and also the training command, MCRD. And that was my first introduction into the types of misconduct that you're going to get out of a boot camp.

So we have a boot camp down at MCRD. We also have the recruiters, the western recruiting region. Now there are not a lot of cases, similarly

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that come out -- of the drill field again, that that scenario that I told you about earlier, which is that we have -- we don't have coed boot camps.

We do have some sexual assaults that have come out of the MCRDs and I think we talked about that a little bit earlier in reference to how one would report such an offense out of -- in that type of constrictive environment.

And I will tell you that I had the distinct honor of being able to follow a recruiting commander through a day at MCRD so that I could better understand what that environment looked like. And it is an eye opening experience in terms of the submission that is required.

But interestingly enough, I was also taken back by the level of training that's involved in that initial phase where the recruits are brought in and actually provided with their rights and how to report if there's any inappropriate touching. And it's a very in-depth training.

And they also give them the mechanisms in how to make that report, that don't include going through their instructors. So they can move outside the chain of command in order to bring a complaint forward. And we have received complaints from the MCRDs and from Marines that are in training. So that seems to be a successful training evolution.

Now in addition, I will tell you though that a lot, if you're talking about coercion, the majority of the cases that we deal with are less than recruiting region cases. But recruiting misconduct, in dealing with poolees, young women that

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are coming into the Marine Corps but are not yet in the Marine Corps.

And so that is something and I reached out to my counterpart in Paris Island to see if that was something that they were seeing as well. And that was a common -- more of a common theme that we were dealing with. And how to capture that misconduct in that, because at that point, we're not really dealing with a senior subordinate, but those characteristics are present in that relationship.

On the question, which kind of leads me to my position on whether or not we should amend the current statute. My humble opinion is that the existing punitive Articles do adequately address the criminality of a non-violent consensual -- or non-consensual sexual act.

I believe that we have the mechanisms. And they're maltreatment, they are orders violations. And looking through the case law and spending a lot of time over the last couple of weeks kind of looking into this, when you look at the sentencings that come out of these cases, so most recently Paris Island had a case with a Gunnery Sergeant.

A Gunnery Sergeant Parker. And he was found guilty I believe of five specifications of Article 92. And he was sentenced to five years and a discharge.

What that means is that that -- those factors are getting to the finder of fact. They are getting to the panel members and they're considering that that rank structure and all of the inherent authority that that brought -- that was a

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consideration to the force. And with the violation of Article 92.

So my -- when I'm looking at whether or not we should amend the specification, I would say that ma'am, you said it best earlier. If you're looking at the wrongful action, my humble opinion would be that you would incorporate that constructive force element. Though that language of what actually currently exists in the Military Judge's Benchbook, where they describe the military authority, the rank.

And as well as those factors that constructive force have developed over years, which are age and position. To bring those elements into the wrongful action so that members are aware of those characteristics and factors and they can consider that.

With that, I'm available for any questions. Thank you so much.

CHAIR HOLTZMAN: Thank you very much for your testimony. Thanks to all the presenters. Mr. Taylor.

MR. TAYLOR: Yes, thank you Madam Chair and thanks to all the panel members for your excellent presentations.

Colonel Kenny I was very interested in your example that you gave where an individual had been charged among other things with fear of impacting the military career under Article 120. Was that under the current version of Article 120? Or was that under a previous version of Article 120?

COLONEL KENNY: That was under the new Article 120 that existed two years ago. So not the current.

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MR. TAYLOR: Not the current one. So I guess my question would be, based on what I thought was your disappointment of the outcome, would it be any different outcome under the current version of 120?

COLONEL KENNY: I don't believe it would be absent some of the things that we've been talking about here. More instruction, more specific language on constructive force in relation to these other areas.

That my Marine Corps brethren down on the end so eloquently stated, the -- a strict liability standard, I'm adamantly opposed to. However, I think we can take the construct of Article 120 as it exists, refine it somewhat and it would be even better in the training environment.

MR. TAYLOR: Well, as the Chair pointed out, the charge to this particular panel among other things, is to answer the question, what impact have the amendments, the current amendments had on the ability to prosecute offenses involving constructive force. I mean with that precise question, what would you say the impact has been of the current amendments on the ability to use constructive force?

COLONEL KENNY: We have not had any cases.

MR. TAYLOR: So let me address that question more generally to everyone. Would anyone like to comment on that? What has been the impact, or what do you see is the impact?

LT. COLONEL SAYEGH: I'll answer that sir. None.

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Nothing positive, nothing negative. We carried on under the same using -- there was a lot of collateral misconduct that has to occur before you can even get to a sex act. Starting with fraternization, starting with drinking, starting with you know, just interacting with a student against general orders.

So the act is you know, -- so whether you rewrite it into the law or not, I mean and the way it was rewritten, it has not impacted, undermined or provided any additional tools for prosecuting.

MR. TAYLOR: Colonel Varley, you looked as if you would like to say something, please do.

LT. COLONEL VARLEY: I cut off my Marine brethren. It's a rare case that doesn't involve some form of bodily harm as it could be charged. And that's a fairly straightforward way to charge it, and the panel members understand that.

The constructive force argument, I just don't see -- I don't see it charged, I haven't seen it in any appellate briefs that I've seen. I don't think it's something they reach for except in situations where it falls more into the maltreatment or the prohibitive relationship, part of Article 92. Which is what I was discussing earlier.

That is strict liability. If you have a sexual relationship with a trainee and you're a drill sergeant, it's strict liability. You have violated Article 92 and you're subject to you know, two years confinement and a punitive discharge.

MR. TAYLOR: Colonel Sayegh I'm not picking on you just

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because you volunteered to answer that question, thank you very much. But I do have a question for you about something you said.

And that is that you were cautioning us not to look at training as just about boot camp. But to look at training as some sort of continuum that continues into the advanced training that individual service members may have.

But I didn't really understand what it was you were saying about that. Because it strikes me as someone who is a teacher, that it doesn't really matter whether the person is in boot camp or not, over whom you have jurisdiction or some authority as to how you evaluate these cases.

So would you explain that? Help me understand what difference it makes whether it's boot camp or one of these other trainings that takes place thereafter?

LT. COLONEL SAYEGH: Yes sir. You're always concerned about applying something across the board. And we talk about a trainer, a trainee and an entry level. That status is kind of what concerns me when we talk about strict liability.

Clearly in a boot camp environment, there's -- you know, it's easy to see. It's black and white, if you will sir. But eventually you know, you become a little more mature and you're with an instructor who may be your instructor, it could be of equal rank.

I would just, you know, I hate to throw the question back to you.

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What do you do with two sergeants, one happens to be the instructor and one happens to be the student? I have nothing -- I'm not opposing strict liability. We kind of have it built in already.

I guess what I'm really concerned with is the sex offender status and calling it a sexual assault absent other factors. You know, if there's a communication about grades, about quid pro quo, absolutely. The theory's there already in the law.

I'm just concerned about giving a -- creating a law that makes it a strict liability and would require the prosecutor to push for something that in the spirit of the law is probably not what it was intended to do.

Given the different training environments, sometimes you're in training for four hours a day. Sometimes you're in training for 16 hours a day. So if you're an instructor over this student if you will, for a short period of time every day, do we hold them strictly liable for what appears to be a consensual relationship?

MR. TAYLOR: But isn't there always an element of coercion whenever there's disparity in power? So long as you can decide what the grade should be, or whether one passes or has to go through recycling, doesn't that apply regardless of the ages of the individuals?

LT. COLONEL SAYEGH: You just used a word sir that -- power. You know again, how do we define power? Is power by rank, is power by authority? And sometimes those two are generally different.

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I could be at a school, the instructor could be a First Lieutenant. Is there power there? Does the First Lieutenant have power over me, or authority over me?

That's why I'm concerned about a strict liability offense that puts a label on who's teaching a class and who's receiving a class outside the vacuum of the context if you will, of the teaching instructor/student relationship, which I believe now the tools are there to emphasize to the court when the case comes about.

MR. TAYLOR: I sense you would like to add to that Colonel Varley?

LT. COLONEL VARLEY: Yes sir. The law has to cover a broad spectrum of both victims and accused perpetrators. And the example that we're talking about, and I'll refer to Congresswoman's Speier's proposed amendment dealing with strict liability and coloring that as a 120 offense.

The example I'm kind of looking at is one where Ms. Morrow kind of illustrated where that kind of offense would be very handy to have for a prosecutor. Because all you have to show is there was a sexual act and then this minimization of oh, it was all consensual and everything, that goes out the window. And frankly, I'm not morally offended at the idea of that guy getting an Article 120 qualifying offense and being a sex offender for the rest of his life.

But if you change the scenario around to a different perpetrator and a different victim, where the perpetrator is an otherwise pretty good drill sergeant

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who's going through a rough patch in his personal life, and you have a trainee who wants to obtain some type of favorable treatment. Wants a pass for the weekend, wants to pass the APFT test, isn't doing too well.

And it's the victim that approaches the drill sergeant and says hey, I will do this for you in return for you doing something for me. So now the drill sergeant's like well, I guess that doesn't sound so bad.

Has sex with her, later on it's discovered. Now that individual, clearly has done something wrong, clearly deserves to be punished. Probably deserves to be a civilian at that point.

However, I would have a hard time saying that guy deserves to be on the sex offender registry for the rest of his life because he accepted the offer of some sexual favor from a trainee in return for some discretionary action that he had the authority and the power to use. That's an abuse of authority.

She didn't come to him because she liked him. She came to him because the Army or the Marine Corps, or whoever, has given him certain discretionary authority that he abused in the acceptance of that favor in return for a benefit.

And that's the danger. When we throw too broad a net, we may catch some fish we don't want.

