

## UNITED STATES DEPARTMENT OF DEFENSE

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## JUDICIAL PROCEEDINGS PANEL

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## MEETING

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FRIDAY  
DECEMBER 11, 2015

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The Panel met in the Holiday Inn  
Arlington at Ballston, 4610 North Fairfax Drive,  
Arlington, Virginia, at 9:02 a.m., Hon. Elizabeth  
Holtzman, Chair, presiding.

## PRESENT

Hon. Elizabeth Holtzman  
Hon. Barbara Jones  
Tom Taylor  
VADM(R) Patricia Tracey

## SUBCOMMITTEE MEMBERS:

Dean Michelle Anderson  
Laurie Rose Kepros  
Dean Lisa Schenck  
BGen(R) James Schwenk  
Prof. Stephen Schulhofer  
Jill Wine-Banks

**STAFF:**

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

Lieutenant Colonel Kelly L. McGovern, U.S.  
Army - Deputy Staff Director

Julie K. Carson - Legislative Analyst

Maria Fried - Designated Federal Official

Nalini Gupta - Attorney Advisor

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

Kirt Marsh - Attorney Advisor

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Adjourn

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

(9:02 a.m.)

MS. FRIED: Good morning everyone.

Welcome to the Judicial Proceedings since Fiscal Year 2012 Amendments Panel. My name's Maria Fried and I'm the Designated Federal Official for the JPP. Colonel Kyle Green is the Staff Director to the JPP. Thank you, Members, who have taken the time to do this important work and for being with us today.

This Panel was established by Congress in Section 541 of the National Defense Authorization Act for Fiscal Year 2013 as amended. The law mandated that two individuals from the Response Systems to Adult Sexual Assault Crimes Panel be appointed to the successor Panel, the JPP.

The Department has appointed the following distinguished Members to the Panel: the Honorable Elizabeth Holtzman, who serves and the Chair of the JPP, she previously served on the RSP as well; the Honorable Barbara S. Jones,

1 Judge Jones also served as the Chair on the  
2 Response Systems Panel to the Adult Sexual  
3 Assault Crimes; Vice Admiral Retired Patricia  
4 Tracey; Professor Tom Taylor; and Mr. Victor  
5 Stone. Members' biographies are available at the  
6 JPP website at <http://www.jpp.whs.mil>.

7 This Panel is a Federal Advisory  
8 Committee and must comply with Federal Advisory  
9 Committee Act and the Sunshine Act. Publically  
10 available information provided to the JPP is  
11 posted on the website, to include transcripts of  
12 the meetings. Any information provided by the  
13 public to Panel Members must be made available to  
14 the public.

15 The Panel also has a Subcommittee.  
16 The JPP Subcommittee was established by the  
17 Department to assist the JPP with its statutory  
18 taskings. The JPP Subcommittee's tasked with  
19 making recommendations to the JPP. The products  
20 delivered to the JPP by its Subcommittee do not  
21 reflect the views or final recommendation to the  
22 JPP, to Congress, or the Secretary of Defense.

1 Rather, the work of the Subcommittee is presented  
2 to the full JPP during its public meetings for  
3 deliberation by the JPP, to inform its own report  
4 and recommendations for submission to Congress  
5 and the Department of Defense.

6 The Panel received one request from a  
7 member of the public to address the Panel. The  
8 presenter will be allotted five minutes to  
9 address the Panel at the end of the session.

10 Thank you. Madam Chair?

11 CHAIR HOLTZMAN: Thank you, Ms. Fried,  
12 and, good morning everyone. I'd like to welcome  
13 everyone to the December meeting of the Judicial  
14 Proceedings Panel. Four of the five Panel  
15 Members are here; unfortunately, Mr. Stone is not  
16 able to be with us today. Today's meeting is  
17 being transcribed and also video recorded by Army  
18 Television. The meeting transcript and link to  
19 the video recording will be posted on the JPP's  
20 website.

21 The Judicial Proceedings Panel was  
22 created by the National Defense Authorization Act

1 for Fiscal Year 2013 as amended by the National  
2 Defense Authorization Acts for Fiscal Years 2014  
3 and 2015. Our mandate is to conduct an  
4 independent review and assessment of judicial  
5 proceedings conducted under the Uniform Code of  
6 Military Justice involving adult sexual assault  
7 and related offenses since the most recent  
8 amendment to Article 120 of the UCMJ in 2012.

9 To begin today's meeting, the Panel  
10 will continue its deliberations on two important  
11 JPP topics: the prevention and response to  
12 retaliation and ostracism against victims of  
13 sexual assault crimes; and secondly, restitution  
14 and compensation for victims of sexual assault  
15 crimes in the military.

16 Our staff has prepared additional  
17 materials based on our previous discussions on  
18 these issues, which we will use to assist us in  
19 today's deliberations. Following our  
20 deliberation sessions, we will hear from the JPP  
21 Subcommittee about its recently completed review  
22 of Article 120 of the UCMJ. The Subcommittee

1 submitted its final report to the JPP earlier  
2 this week, and we are very pleased that many  
3 Subcommittee Members are able to join us here  
4 today to explain their assessment and discuss  
5 their review and recommendations with Members of  
6 the JPP.

7 The JPP plans to continue its  
8 assessment of Article 120 at the next JPP public  
9 meeting in January. We encourage interested  
10 individuals and organizations to review the  
11 Subcommittee's report, which is available on the  
12 JPP website. The JPP welcomes comments and  
13 perspectives on Article 120 and the assessment  
14 and recommendations of the JPP Subcommittee.

15 Finally, each public meeting of the  
16 Judicial Proceedings Panel includes time to  
17 receive comments and input from the public. The  
18 Panel received one such request from Edward  
19 Bartlett, President of the Center for Prosecutor  
20 Integrity, for today's meeting. The submission  
21 was provided to the Panel Members and we will  
22 hear from Dr. Bartlett at the end of the day.

1 All written materials received by the Panel for  
2 today's meeting and previous meetings are  
3 available on the JPP's website at [jpp.whs.mil](http://jpp.whs.mil).

4 Thank you very much for joining us  
5 today. We are ready to begin with our continuing  
6 deliberations on victim retaliation, and we will  
7 be assisted here by the excellent assistance of  
8 Lieutenant Colonel McGovern.

9 LTC MCGOVERN: Good morning, ma'am.

10 CHAIR HOLTZMAN: Good morning.

11 LTC MCGOVERN: Can you all hear me?  
12 I apologize, I have a cold.

13 CHAIR HOLTZMAN: Well, you're not  
14 forgiven for that.

15 (Laughter.)

16 LTC MCGOVERN: We have five main  
17 issues we would like for you all to comment on  
18 today to either provide insights, conclusions or  
19 recommendations. Three of these issues were  
20 previously on your deliberation materials, which  
21 we have been working through the last few  
22 meetings. And, the first one is actually new

1 based on the input we received from the RFIs that  
2 we submitted to the Services, and received back  
3 their responses back last week.

4 So, if we could start with Issue  
5 number one. Earlier in your deliberations, you  
6 all concluded that there should be a standardized  
7 form for sexual assault victims to report  
8 retaliation. The EO process in -- for  
9 discrimination claims, Servicemembers have the  
10 option of filing an informal complaint that is  
11 investigated by their command, or a formal  
12 complaint which is treated more seriously.

13 One of the questions posed to the  
14 Services was, should there be such an option if  
15 there's this form for sexual assault victims in  
16 retaliation. The Services responses are found at  
17 Response 92-C, as in Charlie, and there were  
18 mixed reviews. A few of the Services thought it  
19 would be a good idea, so that they could  
20 informally go through their chain of command and  
21 -- as they are now with the command management  
22 groups.

1 Others thought that it may be  
2 redundant and a bit confusing, because there's  
3 multiple types of retaliation. So, today, if we  
4 could get your thoughts and opinions on the  
5 processes that could be available for  
6 Servicemembers if there is a standardized form  
7 implemented to report retaliation.

8 CHAIR HOLTZMAN: And, what would the  
9 -- can you -- Colonel, could you just go into a  
10 little bit more detail about the, from my point  
11 of view, about the -- what the Services have said  
12 in terms of this?

13 LTC MCGOVERN: Yes, ma'am.

14 CHAIR HOLTZMAN: Which Services were  
15 in favor? Which were not, and a little more  
16 detail about why they oppose the recommendation?

17 LTC MCGOVERN: DoD SAPRO, or the DoD  
18 response, initially, was that they felt it would  
19 be helpful to resolve -- alternative dispute  
20 resolution similar to the EO process, for a more  
21 efficient resolution of those lower claims. The  
22 Army also agreed. The Air Force was unclear what

1 that may look like. The Navy was not in favor  
2 but suggested, if it is going to be available,  
3 then maybe it would be helpful for those non-  
4 criminal, or non-actionable under the UCMJ, type  
5 offenses. And, the Coast Guard was open to the  
6 possibility as well.

7 And the second question, which we'll  
8 get to next, the Services definitions for  
9 retaliation, specifically social retaliation, is  
10 ostracism and maltreatment. You have to have a  
11 specific intent to try to discourage someone from  
12 reporting or participating.

13 So, there is this group of social  
14 retaliation which is not actionable under the  
15 UCMJ. So, I think the Navy's response -- my  
16 interpretation is that the Navy is indicating for  
17 those types of claims, the informal complaint  
18 could be a process there where it's submitted in  
19 writing and handled by the command in a more  
20 efficient manner, even though it's not actionable  
21 under the UCMJ.

22 The Army, and DoD, and Coast Guard

1 thought it would be beneficial for the victim to  
2 have these reporting options, again, giving the  
3 command the option to resolve the case at the  
4 lowest level just like they can with an informal  
5 EO complaint. Admiral Tracey or Mr. Taylor may  
6 be able to provide some insights on the informal  
7 versus formal.

8 CHAIR HOLTZMAN: You took the words  
9 out of my mouth, I was just going to go there.  
10 Admiral Tracey, do you have any comments about  
11 this?

12 VADM TRACEY: I need some refresh  
13 here. The opening paragraph of the Navy's  
14 comments was confusing to me. I didn't think  
15 even in EO complaints that the existence of a  
16 formal and informal reporting process precluded a  
17 victim from trying to get resolution without  
18 having to enter any kind of a process.

19 And so it didn't seem to me that the  
20 establishment of a parallel process for  
21 retaliation was going to preclude a Sailor from  
22 working directly with their immediate chain of

1 command to resolve the issue, but the Navy seemed  
2 to think that it would. And, I didn't believe in  
3 EO complaints even that you were precluded from  
4 getting resolution at an immediate leader level.  
5 Am I wrong in that? I don't remember that as  
6 being precluded.

7 LTC MCGOVERN: I believe you are  
8 absolutely correct, Admiral Tracey.  
9 Servicemembers can always go to their leadership  
10 to discuss issues and problems and they can sit  
11 two people down to try to work out a resolution.  
12 What they then will ask is, okay, we have an EO  
13 Advisor, EOA, at the unit level. This looks like  
14 possibly unlawful discrimination in the EO realm,  
15 would you like to talk to them about your  
16 reporting options? And, that's when they say yes  
17 or no. But, certainly, you can always go to your  
18 leadership to discuss the issue first and seek  
19 resolution.

20 VADM TRACEY: And, again, maybe  
21 refresh me, or maybe Mr. Taylor does remember  
22 this better than I do. What's the formal

1 difference between the formal and the informal  
2 processes in EO?

3 LTC MCGOVERN: The difference is that  
4 the informal will only be handled at the command  
5 level.

6 VADM TRACEY: And, there's a record of  
7 the formal process above the command level?

8 LTC MCGOVERN: Correct.

9 VADM TRACEY: Right, okay. So,  
10 there's always the potential for the individual  
11 to get their chain of command to act and there's  
12 not a record of it, so you'd never have a count  
13 of those instances. You wouldn't know how common  
14 it is and how well the resolution at the  
15 immediate level is working. You'd never have  
16 that and I don't think you could ever get that  
17 without forcing people to take a step they may  
18 not want to take.

19 But, this formal and informal --  
20 formal reporting process is one that gives a --  
21 there's an oversight level applied to the formal  
22 reporting that is not applied to the informal

1 reporting, but there's a record kept of both. I  
2 don't know that that's any clearer.

3 LTC MCGOVERN: Correct, so, there  
4 would be a tracking mechanism, because there  
5 would be a report. One of the victims that  
6 appeared before you all had said that they just  
7 wanted the retaliation to stop. They didn't want  
8 to hang the person out to dry, or get them in  
9 trouble, and that's where, I believe, the  
10 informal process may be appealing to some  
11 victims.

12 JUDGE JONES: Can I ask -- I just  
13 don't -- when you say file an informal report,  
14 are we -- we're talking about something then that  
15 would -- would be a written or other record of  
16 it?

17 LTC MCGOVERN: Yes, ma'am.

18 JUDGE JONES: Okay.

19 LTC MCGOVERN: And, in comparison, not  
20 a very good analogy, but it's just as we have  
21 restricted or unrestricted. It is providing  
22 people options, so that they do come forward and

1 knowing how far that report will then go and to  
2 who it goes to. So, an informal report won't go  
3 as far as the formal report.

4 JUDGE JONES: And, do we want this for  
5 the sake of getting better data? Because, it  
6 seems to me if people are willing to go and file  
7 an informal report, they would certainly, I would  
8 think, be inclined to go and go to the command  
9 without filing any type of report and just ask  
10 for help. I'm just trying to figure out what the  
11 -- how is this going to help the victims?

12 LTC MCGOVERN: In the EO process, you  
13 can actually go straight to -- everybody is aware  
14 through training who their Equal Opportunity  
15 Advisor is.

16 JUDGE JONES: Right.

17 LTC MCGOVERN: So, you never actually  
18 have to go to your command, you can go to this EO  
19 Advisor at your unit level, or the superior  
20 levels, and it would be similar here with the  
21 SACRs. I believe if they're the ones maintaining  
22 the records that you could go to them and say,

1 well, I don't want to make a big deal of this,  
2 but I do want to file something, because I think  
3 there is something going on here.

4 So, it would just be a way to start  
5 the process and a form to memorialize it, if  
6 we're doing a standardized form. Or, you can  
7 elect just to have this standardized form and a  
8 regular investigative process for all -- everyone  
9 who is willing to make a report.

10 JUDGE JONES: Well, I mean in the --  
11 as I know and I know very little about how the  
12 civilian world works institutionally, but most  
13 employers, as part of their, you know, their  
14 complaint process for discrimination, the first  
15 thing you have to do is go to, you know, the EEOC  
16 Coordinator and then after that, after you've  
17 spoken with them, you would do a written  
18 complaint.

19 And, maybe you would go ahead, maybe  
20 you wouldn't, but the point would be that the  
21 employer would have the opportunity to do  
22 something about the problem. I mean, I think we

1 should do whatever we want to do, or need to do,  
2 to encourage victims to come in and talk to  
3 whoever they should about reprisal.

4           Maybe in just saying filing -- so,  
5 would this require establishing -- well, we would  
6 have an EO person there now anyway for  
7 discrimination, so we would add to their duties  
8 that they would also listen to someone who came  
9 in about retaliation? Is that -- I mean, what's  
10 the mechanism? Who do you go file this informal  
11 report with?

12           LTC MCGOVERN: Based on your previous  
13 discussions, I believe everybody was in agreement  
14 that if -- to establish a standardized form so  
15 that there would be a process, officially, within  
16 all the Services that looked the same to report  
17 retaliation. And, the SARC would be the person  
18 to enter that information into DSAIDs. So, the  
19 EO is just an example of another process that  
20 works. That was suggested --

21           JUDGE JONES: So, you would -- so now,  
22 you would go to your SARC and say, I don't really

1 want a formal report filed, I just want to tell  
2 you about this and then the SARC would note that  
3 it was an informal report? I'm just trying to  
4 figure out how this works.

5 LTC MCGOVERN: Yes, ma'am, that's my  
6 understanding is that you could go to your SARC,  
7 the SVC, your command or whichever channel you  
8 would normally go to to report the retaliation.  
9 They would then take you to the SARC, just as  
10 they do for a sexual assault report, and that  
11 SARC would give you your reporting options. Just  
12 as a sexual assault offense, they say you can do  
13 unrestricted or restricted for retaliation.

14 JUDGE JONES: So, maybe this should be

15 --

16 LTC MCGOVERN: You could do informal  
17 or formal, where do you want this to go? What do  
18 you want out of this process?

19 JUDGE JONES: So, maybe we should call  
20 it restricted, or a formal report, if that's the  
21 biggest difference.

22 COL GREEN: I think one of the key

1 aspects with the informal EO resolution is the  
2 opportunity for facilitated resolution with the  
3 EO Advisor. And so, in the EO context, it offers  
4 you someone to assist you with a complaint  
5 perhaps against your command, or a complaint  
6 environment.

7 And so, it just offers you sort of  
8 that mediator, neutral voice to assist you. And,  
9 there are different ways. You don't need to  
10 elect the mediated or the facilitated process,  
11 you can have it resolved directly with the chain  
12 of command. So, there are options, but that's  
13 really the additional benefit of an informal  
14 resolution process -- what might be analogous  
15 here was if the SARC or someone appointed to  
16 facilitate resolution of a retaliation issue  
17 within the person's organization, you know, that  
18 may be an additional vehicle for them to get  
19 help.

20 JUDGE JONES: Okay, and it wouldn't be  
21 restricted, obviously. It's just a lower level  
22 of help?

1 COL GREEN: Correct.

2 CHAIR HOLTZMAN: Mr. Taylor, do you  
3 have a comment?

4 MR. TAYLOR: Yes, I think the  
5 questions that have been asked and the answers  
6 have addressed a lot of my concerns. I wouldn't  
7 be surprised if something like this isn't  
8 happening right now, knowing the slippage that  
9 occurs between any formal mechanism to resolve  
10 something and the informal adaptations that a lot  
11 of offices use in order to make their way through  
12 the day without clotting up the system. So, I'm  
13 not surprised that this is something that's on  
14 the table.

15 My concern, I think, echoes that of  
16 Admiral Tracey's, in particular, and that is that  
17 I'm not sure whether in the Equal Opportunity  
18 complaints there is some formal mechanism for  
19 keeping up with the number of reports that are  
20 filed and resolved informally. I assume there  
21 is. Do you think that would be correct?

22 Because what I would not want to do is

1 to lose the data. I would not -- and the fact  
2 that you have the SARC involved makes me think  
3 that there will be somebody not only to collect  
4 the data so we get a true picture of the number  
5 of retaliation complaints out there, but also the  
6 follow up that's necessary to be sure that people  
7 who are victims of retaliation not only get the  
8 relief, but that the person who is conducting the  
9 retaliation is held accountable for doing so.

10 LTC MCGOVERN: Yes, sir. And, again,  
11 the EO is just an analogy. That person would not  
12 actually be involved. So, the SARC --

13 MR. TAYLOR: Right.

14 LTC MCGOVERN: -- would be collecting  
15 the reports and entering them into DSAIDs, and  
16 then indicating whether it's an informal report  
17 going to the command, or whether it's a formal  
18 report for the command to use, in the Army, AR15-  
19 6 procedures, or if it's been referred to the IG  
20 for reprisal.

21 JUDGE JONES: And, is that going to  
22 require a separate form or is there a way to put

1 it on the same form that they're already using?

2 LTC MCGOVERN: I think that you all  
3 had recommended before there be a separate form  
4 that be linked back to the 2910, which is the  
5 original sexual assault report. And, you don't  
6 have to necessarily decide what exactly the form  
7 would include or look like, but reach a  
8 conclusion as to whether there should be separate  
9 processes for the command to use, or if there  
10 should just be one form and one process.

11 CHAIR HOLTZMAN: Let me ask a  
12 question. If you start -- and, you are thinking  
13 about this, if you were to start, let's say a  
14 victim went to the SARC and said, yes, maybe we  
15 could just resolve this in an informal way. And  
16 then, the victim changes his or her mind down the  
17 road. Do you envision that the victim would be  
18 able to change his or her mind and then go from a  
19 quote, unquote, informal process to a formal  
20 process?

21 COL GREEN: In the EO process, that's  
22 correct, ma'am. The informal is an election

1 where I can seek informal resolution of my  
2 complaint, and if the complainant is unsatisfied  
3 with what happens through the informal resolution  
4 process in the EO realm, they can then file a  
5 formal, or then they can request formal  
6 resolution which then goes to the documented  
7 investigation.

8 CHAIR HOLTZMAN: So, would you  
9 envision that same mechanism working here?

10 LTC MCGOVERN: Yes, ma'am, it's just  
11 creating a record for the SARC to enter into  
12 DSAIDs where, right now, it's not being captured.  
13 And, again, the SARC may not be the person to  
14 resolve it, but the SARC is the one to assume the  
15 information, and then refer the person to the  
16 command for an investigation.

17 CHAIR HOLTZMAN: Okay, so the SARC  
18 would get the compliant and then figure out what  
19 -- to whom the complaint gets referred?

20 LTC MCGOVERN: Correct. And, again,  
21 with the analogy to the EO, it is then referred  
22 to the command, if it's an informal, and, if it's

1 more formal, then it would be whether it's a  
2 recommendation for -- for going to the command  
3 for a formal investigation or to the IG.

4 CHAIR HOLTZMAN: And, would you see  
5 this as -- I mean, some people might say, well,  
6 aren't you devaluing a complaint by making it  
7 quote, unquote informal? And, wouldn't the  
8 answer to that be some people may be discouraged  
9 from coming forward because they don't want the  
10 whole formal process? Would that be a fair  
11 characterization? That this actually gives the  
12 victim more choices as to how to proceed?

13 COL GREEN: I think that's right,  
14 ma'am. And, I think it's important to note that  
15 this isn't so much about the formality or the  
16 informality of the complaint, it's about the  
17 resolution of the complaint. So, the complaint  
18 is filed the same way. I complain that I was  
19 retaliated in this particular way and what I'm  
20 asking for is, I want this resolved informally,  
21 or I want it resolved through a formal process.

22 So, I think if we look at it in that

1 context, I mean, it doesn't change the nature of  
2 the complaint or the treatment of the complaint  
3 at all, it just gives the victims some options  
4 for how it potentially is considered and  
5 resolved.

6 CHAIR HOLTZMAN: And, would we have  
7 some process as part of this? Some requirement  
8 that the SARC follow up with the victim after a  
9 certain period of time to find out whether the  
10 victim was satisfied or not? I mean --

11 LTC MCGOVERN: And, those --

12 CHAIR HOLTZMAN: How would that work?

13 LTC MCGOVERN: That process is already  
14 in place with the command management group. So,  
15 whether it's a formal report or an informal  
16 report, the installation commander is informed,  
17 oh, it's an informal report, it was already  
18 resolved within a month, or this is a formal  
19 investigation, it's still ongoing.

20 But the SARC already speaks to the  
21 victim prior to each command management group and  
22 after, so that communication -- or according to

1 the regulations, that communication and those  
2 processes are in place.