COLONEL KENNY: Could I please add into that?

MR. TAYLOR: Yes, please do, Colonel Kenny.

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COLONEL KENNY: Given that, the portfolio of Air Education Training Command and if you review, and I'm sure you have reviewed the May 2014 DoD Report where it has relevant portions of our different service regulations. There's a really, strong compelling military necessity to have separate service regulations to cover this kind of misconduct, because we have legitimate service culture differences.

So for example, the portfolio of training within Air Education Training Command includes tens of thousands of international students. Part of the training with international students under the State Department's mandate to us, is that we are supposed to indoctrinate them into the American way of life as well.

So the -- if we were to put a strict liability standard between the instructor and the international student, they would be unable to meet their mission. Now, it's very clear that they're not supposed to have sexual relations, but they can have professional personal contact.

Likewise, the flying training world. We -- when a person becomes a Wing Commander of a Wing that has an airframe that they've never flown before. They have to go back to pilot training, okay.

So we literally have One Star Generals in flying training. Now they can't have a personal, sexual relationship with those who are trainers directly over them, no matter the rank differential, but they can have personal social relationships with those who are trainers in other training pipelines.

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Having the ability within the regulations to be able to ensure that our service specific cultures are addressed, is key. If we do one draconian Article and put it in Article 120, and it's you know, sex offender registration and consent doesn't matter, throughout the training environment, it's not going to fit the training world. Thank you.

CHAIR HOLTZMAN: Thank you very much Colonel Kenny. Thank you. Admiral Tracey?

VICE ADMIRAL TRACEY: Colonel Sayegh, I think I followed what the argument was that you were making about the broad application of the terms trainee and trainer and the very, very, very different kinds of circumstances that can be represented. But the Congresswoman's legislation does specify basic training. And what I'd like to confirm is whether you are opposing modifying Article 120 as I think most of the other panel members are, with regard to basic training? Go ahead.

LT. COLONEL SAYEGH: I'm hesitant to disagree with my colleagues. But I don't know if we're -- I guess if it ain't broke, don't fix it, ma'am. I'm not sure if we need it. But if you -- would I -- do I think it would have a negative impact? I can't say that I would agree that it would have a negative impact for -- if we specifically defined entry level trainee as boot camp. Initial accession trainee if you will.

VICE ADMIRAL TRACEY: Okay. Okay.

LT. COLONEL SAYEGH: I hope I answered your question.

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VICE ADMIRAL TRACEY: I think so. Colonel Varley, you made a state -- I think you made a statement that something in Article 120 had been incorrectly applied, and I missed what that was. Could you just backtrack for a second for me.

LT. COLONEL VARLEY: Yes ma'am. I don't think it's been incorrectly applied. But under the current version of Article 120, and I'm going through, and I was a member of the Judge's Benchbook Committee. I'm not much maligned, we do the best we can, when I was a Military Judge.

But within sexual assault, there is a crime, basically what it says is the individual committed a sexual act upon the victim, and the accused did so by threatening or placing the alleged victim in fear that some threatened, wrongful action would occur. Now there are similar statutes to that in State law and Federal law, but it's a threatened wrongful action involving some form of bodily harm.

I don't think it would be appropriate to charge someone with a threat to whip a person with a wet noodle on their back. Well that's a wrongful action, it's an assault consummated by a battery. But I don't think anyone would argue, well that's as sexual assault. It's a very broadly written definition to what a sexual assault can be.

To the best of my research and personal knowledge, it's never been charged that way. But it's very broadly written. And I think it came up earlier, well can't we -- if somebody says look, either you do some sexual act for me, or

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I'm going to give you a bad officer evaluation report, okay.

That would not appear to fall into most of the categories of sexual assault we recognize under 120, except for possibly this. Now my argument would be it -- I think it's a poor use of 120 because again, I tie it to bodily harm.

And we'd be able to punish that conduct under either conduct unbecoming an officer, if it was an officer doing it, maltreatment, basically maltreating someone by trying to coerce them into sex, or giving them a bad evaluation, or extortion. Any of those offenses would also work as a punitive tool to use against somebody doing that type of conduct. So I'm not saying -- I don't like the way it's written ma'am, because I think it's far too broad, and it doesn't comport with anything I've seen outside the military.

VICE ADMIRAL TRACEY: Well Commander Stormer, did I understand you to say that the Navy had successfully prosecuted under circumstances of constructive force that Air Force was unsuccessful within. Can you help me with whether it's two different versions of the law, or what?

LT. COMMANDER STORMER: No ma'am, I was just saying, I was unaware of any cases where we haven't been able to not prosecute. I'm not aware of any cases where we have in fact prosecuted.

VICE ADMIRAL TRACEY: Okay.

LT. COMMANDER STORMER: And I just said it is something that we do in fact teach the concept of to --

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VICE ADMIRAL TRACEY: So in theory you could charge, but you have no idea whether you'd succeeded?

LT. COMMANDER STORMER: Yes, ma'am. Yes ma'am.

VICE ADMIRAL TRACEY: Thanks.

CHAIR HOLTZMAN: Mr. Stone?

MR. STONE: Thank you. Lieutenant Colonel Varley, let's go back to your example again about the end -- well, let me first start by seeing if I correctly understood that there is a strict liability offense if a drill instructor has sex with a sub --

LT. COLONEL VARLEY: Yes, well at least within the Army, under AR 600-20, Army Regulation 600-20, there are prohibited relationships. Among them are any kind of relationship between a drill sergeant and a recruit. And I don't have the language in front of me, but basically anything not required for purposes of training.

MR. STONE: Okay.

LT. COLONEL VARLEY: So if a drill sergeant has sex with a trainee, he's violated AR 600-20, he's subject to two years confinement and punitive discharge, reduction to E-1 under Article 92 of the UCMJ for violation of a lawful regulation.

MR. STONE: Okay. Now are -- were you suggesting, or maybe any of the other panel members, that it would be completely inappropriate to

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add other officers, other trainers, just to broaden the definition of drill sergeant?

LT. COLONEL VARLEY: I don't think anyone's arguing that. I think in most training situations, the definition is expanded under local regulations to cover essentially all -- I think it's referred to mostly as permanent party personnel. So if I'm at Fort Benning, Georgia --

MR. STONE: Okay, okay, I got it. It's expanded, and you don't oppose that.

LT. COLONEL VARLEY: No sir.

MR. STONE: And you said before if I heard you correctly, you didn't mind that trainer getting punished and told that he had to leave the military.

LT. COLONEL VARLEY: It's an authorized punishment to receive a punitive discharge and --

MR. STONE: So you were concerned that he might have to register as a sex offender?

LT. COLONEL VARLEY: I think that's an awfully big stick to use on somebody that accepted a favor that he was offered.

MR. STONE: But doesn't your purview have to do with the military? Why is it your concern what happens after he's out of the military? If the people of the United States decided to make sex registries, why is it that you're going to back off an offense all together, because you don't like what they did outside the military?

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LT. COLONEL VARLEY: Well I don't know -- I'm saying from a policy perspective. Again sir, I'm speaking for myself, and not for the U.S. Army. But my perception is registering someone as a sex offender, because they accepted a sexual favor that was offered to them, not through the coercion, but because of their position of authority, they had the ability to grant this, I think it's going to be perceived as unjust.

And I think that the practical effect of that on prosecutions is, panels are liable to acquit, because they're not going to want to label this guy.

MR. STONE: Well then you won't have to worry about that will you?

LT. COLONEL VARLEY: I would not.

MR. STONE: What I'm saying is you don't mind treating it as a felony, and kicking him out of being under anybody's command in the Army.

LT. COLONEL VARLEY: Yes sir.

MR. STONE: But you don't like some other collateral consequence that the Congress of the United States has decided for other people who do those kinds of things.

LT. COLONEL VARLEY: Again, coming back to my -- my policy perspective is, sexual assaults should involve bodily harm. If there's not a bodily harm aspect, it could be punished elsewhere within the code. That's where I draw my line.

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MR. STONE: Do you also agree with raising the penalty for those Article 92 offenses? Do you think two years is too short?

LT. COLONEL VARLEY: I don't think it's too short, because the cases I've seen where a person's been convicted under Article 92, I've never seen them being maxed out on the Article 92 maximum punishment of two years.

I think it might feel good to increase the punishment range. But I've never seen a case where I thought they would have sentenced him to more time if the maximum punishment would have been higher.

The other case thing is, in most of these cases it's not the guy doing it once. He has several specifications of Article 92, which under our sentencing system, provides for each offense, it's another two years of maximum punishment. So there's usually a broad -- I've never had a case where I thought the maximum punishment that was provided to the sentencing authority was too short.

MR. STONE: Did you hear the last panel with the victim, who said her perpetrator in that case only got two years? Do you think two years was too short in that case?

LT. COLONEL VARLEY: I think she said he got one year, sir. And based on -- and I haven't seen the case. But based on what she was saying, the perpetrator in that case was charged with an Article 93 violation, which would have had a one year maximum punishment. A 92 violation which would have had a two year punishment and adultery under Article 134, which would have had a one year

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punishment.

That was a four year maximum punishment. There was a range that was out there. For whatever reason the Judge -- and again, I'm not sure. In our system the Judge may have sentenced him to one year. Or he could have sentenced him to two or three years, and the pretrial agreement required approval to sentence to more greater than a year. I'm not sure exactly what happened there. But in any case, there were four years available and for whatever reason, he was only sentenced to a quarter of that time.

MR. STONE: Okay. So I gather what you're saying, and I agree with this is, it's a little hard to talk about appropriate punishments when we don't have the presentence report in a particular case. Is that right?

LT. COLONEL VARLEY: Well, the thing is sir, our sentencing system, there isn't a presentencing report. There's aggravating evidence and mitigating evidence that's presented during the sentencing hearing. There is no sentencing guideline.

And each individual sentencing authority, whether it's a Judge or a military panel, has complete discretion to adjudge in most cases, except those with mandatory minimums, a punishment of anything from no punishment to the maximum punishment. It's very individualized for that individual court.

MR. STONE: Well that's true in a lot of States too. Not every State uses a sentencing guideline.

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LT. COLONEL VARLEY: Yes sir. Well, I think it's rare, our system provides for -- and I don't mean to talk above you sir, go ahead.

MR. STONE: Well, no, if the U.S. Supreme Court decided that the Federal sentencing guidelines are only advisory, and the Judge can sentence anywhere from zero to the maximum.

LT. COLONEL VARLEY: Yes sir. My personal opinion is that one of the great strengths of the military justice system is the complete discretion the sentencing authority has over an appropriate person.

MR. STONE: Okay. And that shouldn't be what drives what we do here, right?

LT. COLONEL VARLEY: No sir.

MR. STONE: It should be what drives what we do, the sentencing authority?

LT. COLONEL VARLEY: I'm sorry sir, I'm not sure I understand your question.

MR. STONE: Well, in other words, I didn't think that the sentencing ranges should drive -- should be the driving force as to what's appropriate to be prosecuted. That that should be left to the Judge, after there's a decision whether a person's guilty or innocent.

LT. COLONEL VARLEY: Yes sir, I think -- well my response was to the question do we need to increase the maximum punishment under Article 92,

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which is two years. As I said, it would be fine. I just never -- I don't know that it will make any difference.

MR. STONE: But whether or not a person goes on the sexual registry, that upsets you and drives your opinion about whether or not we should be making other people strictly liable for interfering with recruits, sexually?

LT. COLONEL VARLEY: I don't limit it to the sexual -- sex offense registry as a policy. But that's part of the policy that I see is limiting 120 to offenses where there's bodily harm either applied or threatened.

MR. STONE: I have just one further question for Lieutenant Colonel Sayegh. You're in training, you do training now, it's part of your mission?

LT. COLONEL SAYEGH: Entry level training, yes sir.

MR. STONE: At the Marines. And do you train both the judges and the prosecutors?

LT. COLONEL SAYEGH: We'll, we're responsible for -- the Marine Corps gets on the back of the Navy sir. We do our -- we're all trained at Naval Justice School in Newport, yes sir.

MR. STONE: And does it include training Judges?

LT. COLONEL SAYEGH: Training Judges? No sir, that's handled by the Army actually.

MR. STONE: That -- okay. So then --

LT. COLONEL SAYEGH: The training we do have it, the school

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is in Charlottesville.

MR. STONE: Right.

LT. COLONEL SAYEGH: The training that we do provide instructors, but the school itself is under the cognizant of the Army sir. The Judge's school.

MR. STONE: And I guess, what I want to know is, you made a comment that I found perplexing in light of the changes that were made in 2007, or 2006 and 2012, to the military justice system. You said the military justice system was not designed to make victims whole. Don't you think that Congress disagrees with that, in what they were doing the last two times when they changed the system and ordered this panel?

LT. COLONEL SAYEGH: I would disagree with that sir, only because I think the changes were aimed at holding people more accountable and giving us the tools to prosecute more -- a broader range and a less vague standard of sexual assault. I don't think it was -- they were doing a lot for victims, but not under the military justice or anything.

MR. STONE: So you don't think we -- you think we should be focused on the perpetrators and not be focused on the victims?

LT. COLONEL SAYEGH: No sir, that's not exactly what I'm saying. The law -- you know, the criminal statute should be focused on a criminal act. And making sure we hold a criminal responsible for a wrongful act.

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Any system, I think a victim, you know -- they're going to be subject to that system. They're only going to get so much out of the criminal justice system. So any victim who finds the accused -- I think my point was sir, any victim who finds the accused either acquitted or not punished to their satisfaction, is going to complain about the system. And I don't think any changes we can do can bring their satisfaction to a higher level, if that makes any sense sir.

MR. STONE: Don't you think a lot of those victims are satisfied just to know the prosecutor went forward?

CHAIR HOLTZMAN: Mr. Stone, that will be the last question sir.

LT. COLONEL SAYEGH: I'm sorry, should I answer the question?

MR. STONE: That's all right, that's right. Go ahead, we're going to run out of time.

CHAIR HOLTZMAN: Okay. I just want to go back to the whole question about charging under Article 90 versus 120. Or, I don't know what adultery is, but adultery under Article 90 for the abuse of authority. Captain Andersen, you said that there was really no changed needed because of the penalties under Article 93. But let me ask you a question based on the testimony of the witness. I assumed you heard the Coast Guard -- the woman in the Coast Guard?

CAPTAIN ANDERSEN: Yes ma'am, I know that case very well.

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CHAIR HOLTZMAN: I think -- okay. I think one of the things that -- maybe, I don't want to put words in her mouth, but I think one of the things that she was concerned about was not just the nature of the sentence. But the fact that the man was not convicted of a sexual assault.

And not necessarily because of the penalties of sex offender. But because the label of the action wasn't -- didn't fit the crime. And so that's why I'm asking you this question.

It may be that if you added adultery and Article 92 and Article 93 and a whole bunch of other things like littering, you might come up with a substantial penalty. But if the labeling of the act is not accurate, aren't you going to leave a lot of victims concerned about justice? And what is gained from that?

I mean what is the advantage if we're not talking about disper -- I mean any differences in sentence? What is the disadvantage, then, of putting a proper label on the misconduct? What problems are created by that?

CAPTAIN ANDERSEN: Madam Chair I'm not sure there's any disadvantage to putting the proper label on misconduct that's properly defined. And for the case of Ms. Morrow, just for full disclosure, I was the Staff Judge Advocate that advised on that case.

CHAIR HOLTZMAN: Okay.

CAPTAIN ANDERSEN: My attorney's prosecuted that case. The convening authority I then worked for is the one that made the decisions on that

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case. So I'm very familiar.

And I think it's good to use that case to inform your decision. And so I'm happy to give you more information about that case. And more details about that. And this -- in that case, rape was charged. That was charged.

But after the initial investigation, which I think I saw you had a copy of the Article 32 investigation. Which --

CHAIR HOLTZMAN: I haven't had a chance to read it though.

CAPTAIN ANDERSEN: Right. You'll see that the challenges in that. Although we -- my colleagues have talked about constructive force, and I think there's also some totality of circumstances, in that case, I personally did not think we would meet that, or come close to meeting that.

CHAIR HOLTZMAN: Okay. We didn't actually -- in fairness, we did not hear the evidence about the rape charges. So we can't really make a judgement. But let's assume -- oh, so you're saying that if the evidence had been stronger, or of a different character in connection with the sexual assault that we heard about, that there would have been those charges might have succeeded at trial?

CAPTAIN ANDERSEN: Yes ma'am. Those charges would not have been dismissed prior to trial. And the case -- that case was a plea agreement. And so that also plays into it.

CHAIR HOLTZMAN: Okay.

CAPTAIN ANDERSEN: And as you know, with those, there's

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lots of things to take into account, not the least of which is the victim's input.

CHAIR HOLTZMAN: Okay. I got that now.

CAPTAIN ANDERSEN: So, it just -- the way I'm looking at this, and I don't have as much experience as my colleagues as a practitioner. And I've prosecuted, I've defended, I've been a Judge, but in this case there's -- I don't agree with Representative Speier that you can never consent in a training environment, because I've seen reported cases where it looks like to me pure consent.

Now I do, Ms. Morrow painted, I think, a pretty good picture of what it feels like to be in boot camp. I've been there, I've observed, I've mentored a boot camp company myself. So I understand the challenges.

But I think with -- again, every case is related to facts. And certainly there will continue to be challenging and hard cases. But with a little bit different facts and with constructive force, threats of intimidation, things like that, I believe that under 120 those could be charged as -- in the right case.

In cases where it's not charged, I think -- well, my point I guess was that the existing Articles, 92 orders violation and in the Coast Guard, we have a Coast Guard wide order that says if you are a trainer, you cannot have sex with a trainee period, across the organization. Not just boot camp. It could apply in any kind of -- if I'm in training. We also have a --

CHAIR HOLTZMAN: And what is the penalty for violation of that?

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CAPTAIN ANDERSEN: Violation, it's the same as Article 92, a violation of a lawful general order, it's a two year maximum penalty. And I think that's a discharge as well.

We also have a Coast Guard wide order that prohibits anyone from having sex in a Coast Guard controlled workplace. So consensual sex that occurs in the office, that occurs in a recruit, a barracks, that occurs in anyplace that is controlled by the Coast Guard is also an Article 92 violation.

CHAIR HOLTZMAN: Okay, but going back to -- okay. I appreciate that clarification. I just want your view, though, on the ability, maybe you don't have an opinion on this because you hadn't seen in your experience. But the ability to prosecute under threatening or placing another person in fear and whether --

CAPTAIN ANDERSEN: Well if I -

CHAIR HOLTZMAN: Sorry.

CAPTAIN ANDERSEN: I'm sorry ma'am, go ahead. Sorry. That was the theory we were looking to prosecute under in Ms. Morrow's case. And based on the facts of that case, we didn't think we had enough to prosecute under that theory. Had we had enough to, we would have prosecuted under that theory. Again, assuming her -- the victim's continued cooperation.

CHAIR HOLTZMAN: Okay, well let's put that case aside. What do you need to prosecute under threatening or placing another person in fear? In other words, you're the -- let's just go to Congresswoman Speier's example, Lackland.