3 CHAIR HOLTZMAN: So, that would be  
4 captured, though, in the form that we're  
5 suggesting, that periodically there would be a  
6 questioning of the victim to find out how the  
7 victim felt about the attempt to resolve the  
8 issue?

9 LTC MCGOVERN: Yes, ma'am, that  
10 certainly could be.

11 CHAIR HOLTZMAN: Any other thoughts?  
12 Questions? Comments?

13 JUDGE JONES: No, I think I understand  
14 it better. I was confusing formally, meaning it  
15 went to -- it went beyond the conversation with  
16 the SARC. So, everything or every retaliation  
17 that's reported to the SARC will get sent to the  
18 command, it'll either just be formal or informal  
19 and there'll be some box that says I don't want -  
20 - I want this to be an informal report and  
21 handled one way as opposed to a formal one  
22 handled another. So, is that all we're talking

1 about here?

2 COL GREEN: I think so. And one of --  
3 I think this issue does cross one of the other  
4 issues the Panel's been discussing, is what  
5 organization should be responsible for resolving  
6 complaints of retaliation or reprisal, and  
7 whether that should be the purview of the IG, or  
8 the MCIO, or the command?

9 And so, this may offer a vehicle to  
10 have the victim have a voice in that decision,  
11 where if I go and file a complaint and say that I  
12 was retaliated against and I elect informal  
13 resolution, then that's not going to go to an  
14 investigating agency for resolution, that's just  
15 a facilitated resolution between whoever that  
16 facilitator is and my command to get this  
17 resolved. If I elect formal resolution, then  
18 maybe the decision needs to be made, at that  
19 point, who is the right agency to investigate the  
20 compliant?

21 MR. TAYLOR: I would just like to add  
22 two thoughts to that. One is that I think

1       anytime we're trying to remedy a wrong, the more  
2       alternatives we give to the victim to seek some  
3       kind of remedy that's satisfactory to the victim  
4       is a good thing.

5                   And, the second is that it seems to me  
6       that using your term alternate dispute  
7       resolution, Colonel Green, that commands might be  
8       more willing to accommodate victims concerns if  
9       they know that by doing so, they can head off  
10      some bigger, more thorough investigation.

11                   That might be a good or a bad thing,  
12      but it might be better for the victim, because he  
13      or she might have a better shot at getting a  
14      resolution at a lower level that's going to  
15      stick, because no command wants to be in a  
16      position of having not satisfied a request for  
17      redress when it comes to this issue.

18                   LTC MCGOVERN:   So, have you all  
19      reached a conclusion?

20                   CHAIR HOLTZMAN:   Did anybody have any  
21      further thoughts?   Comments?

22                   VADM TRACEY:   I agree with Mr. Taylor

1 that this would give effectively a three tiered  
2 process for a victim being able to deal with  
3 retaliation. And I think the more opportunities  
4 to get it done at the lowest possible level, with  
5 the least additional cause for people to  
6 ostracize the victim, the better for the victim  
7 and the more likely that you're actually going to  
8 get resolution.

9 I'm a lot less interested in that we  
10 can create a big database to count all these  
11 things, then we've actually created a mechanism  
12 that works for something like this, which is  
13 really insidious, really hard for a command to  
14 help with unless there are ways that they can be  
15 informed of success and failure.

16 JUDGE JONES: And, I guess the  
17 situation of a victim who comes in and says it is  
18 the command that's doing this, where does that  
19 go?

20 LTC MCGOVERN: It has the option of  
21 going to the higher command, or over to the IG,  
22 ma'am.

1 JUDGE JONES: And, the SARC would  
2 obviously know all about this, and make it a  
3 formal -- or still formal or informal? Although,  
4 at that stage, I would assume the person would  
5 want formal, but who knows.

6 LTC MCGOVERN: Right.

7 JUDGE JONES: Okay. So, what would  
8 you like to know? One form, right? Because we  
9 have said that before, only you could, you know,  
10 make it clear it was an informal complaint, as  
11 opposed to a formal one. It would be dealt with  
12 differently, but both forms go to the same place,  
13 to the command and they'd all be captured, is  
14 that the idea?

15 LTC MCGOVERN: Yes, ma'am, unless the  
16 appropriate investigating agency is the IG or the  
17 MCIO, the SARC could refer it to the appropriate  
18 investigating agency along with the command.

19 JUDGE JONES: But, the data will still  
20 be captured?

21 LTC MCGOVERN: Absolutely.

22 CHAIR HOLTZMAN: And, would that be a

1 decision of the victim whether he or she wanted  
2 to go to the IG or the MCIO? How do you see  
3 that?

4 LTC MCGOVERN: I -- I'm sorry, go  
5 ahead, sir.

6 COL GREEN: I think it's always an  
7 individual decision to take a complaint to the  
8 IG. And so, the IG is not going to impose itself  
9 into an investigation until a person has come  
10 forward and filed a complaint with the IG.

11 So, I think the issue here is if you  
12 have an issue of professional reprisal where I've  
13 had some instance in my career affected by an  
14 action of the command, and I believe it's based  
15 on, you know, my having reported a sexual  
16 assault, I still have the option to resolve that  
17 through my chain of command. I can go and ask  
18 them to remedy it or I could even go and let the  
19 SARC know that this has happened and, through an  
20 informal process, have that resolved and it never  
21 reaches the IG.

22 It would be a -- I mean, under the

1 current process, it would be up to the victim  
2 then, if I'm not satisfied or if I believe this  
3 is serious enough that I want to take it to the  
4 IG for resolution. Now, in a criminal  
5 investigation, it may be a little bit different  
6 because, you know, you may have an independent  
7 issue about obstruction of justice, or something  
8 that the command or the investigators impose  
9 themselves on, simply because of criminal  
10 activity. And so, I think there's a little bit  
11 of a different dynamic there.

12 VADM TRACEY: So, let me just double-  
13 check something. So, the SARC takes the report  
14 and, in the next monthly case management review  
15 informs the Case Management Review Board that a  
16 victim has reported retaliation.

17 If the Case Management Review Board is  
18 not satisfied that it's going to be dealt with  
19 correctly, can't they take action to address the  
20 issue? And, they may decide that it needs to go  
21 to a higher level of command for action.

22 It's a good order and discipline

1 issue, as well as the victim's issue, right? So,  
2 doesn't the Case Management Review Board level  
3 retain the authority to try to resolve good order  
4 and discipline issues that are not being remedied  
5 by the way the victim's chosen to do it? I mean,  
6 I don't know that you can say that it's  
7 completely up to the victim not to go to the IG.

8 COL GREEN: I'm not familiar with a  
9 case of an IG -- I guess a commander could refer  
10 an issue to the IG. In our discussions and in my  
11 discussions with IG representatives on this  
12 topic, I mean their indication is in complaints  
13 about reprisal that they don't institute or  
14 initiate an investigation absent the victim's  
15 complaint directly to the IG. But, again, there  
16 aren't a lot of IG cases on these issues. So,  
17 you know, I guess a command and their ability to  
18 refer it to the IG would still be there.

19 VADM TRACEY: And, the Case Management  
20 Review Board has to have some ability to act,  
21 otherwise, it's just a reporting mechanism.

22 LTC MCGOVERN: It is a monitoring

1 agency, but, yes, ma'am, if things are not  
2 happening, the installation commander who's the  
3 Case Management Group commander could certainly  
4 say this needs further action, should be elevated  
5 to another level.

6 JUDGE JONES: So, this kind of makes  
7 me go back and wonder what does informal really  
8 mean, if it's going over anyway to the Case  
9 Management Group? I know the victim is -- I  
10 guess we're telling the victim this means that  
11 there will be no formal dispute -- or resolution  
12 of this. But, does that mean no one's going to  
13 be charged or no one's -- I mean, I don't know  
14 what informal means in having just, you know,  
15 listened what Admiral Tracey said, because you  
16 can't ignore it once it comes over to the Case  
17 Management Group.

18 LTC MCGOVERN: If I can give you a  
19 different example. A soldier reports that there  
20 was a bar fight and there was an assault the  
21 night before. The commander always has the  
22 option to do a commander's inquiry, which is an

1 informal type of process. He can call a few  
2 Soldiers in, say what happened last night? And,  
3 from there, assess, do we need to do something  
4 more? Can we get to the bottom of this? Do we  
5 need to inform the MPs?

6 Or, someone can come in and say, this  
7 person did this to me last night at the bar  
8 fight. I want to file a formal type complaint or  
9 I want a formal investigation done. Then they  
10 follow the Army Regulation 15-6, an  
11 investigator's appointed. They go through and  
12 read everybody their rights before taking sworn  
13 statements. So, that's the more formal process  
14 versus an informal process.

15 JUDGE JONES: That's very helpful.  
16 The only thing I am interested in, though, in  
17 that exact sense, you've hit the nail on the  
18 head. So, the victim wants it to be informal.  
19 The victim tells about being retaliated against  
20 and maybe there was someone else who isn't  
21 reporting, there's injuries involved, but it's  
22 marked informal.

1           It goes to the Case Management Group.  
2           The commander decides to look at it and try to  
3           resolve it at the command level, but changes his  
4           mind because the injuries are too serious, or  
5           there's more facts. So, I guess in my mind, I  
6           just don't know what informal is really  
7           guaranteeing.

8           LTC MCGOVERN: It presents a --

9           JUDGE JONES: Because you can't stop  
10          it once it's reported I guess is where I'm coming  
11          from.

12          LTC MCGOVERN: Versus the restricted  
13          versus unrestricted type sexual assaults.

14          JUDGE JONES: Right. And, I'm not  
15          necessarily for restricted in this context.

16          LTC MCGOVERN: Right, no, because by  
17          restricted we mean it doesn't go to the command.  
18          Now, informal, really, is just a proposal to  
19          expedite closure and resolution of these types of  
20          social retaliation which are not actionable under  
21          the UCMJ, because they're being bullied on  
22          Facebook, they're not being included in group

1 events, they don't -- they can't pinpoint  
2 something under the regulatory definition, but  
3 they believe there's retaliation going on.

4 So, they can't file an actionable  
5 retaliation claim, but they want something done.  
6 In that case, the Case Management Group  
7 commander, or the lead SARC would say, okay, this  
8 is an informal complaint. They were experiencing  
9 some sort of retaliation. It's already been  
10 resolved, let's keep an eye on it. You know, so  
11 the next month, they don't come forward at the  
12 formal complaint, guess that situation was  
13 solved.

14 It's just in the EO realm, it's a less  
15 threatening way to get resolution fast, knowing  
16 you can just have an informal report where it may  
17 be appropriate for retaliation, people are scared  
18 to actually report these because of continued  
19 retaliation. So, if there's an informal  
20 mechanism, maybe we can just get this solved, get  
21 it done without there being this big --  
22 investigator appointed and sworn statements

1 taken.

2 COL GREEN: But certainly, it would  
3 not preclude the command from knowing about that  
4 and saying, wow, I have toxic environment in this  
5 organization. I'm going to completely change  
6 over the leadership. And just because it's been  
7 filed as an informal resolution, it would not  
8 preclude the command from taking action. And  
9 that's true in the EO realm as well.

10 I mean, if someone elects, you know,  
11 informal resolution but the command realizes this  
12 is a much bigger problem than this person's  
13 complaint against in this one instance, the  
14 command can always take action.

15 JUDGE JONES: But, presumably, the  
16 victim is coming in and wants it to be informal,  
17 well maybe not. I guess if -- I was about to say  
18 wants it to be informal because they don't want a  
19 lot of hoopla and more retaliation. So, we don't  
20 know that this solves that problem.

21 VADM TRACEY: I think that's right, if  
22 fundamentally the victim wants it to stop, which

1 I think is right.

2 JUDGE JONES: Right.

3 VADM TRACEY: Then, if the commander's  
4 view is that changing out the leadership is the  
5 only way that it stops, that -- you can't tell  
6 the commander he can't do that, nor can you deny  
7 him information that would let him recognize that  
8 and take that action.

9 LTC MCGOVERN: And, currently,  
10 according to the survey, 62 percent of female  
11 victims who are sexually assaulted are saying  
12 they perceived some sort of retaliation. Yet,  
13 the commanders and NCOs and others appear before  
14 you saying they're not seeing retaliation  
15 reports. So, people are perceiving it but not  
16 seeking help to get it resolved. And, this was  
17 just a possibility as to another mechanism.

18 JUDGE JONES: I just don't want them  
19 to think that, oh, it's informal, everything's  
20 going to be okay. It's going to go very quietly  
21 and, you know, and we're encouraging them to  
22 report it. But, if their true goal is -- I don't

1 know what their true goal is, but I don't know  
2 that informal and formal makes much difference.

3 LTC MCGOVERN: Okay.

4 JUDGE JONES: I mean, maybe I'm wrong.

5 MR. TAYLOR: Well, I think that's  
6 where the oversight makes a huge difference,  
7 because as the CMG meets to look at these cases,  
8 if they identify something that we would call a  
9 cancer in an organization, or a mishandling if  
10 someone has misidentified something as informal  
11 that really should be handled in a more formal  
12 way, then the command always has the option to  
13 step in. And, while it's true that that tends to  
14 undercut the idea that it's informal, I think, as  
15 Admiral Tracey said, it's an inherent part of  
16 command to fix those problems.

17 JUDGE JONES: I just don't want to  
18 promise the reporter something that they're not  
19 getting. That's all. If you think calling it  
20 informal and intending for it to be an informal  
21 resolution will increase reporting, I think  
22 that's a great idea. But, I think everyone has

1 to be warned that it's still, you know, it's  
2 going to be reviewed and it's going to become  
3 part of the information database, that's all.

4 CHAIR HOLTZMAN: Are there any other  
5 comments, questions? So, how would we formulate  
6 this proposal, Colonel McGovern?

7 LTC MCGOVERN: Ms. Holtzman, you  
8 could make a general recommendation that -- for  
9 the standardized form to have an option similar  
10 to or analogous to the EO procedures of informal  
11 versus formal complaints, and let the Services  
12 and DoD figure out what that looks like exactly.

13 Because there are a lot of things to  
14 take into consideration and the EO process has  
15 been thought out as well as the appeals. I have  
16 a handout that shows those processes, and it  
17 takes some thought. So, that's why I would  
18 recommend, in general, that if this could  
19 facilitate or increase reporting and expedite  
20 resolution of some of these cases of retaliation  
21 to get them to stop, it might be worth  
22 recommending.

1                   CHAIR HOLTZMAN: And, should we append  
2 to that suggestion or recommendation that within  
3 a year this be reviewed to determine how  
4 effective it is?

5                   LTC MCGOVERN: I think that would be  
6 a great idea, ma'am.

7                   VADM TRACEY: Can we couch it with --  
8 I think your language was important there that  
9 our intention is to create more opportunities for  
10 people to help resolve retaliation, because it is  
11 so hard.

12                   And so, it's a process that might  
13 raise some visibility which would not otherwise  
14 occur for commanders, and that's why we're  
15 thinking a couple of tiered system may be  
16 important here, so that you don't go from not  
17 being able to talk to your chief, to needing an  
18 IG investigation with nothing in between. That,  
19 I think, might be helpful for Services, and how  
20 to orchestrate what I think our intention is,  
21 it's to open up avenues.

22                   CHAIR HOLTZMAN: Do we have something

1 clear enough for us to vote on?

2 LTC MCGOVERN: I think we have  
3 guidance as far as developing a recommendation if  
4 all are in favor of an informal and formal option  
5 on the standardized form that you're  
6 recommending, we can develop the language from  
7 there for you.

8 CHAIR HOLTZMAN: Yes, would you maybe  
9 by the end of the day we could have, if that's  
10 possible, or if not, the next meeting some  
11 language for us to vote on this. I'm taking it  
12 there's a consensus in favor of --

13 JUDGE JONES: Yes, no, I'm not opposed  
14 to informal. I just think we need to know  
15 exactly what is meant, and what we're going to  
16 tell the victim it means, that's all.

17 LTC MCGOVERN: Yes, ma'am, and we can  
18 go back and dig into the EO process a little bit  
19 to flesh that out for you.

20 CHAIR HOLTZMAN: Okay. So, we are  
21 going to table -- I mean, basically, as I gather,  
22 there seems to be consensus in favor of doing --

1 creating this other option, but we are looking  
2 for language from you --

3 LTC MCGOVERN: Yes, ma'am.

4 CHAIR HOLTZMAN: -- to how to express  
5 that consensus. Okay. Excellent. What's our  
6 next issue, Colonel?

7 LTC MCGOVERN: Okay, ma'am, so that  
8 was reporting and retaliation from the victim's  
9 perspective. Now, we're moving on to how to  
10 track and hold offenders accountable. We wanted  
11 to point out to you the Services were required to  
12 define retaliation in their regulations and  
13 they've all done that.

14 But the -- and they reported in 2014  
15 the results of that, concluding that they were  
16 limited in what they could do because they had to  
17 take into account the constitutional limits that  
18 you can't force people to be friends or associate  
19 with each other. And, therefore, their  
20 definitions of ostracism and maltreatment require  
21 this specific intent element to interfere, almost  
22 to the level of obstruction of justice.

1           So, for instance, ostracism is the  
2 exclusion of social acceptance, privilege or  
3 friendship with the intent to discourage  
4 reporting of a criminal offense or otherwise  
5 discourage the due administration of justice.  
6 Maltreatment has similar language.

7           And, the Staff was just, for the  
8 purposes of the report, wanting your input on  
9 whether you think that definition is appropriate?  
10 Is it too narrow? Because then you are missing a  
11 realm of social retaliation such as the video by  
12 the Army, the cadet at West Point, explained that  
13 she had reported one of her leaders was doing  
14 things that seemed retaliatory to a sexual  
15 assault and many people sided with the leader and  
16 she felt ostracized and left out but there was no  
17 specific intent or deliberate act to prevent her  
18 from further reporting. It was that pressure  
19 that was there.

20           So, right now, according to their  
21 definitions, they aren't able to take any action  
22 under the UCMJ for a lot of the social

1 retaliation that's going on on the Internet or  
2 within units.

3 But, at the same time, I think the  
4 Services have explained thoroughly in their  
5 responses that this is due to the constitutional  
6 limits so that there aren't challenges down the  
7 road that people are interfering with the  
8 accuseds' First Amendment rights or the  
9 bystanders' First Amendment rights. You can't  
10 force people to be friends.

11 So, just looking to make sure that,  
12 first of all, you all are aware that this is what  
13 the Services' regulations are. And, second, do  
14 you have any comments on the narrowness of that  
15 definition when social retaliation is pretty wide  
16 area of misconduct?

17 CHAIR HOLTZMAN: Any Members of the  
18 Panel have any questions about that?

19 JUDGE JONES: So, am I right, though,  
20 that something that might not -- conduct that  
21 might not rise to this level which is quite  
22 specific and is going to be something that's, you

1 know, a threshold that has to be reached before  
2 you can proceed?

3 That type of conduct could still be  
4 dealt with by a commander, correct?

5 LTC MCGOVERN: Yes, if someone's  
6 feeling harassed or they feel like it's  
7 interfering with their ability to be part of the  
8 unit and it's prejudicial to good order and  
9 discipline, certainly, leadership can step in,  
10 talk to people or handle it administratively,  
11 give a letter of reprimand saying you all are,  
12 you know, this is not -- or a counseling  
13 statement.

14 It's not actionable under the UCMJ  
15 under Article 92 Because there's not that  
16 specific intent. But, certainly, leadership --

17 JUDGE JONES: What are the various  
18 things the commander can do? Just a letter of  
19 reprimand or can there be more?

20 LTC MCGOVERN: It would be  
21 administrative actions. So, it would --

22 JUDGE JONES: Only administrative?

1 LTC MCGOVERN: -- counseling, verbal  
2 or oral, letter of reprimand which can be in  
3 their file for inappropriate conduct, but not an  
4 Article 15 or --

5 JUDGE JONES: Okay.

6 LTC MCGOVERN: -- a court-martial  
7 because those require a UCMJ violation.

8 CHAIR HOLTZMAN: I want to get at the  
9 specific intent point. And, for some reason,  
10 what's coming to my mind, and you probably know  
11 this better, well, you definitely know it better  
12 than I do, Judge Jones, but, you know, there's  
13 retaliation in the federal criminal code,  
14 retaliation against a juror or against a witness.

15 Do you need to have the specific  
16 intent of discouraging them from or is it more  
17 general? I mean why is this language here now?  
18 Why is it so narrow? Does the statute itself  
19 require that or is this just an interpretation on  
20 the part of the Services? And, how does that  
21 comport with other kinds of retaliation both in  
22 the military code and in the federal criminal

1 code that are analogous?

2 LTC MCGOVERN: I have not made the  
3 comparison to the federal code, ma'am. The  
4 Services explain that it's necessary to make sure  
5 their prohibition doesn't interfere with freedom  
6 of speech and association.

7 Congress simply said in FY14 NDAA that  
8 the Secretary of Defense define ostracism and  
9 maltreatment committed by peers of a member  
10 because the member reported a criminal offense  
11 and makes such retaliation punishable.

12 They didn't require a specific --

13 CHAIR HOLTZMAN: Okay, but just to  
14 follow that thought through, there are several  
15 ways that you could, as they say, skin that cat.

16 LTC MCGOVERN: Right.

17 CHAIR HOLTZMAN: One would be  
18 ostracism on account of your action. I mean so,  
19 somebody reported a sexual assault and so, if you  
20 retaliated against that person because they  
21 reported it, but you didn't have the intent to  
22 stop them from reporting it, but you just were

1 angry that they did report it.

2 LTC MCGOVERN: And, that's the type of  
3 social retaliation which now currently is not  
4 punishable under the UCMJ.

5 CHAIR HOLTZMAN: Right, but I'm trying  
6 to understand why that's a freedom of speech  
7 issue. I don't see that particularly as a  
8 Article -- I mean First Amendment issue.

9 LTC MCGOVERN: Because if you look at  
10 the types of misconduct when someone is  
11 retaliating against another Servicemember after  
12 they've filed a sexual assault report --

13 CHAIR HOLTZMAN: Well, I was going to  
14 go back to the juror issue, maybe you know --

15 JUDGE JONES: Well, I mean you do have  
16 to --

17 CHAIR HOLTZMAN: -- juror issue, do  
18 you have to have -- I mean, the jury has voted,  
19 okay? Finished. The person's acquitted.  
20 Nothing more and no further action you can do, so  
21 you can't have the specific intent of trying --

22 JUDGE JONES: Of not to affect that.

1 CHAIR HOLTZMAN: Right.

2 JUDGE JONES: No.

3 VADM TRACEY: But, you also can't have  
4 an ostracism and maltreatment scenario for a  
5 juror. I mean, this is about two specific forms  
6 of retaliation, ostracism and maltreatment, which  
7 would be more applicable in the military than it  
8 would be in --

9 CHAIR HOLTZMAN: And so, what is --  
10 maybe ostracism is more ambiguous, but what about  
11 maltreatment? What are we talking about there?