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I'm not taking any particular case in Lackland, but you're a boot camp recruit. Your instructor says I want you in here in my office at 9:00 o'clock at night and you're going to have sex with me, and has sex with her. And why -- can you prosecute that under Article 120, threatening or placing another person in fear? Let's just assume those facts, hypothetically.

CAPTAIN ANDERSEN: Madam Chair I believe you can.

CHAIR HOLTZMAN: You can?

CAPTAIN ANDERSEN: I believe you can.

CHAIR HOLTZMAN: Now, going though to Ms. Kenny, Kenny sorry, she says that you couldn't prosecute under the threat language of 120. She had three cases where you couldn't prosecute. What was the problem there?

COLONEL KENNY: Well, we did. We prosecuted, there was just no conviction.

CHAIR HOLTZMAN: Is that because of the statute or because of the facts, or what?

COLONEL KENNY: The facts in these cases were roughly, and so I'm going to characterize them sort of generally. But the facts of the cases were that the two MTIs took two trainees, who were on ship night, so they had graduated, they were about to ship out to their next training. Took them into a closed room and told them that basically you got to have sex with me. You got to do this with me, or you're not going to get to go to your next base.

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CHAIR HOLTZMAN: Okay.

COLONEL KENNY: Okay. So we charged it as by placing in  
fear --

CHAIR HOLTZMAN: Right.

COLONEL KENNY: Of impact on her military career.

CHAIR HOLTZMAN: And why wasn't that successful?

COLONEL KENNY: We you know, litigated it hard. Put a lot  
of evidence on. We're subject to the instructions that the Military Judge gives the  
jury. And the fact finder, the jury in these particular cases, found that the conduct  
didn't raise to that level.

MR. STONE: Excuse me, did you get instructions, or did you  
get the instructions you wanted?

COLONEL KENNY: We got the instructions that are in the law.

MR. STONE: That's not what I asked. Did you get instructions  
that you felt you needed?

COLONEL KENNY: Based upon the current state of the law,  
yes.

MR. STONE: So it was jury nullification, essentially?

COLONEL KENNY: No. Because as my Army colleague here  
is stating, the jury members did not believe beyond a reasonable doubt that that fear of  
the impact on the military career was enough to, probably, rise the level of bodily harm.

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Therefore --

CHAIR HOLTZMAN: But excuse me. All right, let me just recapture my time. But bodily harm is not part of threatening, is it?

COLONEL KENNY: No, it's not. You can threat -- I mean you can threaten anything.

CHAIR HOLTZMAN: So, what I'm trying to get at, maybe my questions are inartful and help me here, is that you have a statute that seems to be one that you could prosecute these cases under. But that doesn't seem to be a successful, practicably usable statute. Is that not -- am I saying -- is that really the case? I mean did you have an answer to that? Maybe help me out.

MAJOR MANN: Yes ma'am. I think part of the problem is, is that we deal with women who are in the military. And so what that means is that it is very, very hard for them to first accept the fact that they've been victimized. And that's as a prosecutor, that's one of the things that you have to do. Is you have to immediately kind of bring them in, and help them through that process.

And so while we can look at -- like a scenario where I've had a Master Gunnery Sergeant and a Lance Corporal. Very, very large rank disparity in our community. And getting that witness to even talk about the rank disparity being a consideration is sometimes difficult.

And when they testify, you don't always get that evidence before the finder of fact. And then that taken together with all the other circumstances, the

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totality of the circumstances, it becomes a very difficult theory to prove the subjective intent, just based on the witness' testimony and the rank disparity.

And that's why I thought that your earlier suggestion of looking at that wrongful action and bringing in all of the other factors that go along with whatever surrounds the assault, the isolation, the rank disparity. And this particular case I'm talking about was in her home. He showed up at her house. And she was a single mother.

And there were all these things. And these are the things that you want to be able to bring to the finder of facts. And I think that the best way you can do that, is you can do that for instructions and notes so that we can more accurately define the terms in the statute to use the statute. Because as it's written right now, it's --

CHAIR HOLTZMAN: Okay. So you're saying the statute wasn't as written, or possibly as construed presently is not practically useful. And that the statute needs to be, either through executive order or some other way, tweaked to make it more practically useful. Is that what you're saying?

MAJOR MANN: Further explained, yes. I think that that -- if we were to bring in and further define wrongful action. Bring in all of the probable cases of force.

CHAIR HOLTZMAN: Is that something others agree with here? Or is that a unique view? Do you disagree with that, do you agree with that?

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LT. COLONEL SAYEGH: No, Madam Chair. Madam Chair I agree with the panel member that wants to pass a law. The panel wants to pass a law that says a, in recruit training now, a trainee --

CHAIR HOLTZMAN: We can't pass any law.

LT. COLONEL SAYEGH: Well I'm sorry. A trainee cannot consent. It's -- it's strict liability. You cannot consent. So we take that off the table. If there's -- I would ask that whatever it is, it be limited to sexual intercourse, or sodomy, or something severe because you know we have had cases where the touching and the grabbing, or whatever. And I think that's the slippery slope I would not want to go down.

But to pass something that says a trainee or a poolee, if you will, cannot consent. I follow the panel's -- I like it to some extent. My only concern is why are we drawing a line with recruits, you know? They're in recruit training, they're being resocialized. Every second of their day is occupied.

They're not -- you know, they shouldn't be focused on sexual contact. So any sex they're having, obviously is under either duress or for whatever reason. My only concern is, how do you draw the line with other misconduct they commit? If they don't possess the ability, if we're going to say that they cannot consent to sex with an instructor, which is a crime for fraternization, why don't -- are we going to provide them with the same protection if they get a UA, or if they're disrespectful or if they refuse to train?

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I'm just concerned about giving them you know, a minor is a minor is a minor for all purposes. A minor can't consent to sex. Can a trainee -- are we just going to give them that one legal caveat? That they're responsible for everything else they do, but if they consent to it -- they can't consent to sex.

And that's the only real, in my mind, the problem I'm having. Because I think it would be a good tool, but it would not be consistent.

CHAIR HOLTZMAN: Okay. But we're -- I'm trying to parse this out so at least from my point of view, I can understand it. There are some objections and some people who favor the issue of having a strict liability sort of standard in the -- for the initial recruit. But I'm talking about the -- both that, the time of the initial recruit. I'm putting that whole issue aside, the strict liability. I'm trying to deal with the non-strict liability. Just the general idea of abuse of authority, including that early period of time.

And my question really has to do with the fact that I look at the statute and I say gee, looks like it could cover it. But then I hear that in practice it's not useful.

So how do we make the statute usable? How do we have it cover -- take your caveats, take someone else's caveats. I mean, we all understand that there are going to be factual issues and different fact patterns. But how do we make this a usable statute? Can we make it a usable statute? That's all I'm asking

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you. And if not, what are the alternatives? I'm sorry, I sound like I'm beating a dead horse here. I don't mean -- maybe it's just that I'm not understanding. But I would appreciate some enlightenment.

You're telling me the statute is not really usable the way it is. And if you have some suggestions about how to change it, we don't have time now, but you can please communicate those thoughts to us. We would definitely welcome them. And Colonel Varley? Varley, sorry.

LT. COLONEL VARLEY: Yes sir -- Ma'am. So you're not left with a misconception. The case that Colonel Kenny was describing where it was charged as fear --

CHAIR HOLTZMAN: Right.

LT. COLONEL VARLEY: -- to her career, the accused was acquitted of that.

CHAIR HOLTZMAN: Right, I got that.

LT. COLONEL VARLEY: Now, there was not confession in that case. And the only evidence was involved was basically a he said, she said. So he was acquitted of the 120 offenses. But he was convicted of the Article 92 offenses of violating the local reg, as well as some other offenses. He was sentenced to reduction to E-1, 30 months confinement and a punitive discharge. So it isn't as if the gentleman walked. He was punished, just not on that charge.

CHAIR HOLTZMAN: Right.

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LT. COLONEL VARLEY: And that as an evidentiary. I'm not suggesting that the panel engages in jury nullification here. They looked at the evidence and apparently weren't satisfied beyond a reasonable doubt.

CHAIR HOLTZMAN: Okay. So you're saying that this is a usable statute the way it's written?

LT. COLONEL VARLEY: It can be charged ma'am. And it can be prosecuted. I just haven't seen a conviction come of it ma'am. I don't know why.

CHAIR HOLTZMAN: Okay. Well that is a kind of an answer, isn't it. I don't have any further questions. But if you have any thoughts for how we can change the statute or improve the statute, I would definitely welcome them. And I'm sure other members of the panel would as well. And I want to thank you very much for your testimony here today.

(Whereupon, the above-entitled matter went off the record at 2:59 p.m. and resumed at 3:17 p.m.)

CHAIR HOLTZMAN: Thank you very much for reconvening everyone on the panel, and thanks to our audience members. And thanks to our new panel. We will be focusing now on service perspectives on prosecution of Article 120 offenses. And our first presenter is Colonel Mike Lewis, U.S. Air Force Chief, Military Justice Division. Colonel Lewis, welcome.

COL LEWIS: Madam Chair, it's great to see you again having

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appeared before you at the Response Systems Panel several times. I'm going to be talking about a few things from my perspective as well as giving a little bit of a Joint Service Committee's perspective because currently the Air Force has the Chair of the Joint Service Committee.

So I'll be happy to answer any particular questions about where the JSC is on any proposal. I'm joined on the panel by many of the JSC voting group members, my colleagues here.

So distinguished panel members, I want to start with a clarification of something from the last panel that Colonel Polly Kenny, our Air Force representative, wanted to make sure that I covered.