12 LTC MCGOVERN: If you can look on the  
13 proposed issues, the definition is there that  
14 it's a form of retaliation defined as treatment  
15 by peers or other persons that, when viewed  
16 objectively under all circumstances, is abusive  
17 or otherwise unnecessary for any lawful purpose,  
18 done with the intent to discourage reporting or  
19 otherwise discourage the due administration of  
20 justice, or results in physical and mental harm  
21 or suffering.

22 CHAIR HOLTZMAN: Well, if we just took

1 out the specific intent part, but you had all  
2 those other parts like, could cause mental or  
3 physical harm and was abusive, how do we have a  
4 First Amendment issue there? Just curious.

5 LTC MCGOVERN: The type of activity  
6 that the maltreatment or ostracism may not rise  
7 to the level of hazing or anything like that,  
8 it's not including them in activities, it's  
9 unfriending them on Facebook.

10 CHAIR HOLTZMAN: I know, but that's  
11 ostracism part. I'm talking about the  
12 maltreatment part. They were talking about  
13 abusive conduct that results in mental or  
14 physical injury, if I remember the language  
15 correctly.

16 But, if I said, if you included  
17 everything in the definition of maltreatment but  
18 you took out the specific intent, how are you  
19 creating a problem under the First Amendment? I  
20 mean, maybe I'm just not smart enough to figure  
21 that out, but I just would really like to have an  
22 answer to that one.

1 COL GREEN: Well, and I think, ma'am,  
2 more important -- even more pertinently to the  
3 military environment is -- I mean there are  
4 restrictions to freedom of association,  
5 restrictions to freedom of speech within the  
6 military context.

7 CHAIR HOLTZMAN: I'm not even going  
8 there. I'm not even going there. I just want to  
9 understand what their concern is. So, because  
10 that seems to mean what's covered under  
11 maltreatment -- Admiral, maybe you can help me  
12 out here.

13 VADM TRACEY: So, this is a good  
14 question, I think. So, like you, ostracism does  
15 seem to be unique to the circumstances that  
16 military people would be living in.

17 But, I thought that scenarios that  
18 would be categorized as maltreatment would  
19 include assignment of particularly unpleasant  
20 duties on an unreasonable frequency to the  
21 individual, you know, something that's not shared  
22 evenly across the unit and so forth.

1                   Are those the things that are  
2 categorized as maltreatment?

3                   LTC MCGOVERN: Yes, ma'am. And,  
4 usually, it involves a senior/subordinate  
5 relationship. Here, for retaliation --

6                   VADM TRACEY: And they specifically  
7 exclude that, right?

8                   LTC MCGOVERN: They've taken that away  
9 so it --

10                  VADM TRACEY: So, what's a peer-to-  
11 peer maltreatment example? Maybe that would be  
12 helpful.

13                  LTC MCGOVERN: If a specialist's or  
14 enlisted Soldier is just put in charge of a group  
15 of other Soldiers and says, oh, you need to go  
16 clean all the weapons, knowing that she filed a  
17 sexual assault report and everybody else is able  
18 to go to lunch. She may see that as maltreatment  
19 or abusive, you know, being picked on.

20                  But, their definition requires the  
21 reason that there was a specific intent in that  
22 specialist decision to assign her to clean all

1 the weapons was to keep her from continuing to  
2 report, to try to get her to drop out of the  
3 process.

4 VADM TRACEY: So, but as the judge  
5 suggested, I don't see your freedom of  
6 association issue in that. That's a sort of a  
7 different category of activities than ostracism  
8 would be.

9 LTC MCGOVERN: But, I mean it's hard  
10 to pinpoint maltreatment in particular when it  
11 wouldn't rise to the level. But, the fact is,  
12 it's very hard to prove specific intent.

13 VADM TRACEY: Isn't maltreatment  
14 subject to the UCMJ anyway?

15 LTC MCGOVERN: Under Article 93 when  
16 it's a senior/subordinate relationship. But, a  
17 lot of the retaliation that occurs is peer-to-  
18 peer.

19 VADM TRACEY: But, the example that  
20 you gave establishes a senior/subordinate  
21 relationship, the work detail lead as a -- you  
22 can't say no. You're in a duty of obedience

1 position to the leader.

2 CHAIR HOLTZMAN: Let me follow that up  
3 for a second.

4 So, under Article 93 where it's a  
5 senior and subordinate situation, do you need the  
6 specific intent? Someone's shaking his head back  
7 there.

8 LTC MCGOVERN: No.

9 CHAIR HOLTZMAN: Okay. So, if it's  
10 not necessary for a senior/subordinate situation,  
11 why should it be necessary for a peer situation?  
12 It may be harder to prove but I don't think -- if  
13 there's no constitutional issue involved with the  
14 senior/subordinate, why would there be one with a  
15 peer-to-peer? I mean if that's their objection.

16 In other words, if the military's  
17 objection to this is that this raises  
18 constitutional issues, then I don't see it. If  
19 they had some other objection, I'm perfectly  
20 happy to consider that.

21 So, what's your answer, Colonel  
22 McGovern?

1 LTC MCGOVERN: I don't have an opinion  
2 one way or the other, ma'am. I'm just raising  
3 the issue to you all to see if you do think it's  
4 too narrow. It sounds like you believe for --

5 CHAIR HOLTZMAN: But, so, what you're  
6 saying is the military's objection to having  
7 specific intent -- the military's reason for  
8 having the specific intent part of the definition  
9 when it comes to peer-to-peer is because they're  
10 concerned about a constitutional issue here, is  
11 that -- am I correct in --

12 LTC MCGOVERN: Yes, ma'am.

13 CHAIR HOLTZMAN: -- that statement?

14 LTC MCGOVERN: Right.

15 CHAIR HOLTZMAN: Well, I don't see the  
16 constitutional issue. Maybe we should ask them  
17 to explain how there can be a constitutional  
18 issue here when they don't see one -- a  
19 subordinate and superior/subordinate  
20 relationship.

21 VADM TRACEY: Just the language sounds  
22 like it's -- maltreatment is prohibited.

1 CHAIR HOLTZMAN: Yes, exactly.

2 LTC MCGOVERN: But, they're making  
3 maltreatment actually easier because they're  
4 taking away the senior/subordinate relationship  
5 requirement but still trying to maintain  
6 boundaries so that if something is actionable  
7 under the UCMJ, defense attorneys won't come back  
8 and say, well, that was my client's First  
9 Amendment right whether or not he wanted to  
10 associate with that person.

11 VADM TRACEY: That's ostracism.

12 LTC MCGOVERN: Right.

13 VADM TRACEY: Maltreatment is --

14 LTC MCGOVERN: Or whether or not he  
15 wanted to treat that person that way.

16 VADM TRACEY: Badly.

17 LTC MCGOVERN: Yes, treat them badly.

18 CHAIR HOLTZMAN: Abusive, isn't that  
19 the word -- one of the words, abuse and causing  
20 mental or physical injury? I mean, aren't those  
21 requirements? This seems, you know, sort of  
22 serious.

1 LTC MCGOVERN: Yes, ma'am.

2 CHAIR HOLTZMAN: I'm sorry, Mr.  
3 Taylor, I didn't mean to interrupt you.

4 MR. TAYLOR: No, that's fine.

5 Of course, this is a subject that  
6 we've been thinking about a lot at the university  
7 level because of the recent demonstrations and  
8 protests about speech and other kinds of  
9 activities that have to do with something like  
10 ostracism.

11 So, I do think that there's an  
12 argument that if you're planning to hold someone  
13 criminally accountable for ostracism that this  
14 specific intent definition makes some sense.  
15 But, I don't think that necessarily translates to  
16 maltreatment.

17 CHAIR HOLTZMAN: Right, that's my  
18 concern here.

19 LTC MCGOVERN: If you all -- if I can  
20 refer you all to Tab 3 of your reading materials.  
21 This is the 2014 report that DoD provided which  
22 explains their definitions and the limitations.

1 They believe that the freedom of association is a  
2 cherished right under the First Amendment. It is  
3 on page eight, that discussion.

4 And, they are carefully crafting anti-  
5 retaliation provisions to avoid risk of alternate  
6 legislative language being found  
7 unconstitutional.

8 VADM TRACEY: So, this is the first  
9 full paragraph on page eight?

10 LTC MCGOVERN: Correct.

11 VADM TRACEY: Which really is talking  
12 about ostracism.

13 MR. TAYLOR: So, it seems to me that  
14 following up on the Chair's recommendation, maybe  
15 we could ask them what their legal theory is for  
16 maltreatment, as the DoD General Counsel or  
17 whoever's responsible. I assume it's their  
18 office who is providing advice about this.  
19 Perhaps they've written an opinion on it already.

20 LTC MCGOVERN: Correct. And, this  
21 would be the written opinion.

22 JUDGE JONES: So, can I just ask a

1 question then on maltreatment? If you take out  
2 the specific intent, that just means you don't  
3 have to prove that specific intent. But, if  
4 you've proved everything else, you still have  
5 maltreatment, right?

6 LTC MCGOVERN: Correct.

7 JUDGE JONES: You just don't have  
8 something that --

9 LTC MCGOVERN: It would then be --

10 JUDGE JONES: It speaks to  
11 retaliation.

12 LTC MCGOVERN: It would then, correct,  
13 be punishable under Article 92.

14 JUDGE JONES: And, this is punishable  
15 under?

16 LTC MCGOVERN: Right now, this form of  
17 retaliation, unless it has a specific intent, is  
18 not punishable peer-to-peer. So, if --

19 CHAIR HOLTZMAN: But, if it has a  
20 specific intent, what is the -- what Article of  
21 the military code is this?

22 LTC MCGOVERN: Article 92 because

1 these definitions are in the regulation and  
2 they're punitive under the regulations.

3 CHAIR HOLTZMAN: Oh, so it still would  
4 be 92?

5 LTC MCGOVERN: Right.

6 CHAIR HOLTZMAN: So, peer-to-peer with  
7 specific intent is 92?

8 LTC MCGOVERN: Yes, ma'am.

9 CHAIR HOLTZMAN: And  
10 subordinate/superior without any intent is 92?

11 LTC MCGOVERN: Ninety-three.

12 CHAIR HOLTZMAN: Ninety-three? Okay,  
13 got it. Thank you.

14 MR. TAYLOR: But, you know, it also  
15 strikes me that the NDAA specifically required  
16 them to make retaliation punishable under Article  
17 92, yet, if you took the facts of maltreatment  
18 that we've been talking about and taking away the  
19 specific intent, it seems to me like that could  
20 be punishable under Article 134, it's contrary to  
21 good order and discipline. Just take those same  
22 facts without the intent, would you agree?

1 LTC MCGOVERN: Yes, sir.

2 MR. TAYLOR: So, in other words, we  
3 have a way to punish this right now without  
4 intent and yet, we're adding intent here to make  
5 it harder to punish for maltreatment. Right?  
6 Okay.

7 CHAIR HOLTZMAN: So, I think we need  
8 to -- I mean, unless anybody on the Panel  
9 objects, I think we need to communicate with the  
10 General Counsel and find out what their thinking  
11 is because this --

12 LTC MCGOVERN: Can we take one step  
13 back?

14 CHAIR HOLTZMAN: Sure.

15 LTC MCGOVERN: Do you all agree that  
16 the definition of ostracism is appropriate to  
17 have the specific intent requirement?

18 CHAIR HOLTZMAN: How do Members of the  
19 Panel --

20 LTC MCGOVERN: Because there is the  
21 freedom of association and freedom of speech?  
22 But, as far as maltreatment, you can't think of

1 an example why the specific intent should be  
2 required? Is that correct?

3 JUDGE JONES: As long as there is  
4 still other forms of ostracism that's fine, that  
5 a commander can deal with.

6 MR. TAYLOR: Yes, I agree with that  
7 because if we're talking about criminalizing this  
8 kind of conduct, then I think the standard ought  
9 to be higher.

10 But, as Judge Jones points out,  
11 Colonel Green did as well, there are a lot of  
12 other things that a commander can do, not to  
13 mention reassigning people, giving them different  
14 jobs, moving them to different units, there are  
15 all sorts of options that he has or she has to  
16 deal with retaliation that are administrative,  
17 non-punitive, that is.

18 LTC MCGOVERN: Okay, thank you.

19 And, we will communicate with the  
20 Services and DoD to see about --

21 CHAIR HOLTZMAN: The maltreatment  
22 definition.

1 LTC MCGOVERN: -- the maltreatment  
2 definition.

3 CHAIR HOLTZMAN: Excellent.

4 So, what's next, Colonel McGovern?  
5 Are we on to Issue 3?

6 LTC MCGOVERN: Yes, ma'am.

7 Currently, retaliation is not an  
8 enumerated or a specific offense in the UCMJ.

9 And, the Congress asked -- that 2014  
10 report, Congress asked the DoD to comment whether  
11 or not they thought it should be.

12 The Services and DoD came back and  
13 said no, retaliation is currently punishable  
14 under other Articles of the UCMJ. We don't need  
15 a specific retaliation provision.

16 However, when Mr. Galbreath presented  
17 to you all in April, he provided an information  
18 sheet which indicated they were entertaining the  
19 idea of, again, of possibly having an Article  
20 under the UCMJ prohibiting retaliation, other than  
21 92 being disobeying regulations.

22 So, do you have any thoughts on

1 whether or not there should it be a specific  
2 offense of retaliation in the UCMJ? And, if so,  
3 should it just be -- should be for social and  
4 professional retaliation or just professional  
5 retaliation?

6 CHAIR HOLTZMAN: How do Members of the  
7 Panel feel about this?

8 LTC MCGOVERN: I can add two more bits  
9 of information which we tried to capture here.

10 First, the Services said that it would  
11 almost be multiplicitious to have a retaliation  
12 article because you're looking at the underlying  
13 type of misconduct and able to choose within the  
14 UCMJ what's best to punish that actual  
15 misconduct. Was it an assault in retaliation?  
16 Was it ostracism for retaliation? So, it becomes  
17 multiplicitious if it's its own standalone.

18 However, if something is charged as a  
19 retaliation offense, then you can start tracking  
20 how often retaliation is being charged and how  
21 often are people being held accountable?

22 So, there's pros and cons to it.

1                   CHAIR HOLTZMAN: Well, there's also  
2 another aspect to having -- or another reason for  
3 having a separate retaliation crime, which is  
4 that in and of itself, it sends a signal to  
5 people in the military that retaliation is  
6 unacceptable and is criminal.

7                   LTC MCGOVERN: And, my impression from  
8 the Services' response is that they believe that  
9 signal is being sent with these definitions being  
10 incorporated and punishable under Article 92 of  
11 ostracism and maltreatment, that everybody now  
12 knows and is being trained that these are  
13 punishable under the UCMJ under Article 92.

14                   MR. TAYLOR: But, it seems to me that  
15 we are at least putting in -- in the process of  
16 putting in place a number of tracking mechanisms.  
17 So, it seems to me that the retaliation  
18 definition and a statute that's specifically  
19 criminal wouldn't necessarily add more  
20 information to what we should already be getting  
21 through the reporting system now. But, is that  
22 correct?

1 LTC MCGOVERN: DSAIDs should be  
2 tracking the reports coming in and the closure of  
3 a case. I do not know for certain whether DSAIDs  
4 records the actual action that's taken against  
5 the offender.

6 MS. CARSON: For retaliation? DSAID  
7 doesn't track retaliation at all currently.

8 LTC MCGOVERN: But, if they were to  
9 start, they would have to add that as a field.

10 MS. CARSON: Yes, if they have a  
11 person to do it.

12 LTC MCGOVERN: And, certainly, they do  
13 for the sexual assault offense, it reports out  
14 the synopsis of every single case and its final  
15 disposition.

16 VADM TRACEY: So, I think what Mr.  
17 Taylor is suggesting, I think is right that we  
18 were suggesting that we put in place this  
19 reporting process that the SARC would become the  
20 keeper of the entire record around the victim's  
21 experience. And so, I would expect that those  
22 systems that are capturing data will be expanded

1 to include the visibility on whether victims are  
2 experiencing retaliation and whether that's being  
3 dealt with in a timely and satisfactory manner.

4 LTC MCGOVERN: And, whether the  
5 offender is being held accountable. Right now,  
6 there is no way for the Services to tell you all  
7 whether or not offenders are being held  
8 accountable because they would have to go through  
9 every Article 92 violation and every 93.

10 VADM TRACEY: Understood. But, do we  
11 need to specifically recommend that? Does the  
12 Panel need to specifically recommend that the  
13 reporting systems will be expanded to address  
14 retaliation for that to happen or will DoD do  
15 that as a natural course of events?

16 LTC MCGOVERN: I think your  
17 recommendations are taken quite seriously, ma'am.  
18 So, I would go for inclusion.

19 MR. TAYLOR: Well, I may have missed  
20 it because this came up during the October  
21 meeting, but I know it was on the list, the  
22 deliberation guide list, and I actually thought

1 that we had said that any tracking system should  
2 include outcomes and results. So, that's why I  
3 asked the question the way I did.

4 LTC MCGOVERN: Yes, sir. So, your  
5 recommendation is continue to focus on developing  
6 the current tracking system which should include  
7 the final disposition to track offenders being  
8 held accountable but there's not a need then to  
9 have a specific UCMJ offense for retaliation?

10 MR. TAYLOR: Well, that was really  
11 more a question than a recommendation, but that's  
12 just what I'm asking. What do we really add  
13 other than, as the Chair said, a statement, which  
14 is important, a statement about the seriousness  
15 with which we view this particular type of  
16 misconduct?

17 LTC MCGOVERN: Those are the two  
18 outcomes that I see of the signal and the  
19 tracking of having an enumerated offense.

20 CHAIR HOLTZMAN: Well, do we have any  
21 indication from the military as to whether it  
22 would be easier to track what's happening with

1 regard to retaliation if it were in a separate  
2 section of the criminal code? Because, if it is,  
3 then maybe that is a good reason to have it.

4 LTC MCGOVERN: Ma'am, the only input  
5 we have is the written report which says they do  
6 not believe it's necessary in order to hold  
7 offenders accountable.

8 CHAIR HOLTZMAN: Right. It may not be  
9 necessary to hold offenders accountable, but is  
10 it going to be necessary to understand whether  
11 people are being prosecuted for this crime and  
12 the extent to which they are and what's happening  
13 with regard to these prosecutions?

14 JUDGE JONES: But, you're not going to  
15 get, it seems to me, commanders using the  
16 retaliation -- some new retaliation offense when  
17 they can use 134 without the burden of having to  
18 classify the motive. And, they can just say,  
19 prejudicial to good order and discipline.

20 I think if we have a new retaliation  
21 offense, I mean they're going to think, well, why  
22 is this different than what I see as maltreatment

1 period?

2 And, it must be because I think it's  
3 retaliatory. So, do they then have to have the  
4 evidence in their, you know, to know it's  
5 retaliatory?

6 I mean, I just -- I don't think it's  
7 necessary to punish. I think if commanders see  
8 what is necessary to be maltreatment, they're  
9 going to punish. If they also know it's  
10 retaliatory, we might want them to tell us what  
11 was their thought process.

12 But, I don't know. Another specific  
13 offense for retaliation? I don't know, I guess  
14 I'm going back to some of the initial comments  
15 that, you know, the effects of retaliation all  
16 seem to give you an offense anyway, maltreatment,  
17 assault, you know, whatever.

18 I don't disagree, though, with the  
19 Chair that it would be nice to send a message and  
20 I think we need to expand reporting because it  
21 would be nice to know when some of these  
22 maltreatments and other disciplines are because

1 of, you know, retaliation.

2 But, I don't know where I'd go from  
3 there.

4 LTC MCGOVERN: Well, in social  
5 retaliation, it has been defined to be held  
6 specifically accountable under Article 92,  
7 professional retaliation is punishable under  
8 different theories under the UCMJ.

9 But, so, if you wanted to consider  
10 them separate whether or not professional  
11 retaliation would be a standalone enumerated  
12 offense.

13 MR. TAYLOR: But, just to go back to  
14 Judge Jones' point, as I understood it at least,  
15 if you did have retaliation as a separate  
16 offense, how would it make its way into a system  
17 of reporting unless a person were actually  
18 convicted?

19 LTC MCGOVERN: Well, every time an  
20 MCIO gets the case, gets the initial report, at  
21 least in the Army, the CID titles the person  
22 under the offenses alleged. So, they're being

1 titled under Article 92 for disobeying a  
2 regulation rather than titled under an offense  
3 for retaliation.

4 MR. TAYLOR: But, that does not equate  
5 to being convicted. It just means that the  
6 investigative organization has determined that  
7 there is probable cause.

8 LTC MCGOVERN: Correct.

9 MR. TAYLOR: Okay.

10 VADM TRACEY: Can I go back to the --  
11 we're setting up a process, we're recommending  
12 that process be set up where a victim reports  
13 retaliation to the SARC. So, the record of the  
14 retaliation that is arising from a victim's  
15 reporting that they are experiencing the conduct  
16 is going to be captured in that system and the  
17 disposition of it will be recorded, we think, in  
18 that system.

19 I don't have to count it in the UCMJ  
20 system, I'm counting it -- and I want to  
21 understand about retaliation specific to sexual  
22 assault victims, I don't want to muddy the water

1 with the fact that I have a UCMJ Article for  
2 retaliation and all kinds of retaliation get  
3 captured in it.

4 So, I don't know that there's a  
5 message benefit of having a standalone Article.  
6 I don't know that the data gathering has to be  
7 done because you get a -- and I'm not sure, in  
8 fact, that even would improve the data gathering  
9 around what the questions you're trying to  
10 understand for having an Article.

11 LTC MCGOVERN: So then, the sole  
12 benefit at this point would be Rep. Holtzman's  
13 point of sending a signal. Do you all have a  
14 recommendation one way or the other?

15 JUDGE JONES: I guess all I would say  
16 is that I wouldn't support it based on what I'm  
17 thinking and know right now, having a separate  
18 specific offense.

19 MR. TAYLOR: I agree.

20 VADM TRACEY: Same here.

21 LTC MCGOVERN: Okay.

22 CHAIR HOLTZMAN: I agree, too. But,

1 I'd like to kind of throw out to the issue, that  
2 in terms of at least recording what's transpired  
3 that, you know, that after some period of time,  
4 whether we're talking about a year or 18 months  
5 or something, there needs to be some  
6 understanding or the military should be examining  
7 whether it can, in fact, properly record  
8 retaliation dispositions, convictions and so  
9 forth under the present system.

10 Because, if they can't, then that's  
11 something that has to be examined. That'd be my  
12 only concern here.

13 LTC MCGOVERN: Yes, ma'am. And, we  
14 can incorporate that into the report.

15 CHAIR HOLTZMAN: Okay, so then we are  
16 finished with Issue Number 3 and what about --  
17 are we up to Issue Number 4?