So I'd like to do that upfront. So she described very clearly three of the Air Force MTI cases that were involved down at Lackland, where the government had been unsuccessful in having a conviction under the 2007 to 2012 version of Article 120 involving a threat or fear type theory.

It's just an oversight. She neglected to tell you about United States versus Walker, which is a case with different facts that the government did use that theory and was able to obtain a conviction. And that conviction was reviewed by the Air Force Court of Criminal Appeals. And they have actually given us a decision. The ACM Number is 38237.

That decision is not all that old, but particularly, on appeal the question was, was there factual insufficiency with that threat of fear? And the Air

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Force Court of Criminal Appeals in this case said that those contentions of the appellant were not met, and they upheld the conviction.

So that is a case for you to look at where the fact finder determined that it was sufficient. And Colonel Kenny, who is much more familiar with the ins and outs of each of these cases than I am, having lived them firsthand, she would probably tell you very much that the facts in the Walker case were different.

So instead of a trainee who had completed training, who was ready to be going off to their next duty assignment, the victims, plural, in the Walker case involved were actually still in the training environment.

And the language used by Walker was much more egregious. And the physical behavior associated was much more egregious, so I think if you compared the facts of those cases you can kind of see a little bit of how four cases in the Lackland arena played out as you determine what changes are necessary.

Now, back to my original message, which I plan to provide some written comments so that we can get through everyone quickly and get to your questions. But my general message is one that you've heard before already, which is please do not change the statute of 120 dramatically, unless you find it absolutely necessary to recommend that you do that because there are second and third order effects that really need to be considered.

And I would suggest that anyone who comes before the panel or submits a written comment that doesn't give you specific statutory language is coming

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up with an idea or a concept. When the Joint Service Committee sits down to try to write rules, the devil is in the details many times.

And so those that come up with proposal for either splitting the offenses, the contact and penetration offenses into different parts of the UCMJ, I would suggest that it would be helpful to know exactly where they want to put them, and then evaluate whether that is actually going to have any meaningful impact or not and whether it's worth risking some of the stability associated with, now, we have two plus years prosecuting under our new Article 120 statute.

My other point is that if we had a blank slate and we were writing Article 120 from this point on, and we didn't have to worry about anything else, sure, we would write it differently. We would learn from things that have happened, and we would close holes. And there's certainly maybe tweaks. There may be adjustments that need to be made, and the Joint Service Committee's certainly open to any of those things. What we found in the pre-2007 version of Article 120 is that those came through case law.

And so what would happen is we would get a case on constructive force. And the appellate courts would be telling us whether constructive force was appropriate or not. And then we would cite that case, and it would go into the military judge's bench book.

And then we would go into and update the Manual for Courts-Martial via executive order, if we needed to make sure that that was in the book

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so that every practitioner would have it. Instead, where we are a little bit right now, is, with the changes coming from Congress. Then we're waiting for the time line it takes to get an executive order squared away and through the process that it needs to go to.

And the services are actually probably putting out regulations much faster than, and the bench book is probably putting out instructions much more faster than any other process that we have. And then finally, we've talked about maltreatment here with other panel members, and there was a discussion that the Joint Service Committee was looking at Article 93, the Maltreatment Offense.

And the speaker was correct that we are going to propose a change to the maximum punishment for Article 93. The proposal right now is to change the maximum punishment from one year to two years. But that is not in specific relation to a sexual act or sexual contact offense. It would be for -- all cruelty and maltreatment would have that escalator maximum.

And that is again a proposal at this point that will go through a very robust EO process. So that is my overall opening comments, and I look forward to any of your questions.

CHAIR HOLTZMAN: Thank you very much, Colonel, and it's a pleasure to see you again, I must say. Okay. Next presenter is Colonel John Baker, U.S. Marine Corps, Deputy Director, Judge Advocate Division, Military Justice and Community Development.

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COL BAKER: Good afternoon, Madam Chairwoman and distinguished panel members. In my role as the Deputy Director, Judge Advocate Division, I'm responsible for the oversight of the military justice practice across the Marine Corps and the professional development of the Marine Corps legal community.

And as Mike said, I'm a member of the Joint Service Committee. I'm here today to offer my perspective on whether we need further changes to Article 120. And quite simply, in my view we do not need further change, really for all the reasons that Mike said. I look forward to our discussion and to answer any questions that you have.

CHAIR HOLTZMAN: Thank you. I see another familiar face lurking.

CAPT CROW: Yes, ma'am. Good to see you again.

CHAIR HOLTZMAN: Our next presenter is Captain Robert Crow, U.S. Navy Director of Criminal Law Division.

CAPT CROW: Thank you, Madam Chair.

CHAIR HOLTZMAN: Good afternoon. It's a pleasure to see you again.

CAPT CROW: I'll cut straight to the point. I'm in the policy role as well on the Joint Service Committee. Prior to this job I stood up the Navy's TCAP program. And I actually do have one case where we did get a conviction for the implied threat, and it was an implied threat, not an outright threat.

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And in questions if you'd like, I can walk through some of the facts of the case. It was not a recruit, recruitee or trainer, trainee type case. But it was a commanding officer of a vessel, and a junior enlisted that worked for him. So I think that goes directly to your question, does the statute work.

That was the middle statute, the 2007 to 2012 version. However, that particular language in the statute is almost identical to the current version, which would still permit such charging. The one slight difference is it was a guilty plea case, so it was reviewed on appeal as a guilty plea. However, it was affirmed and so does serve as precedent for charging based on that.

I want to echo the comments from Commander Stormer earlier, Captain Reismeier, the last panel. From the Navy perspective, we don't need major change. And I agree with Colonel Lewis. If we were starting fresh here, clearly there's some things that we could clean up or do better, but there's so much change and turmoil right now with 120 as well as with all the legislation that was passed this last year that I think the buzzwords you heard in the last panel were stability, or the last session, Captain Reismeier, stability and predictability.

And we're at that stage with this new statute, and so also agree that drastic change is not necessary at this time, and also look forward to taking the panel's questions.

CHAIR HOLTZMAN: Thank you. Our next presenter is Lieutenant Commander, John. No, Lieutenant Colonel John Kiel, U.S. Army, Criminal

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Law Division, Office of the Judge Advocate General. Welcome, Colonel.

LTC KIEL: Thank you, Madam Chair. Thank you for inviting us to speak with you this afternoon. My background, just real quick, I'm the Chief of Policy for the Army Judge Advocate General on dealing with military justice matters. And I'm a working group member on the Joint Service committee with the panel members you see before you. I've been a trial counsel, defense counsel.

I taught criminal law at the United States Military Academy at West Point. And my last assignment I got the unique perspective of actually seeing how Article 120 in the Army is put in practice, where I was a Deputy Staff Judge Advocate for one of our biggest, or largest general court martial convening authorities in Germany.

In our office we had five different law centers, 13 prosecutors, or trial counsel, as we call them. I'm sorry a senior trial counsel, a chief of justice. And then in the Army we had these special victim prosecutors, like Colonel Pickands to my right here. So if you'd like, we could talk about how we go about charging Article 120 cases at the ground level, the interaction between leadership, the staff judge advocate or the deputy staff judge advocate.

And some of our junior prosecutors, how they're trained and mentored by the senior trial counsel, then our interaction with our special victim prosecutors, and then ultimately with the general court martial convening authority. I, like most of the panel members you've heard from in the last two public sessions,

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practiced under pre-2000 Article 120. In my personal experience as a prosecutor, I found the statute predictable, informative.

And it carried enough, like Mr. Sullivan, I believe, stated, enough judicial gloss to make me comfortable charging a case under any number of theories. As a defense counsel, I knew I had to prepare for any possible theory, and thanks to a then robust Article 32 process, I was able to prepare for what those were.

Captain Reismeier from the Navy illustrated a point in your last public meeting. He testified that criminal practitioners benefit from, again, predictability. They need to know what they're doing today will be sustainable under case law that will be created tomorrow. Layers of statutory changes inserted into a body of law that is still developing in trial and appellate courts is akin to building a plane while flying it.

Current Article 120 works in its current form for the most part. It is appropriately offender and not victim focused. And it covers a broad range of sexual misconduct. However, the current statute, as you heard this morning, could use technical fixes. It's not perfect. Some of the fixes that you heard this morning that I personally support are to define impairment, to give a further definition of incapable of consent, and then to add via an object to the definition of sexual contact.

These are some of the examples of technical fixes to the statute your committee could recommend to make it better without revamping the entire thing and driving prosecutors and judges crazy. As you previously stated, it is not

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your intent to do. Thank you, and I look forward to answering any of your questions.

CHAIR HOLTZMAN: Thank you very much, Colonel Kiel.

And now we have another person who's coming back for a second, another person who's prepared to be victimized twice I guess, Lieutenant Colonel Alex Pickands, U.S. Army, Trial Counsel Assistance Program. Welcome back.

LTC PICKANDS: Thank you, Madam Chair.

CHAIR HOLTZMAN: We're actually very glad to see you. You gave very useful testimony and glad to see you again.

LTC PICKANDS: Thank you, Madam Chair. All right, I won't spend a time repeating my views on Article 120. I gave those at length this morning.

But I do offer myself for any questions about Article 120 or how the Army does go through its process of collaborating with investigators, identifying offenses, charging those offenses, bringing those to trial.

I think on this panel I'm the sole non-policy maker. I only make policy for my prosecutors. I am simply a trial practitioner. I do have experience with each of the three statutory schemes.

CHAIR HOLTZMAN: Thank you very much, sir. Our fourth presenter is Captain Retired Stephen McCleary, U.S. Coast Guard, Former Chief of Military Justice. Welcome.

CAPT. McCLEARY: Good afternoon, Madam Chair, members of the panel. Thanks for having me here. I currently work in the Coast Guard's

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Office of Military Justice, which is our policy shop.

We provide the Coast Guard representation at the Joint Service Committee. We're also the trial counsel assistance shop. We're also the appellate government shop all kind of rolled into one.

That's where I work as a civilian. When I was on active duty I was the chief of that office twice. I was a Coast Guard's voting group member on the JSC when we worked on the proposals that eventually became the current version of Article 120.

And also to the extent that it's helpful for any questions you might have given some of the previous discussion, when I was a Lieutenant Commander, I was the Staff Judge Advocate of our boot camp in Cape May.

And one of the disadvantages of going last is I don't want to bore you with a long dissertation that I might make.

The one comment I would make is that I think for any prosecutor under any set of criminal laws, you're going to find cases that are hard to charge and some that are going to be hard to prove.

Sometimes they're going to be both. That doesn't necessarily mean that you need to change the whole set of laws. To use the adage that I think all of us heard in law school, hard cases make bad law.

There are going to be some hard cases that we deal with that no matter what we do to Article 120 we will find difficult to charge.

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And I just ask you to think about that. And I look forward to any questions you might have. Thank you.

CHAIR HOLTZMAN: Thank you. Mr. Taylor.

MR. TAYLOR: Thank you very much, Madam Chair, and thank you for all of your presence here this afternoon as well as your testimony.

One thing that I think is very interesting about the way you're characterizing the current situation regarding Article 120, and maybe I misheard two speakers say something that sounded a little different.

So I want to first of all just give you a chance to help me understand that. I thought Colonel Lewis, that you said words to the effect of we don't want to risk upsetting the stability of the cases over the past two years.

And I thought, although I may have misheard you Captain Crow, that you said we don't need major changes, but we could clean up the turmoil.

So if I roughly heard what you said roughly correctly, or even if I didn't, how do you assess what we're doing right now? Do you assess that we have a state of turmoil? Or do you assess that we have stability?

COL LEWIS: So Professor Taylor, I certainly don't doubt your memory, and those words probably came out of my mouth. Exactly what I was really attempting to say was we can't change the fact that we have three statutes with Article 120.

We can't change the fact that if the offenses before 1 October

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2007 we have to charge it one way, if it's between 1 October 2007 and 27 June 2012 we have to charge it another way perhaps.

And then after that offense and those — that definitely creates an amount of turmoil that's already in the system, and no matter what you do it's going to still be there.

What I'm suggesting is the current statute right now has only been in effect for just over two years. There are a number of cases that need to make their way through the appellate process.

Those trial decisions were made in those cases by trial judges. The litigants ask the judges for instructions, and they either gave them or they didn't.

And either way those cases were going to go up on appeal. And so we don't quite know exactly what the appellate courts are going to do in all of these cases.

So rather than making wholesale changes that's going to give us a fourth statutory scheme to further confuse the issue, I'm suggesting that we let the dust settle and only fix those areas where it's very clear that there's a gap in the law.

MR. TAYLOR: So Captain Crow is that sort of what you meant as well?

CAPT CROW: Yes, sir, exactly.

MR. TAYLOR: Okay. Well thank you for that clarification.

One of the questions that continually arises is whether, if there are to be changes, it's

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better to try to make them by tweaking the executive order through the Joint Service Committee and the process that we all somewhat understand.

But I'd be interested to hear your comments on how long that generally takes because I have the sense that some people think it's too slow.

COL LEWIS: I would share that the general sense is that it's too slow and that that is probably almost held universally. The process does take a long time because these are very, very difficult issues.

So essentially what happens is there are certain things that the Joint Service Committee has to take on to update the manual for courts-martial because Congress has given us direction to do so.

There are a number of people who are military justice experts and members of the public who provide inputs to the Joint Service Committee and suggest that we take on certain things.

And then there are the things that the Joint Service Committee itself, through the working group and the voting group, through the guidance that the Department of Defense General Counsel's office provides to us that we decide to take on ourselves.

So currently there are two executive orders that the Joint Service Committee is working on. The first one is the residuum of a August 2012 voted executive order.

So that was submitted for public comment, as you can tell, a long

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time ago. Then there is a version that we are working on right now that we anticipate putting out for public comment very soon.

And that would be in the Federal Register. Then there will, of course, be the next iteration that would take on any changes that Congress gave us with the Fiscal Year '15 National Defense Authorization Act, any changes that the Secretary of Defense pushed down to us to consider out of Response Systems Panel, questions from the Military Justice Review Group that could be provided to us that we decide or the Department of Defense decides to look at.

So there's a process of getting that executive order through us to the public for them to comment on in a 60 day public comment period, then for it to go out into an interagency process.

And the interagency process includes the Department of Justice looking at it, the OMB, providing it to other interagency for them to comment on it and eventually to the National Security Staff and to the White House.

And sometimes the things that we are proposing are able to be put in executive order. The President signed our last streamlined executive order 13669.

I believe the date was 13 June 2014, so that's our most recently successful product with getting through the process. But there are two more that we are working very closely on.

MR. TAYLOR: So what would say the average time from cradle

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to grave would be from the time it leaves your office until the time it actually is effective?

COL LEWIS: I think it depends on the issue because it can get hung up at any different process but, for instance, certain changes from the Fiscal Year '14 National Defense Authorization Act have already been signed and are in effect already.

And so that time frame for some of those issues was six months. But there are other issues like the Part 4 for the Manual for Court-Martial for Article 120, which went into effect on 28 June 2012, still are not in our book.

And that's the proposed model specifications and others. Those are in that executive order that was voted by my predecessor and others perhaps who were on there back in August 2012.

So you can see that that one's more than two years, and it is still not signed.

MR. TAYLOR: Thank you.

CHAIR HOLTZMAN: Do you mind if I ask a question? I'm trying to understand where that is. You propose, the Joint Service Committee proposed some changes or are proposing the contents of an executive order with regard to the new Section 120 that was passed in — that took effect in 2012.

And that's been at the White House since --

COL LEWIS: Madam Chair, I don't mean to imply that that's

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been at the White House for that time. There were multiple parts of the original executive order.

One part of it involved the maximum punishments for Article 120. That was signed in an executive order in 2013. But other parts of it did not get into that executive order.

They are in, and they did not get into the one after. They are in the one that is now going through the interagency process.

So it is not sitting at the White House. I didn't mean to imply that.

CHAIR HOLTZMAN: Has it gotten to the White House yet?

COL LEWIS: I believe that staff members know that it is there, but formally in the process it is not with them for action.

CHAIR HOLTZMAN: Okay. Thank you.

MR. TAYLOR: Thank you. Captain Crow, you offered to tell us a little bit more about a case that involved an implied threat.

Since that's something we've talked about quite a bit this afternoon, would you share the details of that with us to the extent you're able to do so?

CAPT CROW: Yes, sir. And I'll kind of be vague on some of the details --

MR. TAYLOR: Of course.

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CAPT CROW: -- just based on the victim's privacy, but in essence you had an O5 commanding officer goes to a party with the crew after doing an ammunition onload.

And so you're using the government van to go back to the ship after he'd been drinking with a lot of junior enlisted, which by itself to a certain degree we're already getting into criminal misconduct if a senior officer doesn't pull out of a situation when they should.

So he got completely intoxicated in front of them, crossed the line, kind of cornered one of the junior enlisted and sat by her in the back of the van.

They went back to the ship. He kind of held her back without touching her but was slow getting out of the back of the van. All the other crew members went over the brow on the ship.

And then he was right there beside her, so as they crossed the brow he kind of stood where she would typically go to go to her berthing and instead kind of escorted her up to his.

Again, never touched her at that point in time other than just putting a hand on her back at one point in time, goes up to his state room.

And the only thing that he had said earlier in the evening was, tell me a story, which it's a CO to a junior enlisted. She took that as an order and thought I have to do what the CO is telling me.

They get in his state room, and he tells her give me a kiss. And

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she complies, goes into the head, the restroom, comes back out. And then he began performing various sex acts on her.

Not once did she ever say no. Not once did she run at that point in time, so that's why I said it was implied threat.

And so the way I charged that particular specification, well, several different acts took place.

But I used the same constructive force theory was through the abuse of his military rank, position and authority creating an implied threat to negatively affect the military career of and then victim.

And she clearly felt that she was not in a position to say no to her CO. So a little bit similar to when you're talking about a trainer and a trainee where that authority is over there.

But again, he plead guilty to that. When I charged it, I will say I spent a lot of time. And some of that language is not in the Manual for Courts-Martial, charged it knowing it was going to go up on appeal if he was convicted and would be reviewed by the courts.

He plead guilty, so it kind of made it easier. But otherwise we were kind of in that new territory there and took a risk and spent a lot of time trying to make sure that we do it under this particular part of the statute, knowing that even without that, piece of the sex offense, everything else that he did with, I'm going to charge sobriety in different ways as well.

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But the 120 piece was tied to that implied threat.

MR. STONE: Did you have a sentence bargain with him?

CAPT CROW: We did. Yes, sir.

MR. STONE: And what was it?

CAPT CROW: I agreed to 42 months for a guilty plea, and I think the military judge gave him 11 years. And it sounds like a light sentence.

I wasn't necessarily happy with it, but at the same time, the condition at that point in time was -- and there were two victims actually but different offense some other time.

But neither victim would have to testify. Neither victim would, I mean it would be all videotaped, so they were completely onboard with that.

And that was the plea agreement, and to follow up, sir, with a question that you kind of raised earlier, pre-trial agreements in the military are between the convening authority and the accused.

They are negotiated by defense counsel with strong recommendations from trial counsel to the convening authority and staff judge advocates, if it's a GCM especially.