18 LTC MCGOVERN: Yes, ma'am.

19 Julie Carson is our legislative  
20 expert, but the Legal Justice for Servicemembers  
21 Act was proposed last year, which contained  
22 provisions to expand the Military Whistleblower

1 Act as well as other retaliation proposals. It  
2 was not incorporated into the FY16 NDAA.

3 One of the main components of the  
4 Legal Justice for Servicemembers Act was they  
5 pointed out, the burden of proof is different  
6 when you're proving the elements of the Military  
7 Whistleblower claim where it's all preponderance  
8 of the evidence versus civilians have a clear and  
9 convincing standard when it comes to having to  
10 prove, did that retaliation -- would it have  
11 occurred absent the person making a sexual  
12 assault report?

13 Kind of convoluted.

14 So, there's four elements to proving  
15 a whistleblower type complaint. And, that last  
16 one is, that there has to be evidence shown by a  
17 preponderance of evidence whether or not that  
18 would have already occurred.

19 So, if someone has experienced sexual  
20 assault but then they repeatedly came up hot on a  
21 urinalysis for cocaine, they were  
22 administratively discharged. And the command's

1 response was, well, that would have happened  
2 regardless because she was coming up hot for  
3 cocaine even prior to the sexual assault.

4           However, it gets a little murky if the  
5 sexual assault --- that the urinalysis testing  
6 comes up after, because then there could be some  
7 sort of causal connection as to why she was  
8 having problems.

9           So, then it becomes would that have  
10 happened otherwise or was it because of the  
11 sexual assault.

12           So, that last element is quite murky  
13 in these situations and that alone is why many of  
14 the cases are not substantiated is because,  
15 usually, the sexual assault victim's performance  
16 does decline and it's hard to prove that that  
17 would not have occurred otherwise.

18           The civilian proposal or the proposal  
19 is under the Legal Justice for Servicemembers Act  
20 make it more similar to the civilian standard  
21 where they just have to show by clear and  
22 convincing evidence rather than a preponderance

1 of the evidence that that adverse action would  
2 have occurred otherwise.

3 Have I sufficiently confused you?

4 VADM TRACEY: For the non-lawyer in  
5 the group, could you tell me what the difference  
6 is between clear and convincing.

7 LTC MCGOVERN: I wish I could. I can  
8 leave that up to Judge Jones.

9 JUDGE JONES: Clear and convincing  
10 sounds a lot tougher.

11 LTC MCGOVERN: It does.

12 CHAIR HOLTZMAN: It is tougher, that's  
13 what I thought.

14 JUDGE JONES: It's a lot tougher.

15 CHAIR HOLTZMAN: So, how is it --

16 JUDGE JONES: But, I'm confused at  
17 who's proving what here?

18 LTC MCGOVERN: Right.

19 JUDGE JONES: What's the element --  
20 this is the element the plaintiff or the  
21 prosecutor has to go forward with? Is that what  
22 we're talking about? What is it that the

1 prosecutor or plaintiff has to prove?

2 LTC MCGOVERN: Well, and in this case,  
3 it's the whistleblower in her allegation --

4 JUDGE JONES: What is it that the  
5 whistleblower has to prove? That this would not  
6 have happened but for the retaliation?

7 LTC MCGOVERN: Correct.

8 JUDGE JONES: And, the standard --

9 LTC MCGOVERN: By a preponderance of  
10 the evidence.

11 CHAIR HOLTZMAN: That's now the  
12 preponderance of the evidence?

13 LTC MCGOVERN: Right.

14 JUDGE JONES: Right.

15 LTC MCGOVERN: That's for the  
16 military. We made -- Julie made a chart that  
17 shows for DoD civilians, they can come back with  
18 clear and convincing evidence or the agency can  
19 come back -- has to come back with clear and  
20 convincing evidence that that would have occurred  
21 otherwise.

22 CHAIR HOLTZMAN: So, in other words,

1 what's being proposed is that it's -- the Agency  
2 have a higher standard, tougher standard to show  
3 --

4 LTC MCGOVERN: To counter.

5 CHAIR HOLTZMAN: -- to show that the  
6 whistleblower was acting -- was not acting as --  
7 to show that the whistleblower was not acting as  
8 a whistleblower on the proposal would create a  
9 tougher standard -- make it harder to show that  
10 the whistleblower wasn't acting as a  
11 whistleblower.

12 LTC MCGOVERN: Correct and in the  
13 guide prepared by DoD for military  
14 whistleblowers, they look more at the totality of  
15 the circumstances.

16 And the example they provided was the  
17 whistleblower says she has been a good performer,  
18 but she was not put up for promotion. The  
19 commander comes back and says, she was a lousy  
20 performer but she has all -- they look at her  
21 record and she has outstanding reports.

22 So, by a preponderance of evidence,

1 the IG determines the commander was wrong and the  
2 whistleblower was correct.

3 So, there isn't necessarily a counter-  
4 Agency clear and convincing standard, it's  
5 looking at the totality of the circumstances and  
6 what's the 51 percent versus 49 percent, Admiral  
7 Tracey.

8 MR. TAYLOR: So, I have a clarifying  
9 question. When you teed this question up, you  
10 said whether the JPP wishes to comment on Senate  
11 1130 which proposes revisions to whistleblower  
12 protections to include.

13 So, my clarifying question is, are we  
14 just focusing on the evidentiary standard or were  
15 you seeking our input on the act itself? The  
16 bill itself?

17 LTC MCGOVERN: At this point, sir, due  
18 to time constraints, we were focused on what the  
19 Congressional Hill and others, I believe Human  
20 Rights Watch also recommended if you changed the  
21 preponderance of the evidence.

22 MR. TAYLOR: Well, I mean that's an

1 important point because while I think this Legal  
2 Justice for Servicemembers Act has some salient  
3 provisions, it also has some that are very  
4 troubling.

5 LTC MCGOVERN: Right.

6 MR. TAYLOR: And, if we're just  
7 looking at the evidentiary burden, it makes it  
8 easier for me at least to provide meaningful  
9 feedback.

10 So, if that's what we're looking at,  
11 the next question is, is that a standard that is  
12 set by Statute for the Military Whistleblowers  
13 Protection Act or is that a DoD standard?

14 LTC MCGOVERN: No, the guide contains  
15 the standard.

16 MR. TAYLOR: So, it's the guide? I  
17 didn't think this was a matter of statute, that  
18 this was the standard. So, if that's the case,  
19 then why wouldn't it be logical to put the  
20 military member on at least as good a position as  
21 a civilian member of the Department of Defense  
22 and adopt the same standard?

1 CHAIR HOLTZMAN: What's the rationale  
2 for the difference?

3 LTC MCGOVERN: We do not know the  
4 rationale, ma'am.

5 CHAIR HOLTZMAN: Well, maybe we should  
6 get that if there is one.

7 LTC MCGOVERN: Right. And, we were --  
8 we spoke about that earlier this week trying to  
9 figure out if it's because civilians have the  
10 whole MSPS system versus Servicemembers have the  
11 EO system. We're not clear as to why there are  
12 differences. The element that --- that fourth  
13 element is slightly different.

14 If you go to Tab 6 in your reading  
15 materials, the first page of the chart shows the  
16 four elements. So, by a preponderance of the  
17 standard for the military member, there must --

18 JUDGE JONES: I'm sorry, where are  
19 you, Colonel?

20 LTC MCGOVERN: Tab 6 in your reading  
21 materials.

22 JUDGE JONES: Right.

1 LTC MCGOVERN: The first page.

2 JUDGE JONES: Okay.

3 CHAIR HOLTZMAN: It says four  
4 elements, is that where you're --

5 JUDGE JONES: Oh, four elements, I  
6 see.

7 LTC MCGOVERN: Right. So --

8 JUDGE JONES: Thank you. Thanks.

9 LTC MCGOVERN: The whistleblower shows  
10 a causal connection between the personnel action  
11 and the retaliatory action.

12 In the civilian world, the knowledge  
13 of protected disclosure was a contributing factor  
14 in the decision to take personnel actions.

15 So the whole fourth element is  
16 slightly different as well.

17 MR. TAYLOR: I guess my point in this  
18 line of questioning is it may not be necessary to  
19 really get involved with Congress if this is  
20 something that we can change within the Defense  
21 Department unless there's a rationale for the  
22 difference that I can't perceive.

1 LTC MCGOVERN: Yes, sir.

2 CHAIR HOLTZMAN: Maybe that's the  
3 inquiry to the Defense Department on both of  
4 these points. What's the reason for the  
5 difference and is there a justification for the  
6 difference?

7 LTC MCGOVERN: Yes, ma'am, we can find  
8 that out.

9 CHAIR HOLTZMAN: I think that would be  
10 helpful before we make a decision.

11 VADM TRACEY: Difference both in the  
12 fourth element and in the --

13 CHAIR HOLTZMAN: Yes.

14 VADM TRACEY: -- burden of proof,  
15 right, for both things?

16 LTC MCGOVERN: Yes, ma'am.

17 CHAIR HOLTZMAN: Anybody disagree with  
18 that?

19 JUDGE JONES: No.

20 CHAIR HOLTZMAN: Okay.

21 LTC MCGOVERN: Okay, and --

22 CHAIR HOLTZMAN: I'm beginning to

1 sound like Justice Kennedy.

2 LTC MCGOVERN: And, for the final  
3 issue on retaliation, the NDAA did adopt one of  
4 the proposals, it was called the Support Act  
5 which had several parts to it. They incorporated  
6 the part that had to do with retaliation  
7 requiring DoD to publish a strategy.

8 There are three things that are  
9 required in that strategy by Congress. But,  
10 based on your review of retaliation, wondering if  
11 you wanted to make any comments as to what you  
12 would like to see in a DoD strategy for  
13 preventing, prohibiting retaliation.

14 CHAIR HOLTZMAN: Well, what did  
15 Congress want them to focus on?

16 MS. GUPTA: Those three elements. The  
17 three elements are, first, the strategy must  
18 include bystander intervention programs.

19 JUDGE JONES: I'm having a little  
20 trouble hearing you. Sorry.

21 CHAIR HOLTZMAN: Yes.

22 MS. GUPTA: First, the strategy must

1 include bystander intervention programs  
2 emphasizing the importance of guarding against  
3 retaliation.

4 Second, the strategy must include  
5 Service policies and requirements to ensure  
6 protections for victims of sexual assault who  
7 report.

8 And, third, the strategy must include  
9 additional training for commanders on methods and  
10 procedures to combat attitudes and beliefs that  
11 result in retaliation.

12 So, they've very -- they're quite  
13 vague.

14 CHAIR HOLTZMAN: But one of the things  
15 that's not part of the comprehensive strategy  
16 required by Congress is to develop standardized  
17 methods for tracking and keeping, you know,  
18 keeping records of what's going on to begin with.

19 MS. GUPTA: Correct.

20 CHAIR HOLTZMAN: I mean, I don't know  
21 whether we need to -- do we need to -- which is  
22 something we were going to recommend anyway. Do

1 we need to recommend that also as part of our  
2 recommendation that it be -- I mean do we have to  
3 categorize that as a response to the NDAA?

4 LTC MCGOVERN: No, ma'am. This is  
5 just an opportunity for you all to comment if you  
6 would like to see other things included in their  
7 strategy.

8 VADM TRACEY: So, aren't we  
9 recommending sort of three things? We're  
10 recommending that retaliation be treated as a  
11 part of a continuum of the victim's experience so  
12 that it becomes a part of the view of what are  
13 the records kept around a particular sexual  
14 assault allegation.

15 We are recommending that the reporting  
16 opportunities be enhanced so that victims have a  
17 better chance of having the retaliation  
18 effectively addressed.

19 And, the third, that we are  
20 recommending that the Department take account of  
21 how to track what's working and what's not  
22 working with regard to retaliation as part of the

1 strategy.