But it is the convening authority's prerogative to enter into a deal and to enter into any of those terms, but again on strong advice. Prosecutors do not have independent discretion to do that.

MR. TAYLOR: So my last question for any member who would

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like to address it is this: is there an effective mechanism in your community for sharing lessons learned of the type that Captain Crow just outlined?

CAPT CROW: Yes, I think our Trial Counsel Assistant programs talk a lot together. I know I talk to them when I stood the Navy version of it up.

And we clearly talk amongst ourselves here at the Joint Service Committee, but the TCAP programs, I think they share a lot of information back and forth.

MR. TAYLOR: Thank you. Madam Chair.

CHAIR HOLTZMAN: Admiral Tracey.

VADM TRACEY: Colonel Lewis and Captain Crow, both of you said effectively that there are things that could be cleaned up in the Article 120 if we were starting over.

I got that, but can you just highlight a few of those holes? Are they more than the definitions that others have spoken to?

CAPT CROW: I think Colonel Kiel nailed a couple of them, the object issue which came up recently, you know, that and the one I don't think it caught before.

But I'll give you also a danger in that one as well depending on how it's narrowly defined.

And you had reference to testimony earlier today about putting finger into mouth, which under this statute, if done to humiliate, nothing to do with sex

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whatsoever is a sex offense.

And it's a registerable sex offense if a certain state says that it is.

And so that's the penetration aspect.

Take that with the contact that the Colonel mentioned where if you're doing for the sexual desires or sexual gratification, makes perfect sense to charge that and make that or expand the statute on that one such that if you're using an instrument or an object or anything for that purpose, that you would.

So I think that's a perfect example, but if you went as broad as the whole definition on the penetration aspect of object, then you could charge a situation where if you hit someone with a fly swatter on the rear end with the intent to humiliate, hazing-type situation, that that would then be a sexual assault just like it is under the penetration, if charged that way.

So again, it's one of those, it's kind of got to be narrowly tailored.

And I think to the sexual gratification, makes perfect sense on that one.

And I will say on — my personal opinion on the definitions, those can be handled, even though it may be a lengthy process, from the executive level or the Benchbook in clarifying those unless Congress has given a definition that's inconsistent as opposed to Congressional Act whereas the object piece would take an act by Congress to expand that piece of the statute that then we could further define.

COL LEWIS: So the only thing that I'll add, and it's nothing that you haven't heard from earlier panel members, is the incapable piece, when it involves

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intoxication by alcohol.

And you heard Mitch Rosenow talk about that. Judges have instructed members on and given the definition of that in Air Force cases.

And some of those cases have resulted in convictions that will be reviewed by the appellate courts. So during your process and review it may be appropriate for you to look at what instructions are being given there.

So in our script that comes from the Department of the Army, Pamphlet 27-9, what you've heard is the military judges' Benchbook, I give you a couple things.

First, make sure you're using the most recent version. So there's a 2010 version that was out there that was historically the long one that we had.

But the current version is actually 10 September 2014, and it's not like the hard copy was the only version out there.

The Army Trial Judiciary published an electronic Benchbook that I actually had on my computer as a military trial judge so that I could see what the Benchbook Committee had voted on and believed were the current state of the law.

So when an appellate court came out with the decision, if the Benchbook Committee or any of the services felt that that changed the instructions that we should be giving court members, they propose it and send it through.

And it can get into an electronic Benchbook a lot quicker than it gets into the hard copy manual.

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So take a look at that, but in our trial script every case I would ask the prosecution, do you have any tailored instructions that you would like me to give the panel.

And I would ask the defense counsel the same question. There's nothing that prohibited either side from proposing an instruction, a tailored instruction based on case law, based on Webster's dictionary, based on a prior version of the statute, enforcing me as the military trial judge to decide whether I was going to give that instruction or not.

And that's sometimes how case law gets made, under the common law. And so I suggest that some of those cases are going to make their way through in a very, very robust appellate practice that all of us have are going to identify those issues. And the appellate courts are going to have to take them on.

MR. STONE: Thank you. Captain Crow, I thought I heard before that the Marine judges are trained at the Army JAG training school. Is that true, the Navy judges do?

CAPT CROW: It is, and actually the Army and the Navy have a combined trial judiciary and appellate judiciary. But we all go through the same course at the judges course that's sponsored by the Army.

MR. STONE: If we're having the different services all train the judges the same way at the same place, maybe somebody on the panel can articulate to me what I heard before about the different services needing differences and special

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rules.

And maybe even why precedents in any of the Army appeals courts aren't uniformly applicable so that we can get the case law out there faster, and it'll be binding instead of hoping that you have some Navy cases and then some Air Force cases.

And wait for some Army cases, and everybody having to wait. Wouldn't that accelerate an understanding of at least Article 120? Is there some difference in the way the services do it that we should know about?

CAPT CROW: I think it's being done. I'm not sure exactly the context of the question earlier. I don't think I was here, but I didn't draw that specifically.

But all of our appellate courts publish their opinions. Even an unpublished opinion, it's still published out there. It's just not binding precedent.

All services look to each other and clearly when cases go up from each of the service courts to the Court of Appeals for the Armed Forces or CAAF, then that is clearly binding for all courts coming back down.

Where we may sometimes, if this was what the question was referenced to earlier, had a little bit difference within service culture or service differences. Maybe that we have an instruction in the Navy that prescribes certain things onboard ship where that would not be the same in the Army.

But that would be within the context of like an Article 92

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violation for hazing or fraternization or something onboard a ship that maybe would be a little bit different. But under 120 itself, should be the same.

MR. STONE: And I guess the other question that I have is, and I guess this relates to the hypothetical about hitting somebody with a fly swatter.

I presume that there's still some discretion not to charge something like that, and so hearing these hypotheticals that I don't think would be charged both here and in earlier panels, doesn't really persuade me to much of the point that the people making the hypotheticals seem to be making.

I mean do you — have you ever seen a case where somebody was hit with a fly swatter and charged?

CAPT CROW: I've certainly seen investigations where that is the going in position. Charged and court-martialed that I was involved in personally, not personally in my experience.

I mean maybe as an assault consummated by battery under Article 128, but not as a sexual offense.

MR. STONE: Right.

COL BAKER: And if I could follow up on Colonel Lewis' point as it relates to the investigations, as the rules exist right now, if an offense, the crazy hypothetical, meets the elements of a sexual assault the — our, like NCIS for the Navy and Marine Corps, has to investigate that case.

And so as we make — if we make broad statutory language that

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captures these hypotheticals, this is happening.

We are taxing our investigative agencies to not only investigate, to use the vernacular, felony cases, are really now spending a lot of their time, effort, energy investigating cases that they otherwise wouldn't. I'm not sure if that gets to your point but —

MR. STONE: Well I guess some of that is because of the pent up feeling that a lot of cases weren't investigated in the past, so that doesn't trouble me at all.

What I thought you were going to tell me is that there's some ongoing adverse effect to the person who's investigated, but I don't know that that's true.

COL BAKER: But there is, sir, because --

MR. STONE: Yes, that's what I want to hear.

COL BAKER: Okay. If law enforcement begins at investigation, and they have, and the elements, the fly swatter example, would it meet the elements of a sexual assault?

That individual's title in a law enforcement investigation, it goes into the NCIC. And so a records check comes up, and they're popping for that.

There's a long, torturous process to get removed from that, but we have, where it's — I'm having a hard time articulating. But we are impacting.

We are putting adverse impacts on folks that otherwise wouldn't.

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And so that's why the concern about the really broad definitions is — it's trouble.

CAPT CROW: I mean I agree with that. One of the things that's been discussed, I think during the Response Systems Panel was the famous New York Times kiss on — under today's statute would that be a sexual assault.

And good arguments are made that it would be based on that, so I think that's something. There was a lot of discussion that. But it's what message are we wanting to communicate.

And I would respectfully request the panel, we've had a lot of discussion about prosecutors and convening authorities or prosecutors having to charge these cases.

Part of the purpose of the law is to tell people what not to do. So we need to focus a little bit on the deterrent effect of being clear, to tell people what behavior will not be permitted regardless of if it's hard for us to figure out how to charge it, if it's really bad and we want it to get there.

And so I'd ask the panel to kind of look at that approach as well if there are going to be changes coming forward or recommendations on other things.

And the last thing, sir, to your question, under the military anyone that's active duty can prefer a charge on another person.

So it's not just a prosecutor that swears out a charge. That typically doesn't happen these days, though that has been the history of the UCMJ that anyone could prefer charges.

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So there could be someone who initiated a charge. Whether or not a convening authority, you know, a prosecutor goes forward on it, different discussion.

CHAIR HOLTZMAN: Okay, thank you. Just a few questions. First, how do you feel about Congresswoman Speiers' legislation, creating strict liability for boot camp misconduct, sexual acts between trainer and the recruitee at that time, and the recruit. Can we start with you, Colonel Lewis?

COL LEWIS: I think my concern with the statute as drafted is the window of time after the person completes basic training.

So the statute covers a 30 day period thereafter where that same strict liability environment might not be quite so necessary.

So there are certainly state laws out there who have said that adults who are still in a high school environment, kind of a statutory rape type offense.

But in our research in preparing for this we came across a media article involving an Arkansas case where the Arkansas Supreme Court had actually sat with that person, was over 18, had a five month relationship with their 38 year old psychology teacher.

And the Arkansas Supreme Court overturned that on constitutional grounds. Now I don't know the case specifically as to whether that's the Arkansas Constitution or the U.S. Constitution.

But it does raise that concern that somebody who is over the age

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of 18 generally might have a different set of rights and choices to make than someone else.

So as we look at a strict liability offense, narrowing that to the areas where we really need to narrow it should be looked at extremely closely.

And my personal view is that we can take the existing Article 120 statute, and we can make clear in the definitions what conduct we are trying to capture without going the extra step of making it a strict liability offense and capturing any offense where we heard in the prior panel that it could go a lot further.

CHAIR HOLTZMAN: Anybody have any other views on that that they'd like to express?

CAPT. MCCLEARY: I would say one thing ma'am, is that we already do. All of the services have a strict liability offense for that that is in place.

And I would turn the question around. Why is it that the strict liability needs to be under Article 120?

CHAIR HOLTZMAN: Well, I'm not going to speak for Congresswoman Speier, but I think probably one of the reasons is that it creates a long term sexual offender — consequences as a sexual offender.

So the penalty is much more severe than it is presently or even on a contemplated way under Article 93 or 92? 92.

MR. STONE: Before you leave that topic, if I can just ask if any of you know has that strict liability statute that you do have been held unconstitutional

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by any of the military courts of appeals?

COL LEWIS: No.

COL BAKER: No.

CHAIR HOLTZMAN: Now with regard to, you said 120 might be able to work as a substitute, Colonel Lewis.

I don't have your exact words, for a strict liability statute in terms of making sure that drill sergeants and other trainers at the boot camp stage can be held accountable.

Do we need any changes to 120? Do we need any clarifications to 120?

COL LEWIS: I'm confident that we could probably clarify 120 whether it's via a definition that comes from case law, a definition that was -- could be proposed to the President in executive order or a definition that Congress came up with that helps out with practitioners.

But again, my caution is the second and third order of facts, that we know what we're criminalizing, that we intentionally know what the consequences of it are going to be and that we really do believe that this offense requires the Article 120 label on it and all the consequences that will come with it.

And if the answer to those questions is absolutely yes, then that's what the recommendation should be.

If the answer is, well we're not really quite sure, then I think we

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should be looking at what other tools the services have.

And we have Article 92 with a maximum for a single offense, a violation of a lawful general order, regulation of two years.

We have maltreatment, which if our JSC recommendation eventually gets approved would also be two years, but it's one year right now.

And we know that you have other offenses, Article 133 for conduct unbecoming, as other previous folks have testified.

CHAIR HOLTZMAN: One group that you left out of your list of entities that could affect this is this panel.

And if you have any thoughts about what could strengthen 120 in this regard, we'd appreciate hearing that from any of the members of the panel.

Okay. My second question has to do, or second set of questions, I hope not more than one, Congresswoman Frankel suggested a different approach to the issue of abuse of authority.

Basically changing, I don't know if you've seen her proposal. But basically creating as part of 120, a special category for using a position of authority, actually abusing a position of authority.

What is your view of that? I'm not sure this is the most artfully created statute or proposal, but what's your view of that approach?

And obviously it's broader than the boot camps example, but what's your reaction to that if any members of the panel want to respond?

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CAPT CROW: I will take it up. I don't think it's necessary, and I think we've already got that.

And as you know Congresswoman, everything within the military is about authority, I mean up and down the chain of command there.

And so how you narrowly define that or tie that in, I think, would be very, very problematic. But I go back and ask the question raised earlier.

What are we looking to resolve? Where do we think there is a particular problem? And if there is, then that's something we could look at and try to tailor that.

But right now under the current charging mechanisms that we have, all the different instructions, all the different articles under UCMJ that we have, it's hard to find some conduct that cannot be appropriately charged in some manner that is offensive and criminal. So I just don't see the need.

CHAIR HOLTZMAN: Anybody else disagree or want to respond?

LTC PICKANDS: Madam Chair, as a prosecutor looking at the phrase, using their position of authority, I'm not sure how I would prosecute that.

I don't think that it's anymore specific a statement than what we have right now in the sexual assault part where they just have threat or fear blank of whatever lesser version of harm.

And I'm afraid that proscribing as a sexual offense any use

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implicit or explicit, but especially implicitly would, even as a prosecutor seems to be a frightening expansion of criminal culpability.

As I said earlier, I'm supportive of criminalizing training cadre misconduct, but this proposed amendment concerns me. It's being too over-inclusive.

CHAIR HOLTZMAN: If there are no other comments about that, I just want to address one other area, which is going back to the area that was raised by Mr. Taylor. Namely, how do we speed up this process of getting comments, getting an executive order by the President on Article 120, the new statute and from the Benchbook, the judiciary's Benchbook?

Two years have gone by, and what do we do about changing this snail's pace?

COL LEWIS: Madam Chair, I don't have any specific recommendations for you. I can tell you that the JSC members take their responsibilities to shape the law and do everything we can very, very seriously.

But we also must fairly say that this is not the only thing that we are tasked to do to complete our jobs. And so that is not intended to be any sort of excuse because we understand how important this is.

But I think like many things, when a microscope is shined on something or a flashlight is shined on something, sometimes the attention can be a little bit higher.

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Certainly I know everyone at this table knows how important it is. And I know that our representatives at the OSD General Counsel's Office understand that as well.

We want to get this guidance through and out to the field. Some of these questions that you're struggling with as to what's the right thing to do, we have had to struggle with too, in order to write a rule that is going to be useful in practice.

Whether that's a new rule for how we do new Article 32 investigation or how we keep our system in balance now that our Article 32 investigation is much more like a probable cause hearing.

Those are difficult issues, and sometimes they just take time in order to get them right. And we need to have the public comment period so that what the JSC is doing is as transparent as it can be.

CHAIR HOLTZMAN: Okay. So I think that is very important to be deliberate, but there needs to be a speed element here in my opinion, too.

Could you explain the process? You've now finished — have you finished your work with regard to Article 120, the Joint Services Committee, and so then it's gone to the interagency part of this process? Where is that?

COL LEWIS: Yes, ma'am. The Part 4 for the Manual for Courts-Martial, which would give the elements definitions and model specifications, those have not changed from what the Joint Service Committee put out prior to June of

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2012.

Those — there's no change from what the draft document, that what's in the proposed executive order. But the proposed executive order from August 2012, is over 200 pages long.

And it has a large number of changes because we're not just looking at changing Article 120 and executive order. We're changing a lot of things in the rules for court-martial.

We're changing a lot of things in the military rules of evidence. The executive order that is with the JSC right now that will be going up for public comment soon is about 100 pages long.

There are not any Article 120 definitional changes in that executive order right now. But this is a process where there will be yet another executive order and then another one. So it's not like we're done.

CHAIR HOLTZMAN: But the one that is sent out for public comment, that's the one that deals with Article 120?

COL LEWIS: Correct.

CHAIR HOLTZMAN: And so it's now in the public comment stage, or it's — is the public comment stage finished on that?

COL LEWIS: It is.

CHAIR HOLTZMAN: Okay. So now it's gone to?

COL LEWIS: Interagency process.

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CHAIR HOLTZMAN: Well, what does that mean?

COL LEWIS: That means that the other agencies in the federal government who get to look at an executive order prior to the President's acting on it are reviewing it.

CHAIR HOLTZMAN: Department of Justice and other agencies like that, and did they get a time frame to look at this?

COL LEWIS: They do give the time frame, but sometimes they have very substantive comments and concerns that then need to come back to us.

CHAIR HOLTZMAN: Oh, so then it comes back to Joint Service Committee, and then is there another time for another round of public comment?

COL LEWIS: We're not required to do another round of public comment, and we have in recent memory not done that to keep the process from slowing down further.

CHAIR HOLTZMAN: Okay.

MR. STONE: And how long do those other agencies have? You didn't answer that.

CHAIR HOLTZMAN: I didn't ask that yet.

COL LEWIS: Sir, I'm sorry. I just don't know the answer to that right off the top of my head, but I know we can get that to the panel so that you know exactly the time frame that we've provided.

CHAIR HOLTZMAN: Okay. So they haven't finished their

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comments, yet?

COL LEWIS: Correct. And it is the Department of Defense General Counsel's Office who is the one that is responsible for pushing that out for public comment.

So the Joint Service Committee is a committee that works essentially for the General Counsel's Office per a Department of Defense instruction.

CHAIR HOLTZMAN: So once you get the comments back, let's say from the Department of Justice through the interagency process, then you send it to the White House?

COL LEWIS: Correct, but we'll --

CHAIR HOLTZMAN: Assuming that, I mean then you look at it. You decide whether the comments are justified or not. You make changes as appropriate or not, and then you send it to the White House.

COL LEWIS: Correct.

CHAIR HOLTZMAN: So it still needs to go to the White House.

COL LEWIS: It does, but they've -- I am fairly certain, and I will ask my colleagues who've done more executive orders than I have on the JSC that they have seen an advanced copy of it at at least a staff level.

So they have an idea of what's going to be in it. Whether they have made any decisions on it at the staff level I doubt because they want to know what the others in the interagency process believe.

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CHAIR HOLTZMAN: Okay. So the Office of General Counsel though might have a much better, of the Defense Department, might have a better sense of exactly where things stand right now?

COL LEWIS: Yes, ma'am.

CHAIR HOLTZMAN: Thank you. I don't have any further questions. Any of the panel members have anything else they'd like to ask?

So let me thank you all for coming, and for those who were repeat offenders, thank you for doing that. And we really appreciate your willingness to share your expertise with us. Thanks. And I guess this --

LTC GREEN: Madam Chair, we don't have any public comment today, so I believe we can close the meeting if there's no other business with the panel.

CHAIR HOLTZMAN: Thank you.

MR. SPRANCE: The meeting is now closed. Thank you all very much for attending.

(Whereupon, the above-entitled matter went off the record at 4:13 p.m.)

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