2 So, I think we are recommending sort  
3 of three thematics that might be germane to the  
4 strategy.

5 LTC MCGOVERN: So, ma'am, would you  
6 like to recommend that those be included in an  
7 overall strategy to prevent retaliation along  
8 with the training requirements?

9 VADM TRACEY: I would recommend that,  
10 yes.

11 JUDGE JONES: No, I would as well,  
12 because it's really not captured by the three --

13 MR. TAYLOR: Right, I agree.

14 JUDGE JONES: -- pieces here.

15 CHAIR HOLTZMAN: That's what I'm  
16 writing, too.

17 LTC MCGOVERN: Okay, thank you.

18 Those are the primary things that we  
19 were hoping to get through today. So, thank you  
20 very much.

21 CHAIR HOLTZMAN: Good. So, should we  
22 take a ten minute break?

1 MR. TAYLOR: Please.

2 CHAIR HOLTZMAN: Great.

3 JUDGE JONES: Agreed.

4 LTC MCGOVERN: Thank you.

5 (Whereupon, the above-entitled matter  
6 went off the record at 10:31 a.m. and resumed at  
7 10:50 a.m.)

8 CHAIR HOLTZMAN: Are we prepared to  
9 commence? Okay.

10 COL GREEN: Yes, ma'am.

11 CHAIR HOLTZMAN: Colonel Green, sir?

12 COL GREEN: Ma'am, we have time ---  
13 briefly on the schedule this morning for the  
14 Panel to discuss and --

15 CHAIR HOLTZMAN: Excuse me, can I ask  
16 if anybody has some private conversations to  
17 please take them outside so that we can listen to  
18 the presenter.

19 Thank you.

20 COL GREEN: Yes, ma'am.

21 In previous meetings, the Panel has  
22 essentially concluded its deliberations on the

1 topics involving restitution and compensation for  
2 victims of sexual assault.

3 And, the staff prepared a report for  
4 the Panel's consideration that was sent to the  
5 Panel on the 29th of October and that included a  
6 summary of the Panel's review, an Executive  
7 Summary and a summary of the Panel's  
8 recommendations, the six recommendations that the  
9 Panel made on this topic.

10 The staff has been working on that  
11 report and received feedback from some of the  
12 Members earlier. As part of the advanced reading  
13 materials, I sent a copy of the last version of  
14 the report to the Panel Members with some  
15 comments that we received from Panel Members  
16 primarily to the Executive Summary and the  
17 Summary of Recommendations. So, I've provided  
18 that to the Panel Members.

19 And we just reserved time this morning  
20 for the Panel Members to consider whether you are  
21 ready to adopt the report or how you want to deal  
22 with any additional changes or edits or

1 modifications to the report.

2 CHAIR HOLTZMAN: Colonel Green, do we  
3 have any further edits to this report or is this  
4 now -- do we have all the edits in front of us?

5 COL GREEN: Ma'am, the copy that I  
6 provided to the Members, you provided this week  
7 some additional --

8 CHAIR HOLTZMAN: Oh, okay.

9 COL GREEN: -- some additional  
10 feedback on the Executive Summary and the Summary  
11 of Recommendations.

12 None of that changes the report  
13 substantively, it's merely administrative changes  
14 to the wording and clarity of those executive  
15 level documents at the beginning of the report.

16 So, I can send those out to the Panel  
17 Members if the Panel is comfortable substantively  
18 that the report reflects its conclusions and the  
19 Panel Members can either meet telephonically, can  
20 confirm by email that they're comfortable with  
21 the administrative changes that have been made  
22 and those updates, however the Panel Members want

1 to deal with that in terms of finalizing the  
2 report.

3 CHAIR HOLTZMAN: Colonel Green, so  
4 this is my suggestion. At the end -- the  
5 conclusion of this meeting, maybe next Monday or  
6 whenever you have an opportunity, send out the  
7 additional changes.

8 If everybody accepts them and we can  
9 get a communication by email, then we don't need  
10 anything further and we can proceed to issue the  
11 report.

12 However, if people have some  
13 substantive objections or whatever, then we can  
14 arrange -- and then the staff can arrange a  
15 telephonic meeting and that would be -- and we  
16 can proceed in that way and we could set that up  
17 next week or as soon as possible.

18 COL GREEN: Yes, ma'am.

19 CHAIR HOLTZMAN: Is that okay with the  
20 Members?

21 JUDGE JONES: Yes.

22 MR. TAYLOR: Yes.

1 CHAIR HOLTZMAN: Admiral?

2 VADM TRACEY: I'm good.

3 CHAIR HOLTZMAN: Good, thank you.

4 Okay, thank you.

5 COL GREEN: Ma'am, we'll change in  
6 place. I think we'll move on to the  
7 Subcommittee's report to you and so we'll change  
8 out, allow the Members to come up and get the  
9 screen set up.

10 CHAIR HOLTZMAN: Great. Thank you  
11 very much.

12 So, I guess this is the moment we've  
13 all been waiting for.

14 I want to welcome Members of the --  
15 some Members of the Subcommittee who will be  
16 presenting to the JPP. The Subcommittee has been  
17 studying Article 120 and we're very -- I know  
18 Members of the JPP are eagerly awaiting your  
19 views on the subject.

20 So, I don't know how you want to  
21 proceed. Have you decided that? I mean, Dean  
22 Anderson, are you going to commence or who is

1 going to commence?

2 LT COL HINES: Ma'am, I think what  
3 we're going to --

4 CHAIR HOLTZMAN: Or Colonel Hines?

5 LT COL HINES: -- do is Dean Anderson  
6 will open up with the first few slides and then  
7 Professor Schulhofer has a group of slides. Ms.  
8 Wine-Banks has a group and then Dean Anderson has  
9 the final group.

10 So, they'll be doing their pieces one  
11 at a time.

12 CHAIR HOLTZMAN: Excellent. Thank you  
13 very much.

14 Dean Anderson, welcome.

15 DEAN ANDERSON: Good morning.

16 CHAIR HOLTZMAN: Good morning.

17 DEAN ANDERSON: It's an honor to be  
18 here and to share with you the results of a very  
19 intellectually thrilling process we've all been  
20 through looking at, very carefully, Article 120.

21 We were pleased to have many Members,  
22 two of whom are obviously on the JPP and led the

1 Committee, take a look at these many issues and I  
2 won't go through the list of people on our  
3 Committee, but it was ably staffed by a number of  
4 people who contributed and a number of whom are  
5 here.

6 We had referred to us -- you referred  
7 to us a number of important questions. And, we  
8 had 17 questions from the JPP referred to us  
9 about Article 120 and there were a whole posse of  
10 questions about coercive sexual offenses, in  
11 particular, that we'll get to involving abuse of  
12 authority.

13 The result of our analysis of these 17  
14 questions is that we have seven recommendations  
15 for amendment to Article 120 or the Manual for  
16 Courts-Martial and then ten recommendations for  
17 no changes.

18 We met seven times over the course of  
19 a series of months, had many, many presenters in  
20 front of us, all of whom gave us a tremendous  
21 amount of experience and wisdom that we could  
22 reflect upon.

1           Retired military trial judges, senior  
2 prosecutors and defense counsel, appellate,  
3 governmental, government and defense counsel,  
4 civilian prosecutors and defense counsel, general  
5 and flag officers and command at the Services'  
6 entry level training installations which became  
7 very important in terms of abuse of authority, an  
8 analysis of that, Staff Judge Advocates to  
9 training commanding officers, Chair of the Joint  
10 Services Committee at the time of the current  
11 version of Article 120 -- that the current  
12 version of Article 120 was drafted.

13           As you know, it's gone through a  
14 series of revisions over the course of the past  
15 few years.

16           And, the Director of Law Enforcement  
17 Policy for the Department of Defense, a member of  
18 Congress and one of her constituents who was a  
19 victim of sexual misconduct during her entry  
20 level military training.

21           It was an extensive group of  
22 presenters and they gave us quite a bit to think

1 about and changed many of our minds about many of  
2 the issues that we approached.

3 We also considered more than a hundred  
4 written sources in our deliberations.

5 Our conclusions and recommendations  
6 are based on this information we received from  
7 the witnesses, our questioning of those  
8 witnesses. We were an active Panel quite engaged  
9 with each of the witnesses who came before us and  
10 really, our deliberations about the written  
11 sources and documents that were submitted to us  
12 and then our own discussions among ourselves as  
13 we tried to sift through a tremendous amount of  
14 information and make some wise recommendations --  
15 hopefully wise recommendations, to this body.

16 We were careful to ensure that our  
17 conclusions and recommendations were responsive  
18 specifically to the 17 issues you sent to us and  
19 did not try to go further than those 17 issues.  
20 There are many things one could do with Article  
21 120, but we tried to hew carefully to the  
22 directive you had sent us.

1           And, we also include in the report  
2 alternate views on the issues that we made  
3 conclusions on.

4           Our conclusions and recommendations  
5 are presented and in groups and not exactly in  
6 the sequence of the 17 as they were handed to us.  
7 It became clear that a number of the questions  
8 related to one another and should be grouped  
9 together and presented to you in that form.

10           So, many of the definitions and terms  
11 in Article 120 of the UCMJ, defenses and the  
12 offense of indecent acts, we will present to you  
13 as a group.

14           And then, we will discuss a range of  
15 the questions that involve coercive abuse of  
16 authority that came up and are conceptually quite  
17 different than the other issues that we needed to  
18 address.

19           In terms of the definition of the  
20 terms and the defenses and the offense of  
21 indecent acts, we have four recommendations for  
22 statutory amendments, one recommendation for an

1 amendment simply in the Manual for Courts-  
2 Martial. We didn't believe that a statutory  
3 amendment was necessary on that issue and we'll  
4 go into it, and then, five recommendations for no  
5 change.

6 I will say that, overall, we tried to  
7 be -- we were mindful. We were reminded many  
8 times that this Statute has been revised. We  
9 tried to be respectful of the Statute as it's  
10 currently constructed and intervene in that  
11 Statute in modest ways, mindful of the repeated  
12 interventions that have happened over recent time  
13 over the past ten years or so.

14 The first section that we'll address  
15 is about terms and definitions in Article 120,  
16 looking particularly at the definitions of bodily  
17 harm, consent, fear and force and then also  
18 questions of mens rea that were not sent to us as  
19 global questions but were sent to us in a  
20 specific way.

21 So, I'll turn it over to Stephen  
22 Schulhofer -- Professor Schulhofer.

1                   PROF SCHULHOFER: Thank you very much.

2                   Thank you for inviting us here today.

3 I have the privilege of presenting our  
4 conclusions on five of these issues that Dean  
5 Anderson just mentioned.

6                   As she said, what we are aiming to do  
7 today is to give you the bottom line of what was  
8 a very extensive series of meetings where we  
9 heard from witnesses and deliberated in quite a  
10 bit of detail.

11                   So, all we can aim to do today is to  
12 give you the bottom line result of those  
13 deliberations.

14                   And so, I'm going to go through the  
15 first five issues that Dean Anderson mentioned,  
16 the definition of bodily harm, the definition of  
17 consent.

18                   That's bodily harm is issue number  
19 five. The definition of consent is issue number  
20 one. The definition of fear is issue seven and  
21 then the definition of force, issue eight and the  
22 mens rea issue is issue number ten.

1 I want to start with bodily harm  
2 because that term plays a central role in the  
3 scheme of liability under Article 120.

4 The core offense under Article 120(b)  
5 is committing a sexual act upon another person by  
6 causing bodily harm. That's in 120(b)(1)(B) if  
7 you -- I take it we're not putting the Statute up  
8 on the --

9 LT COL HINES: Well, we have the  
10 redraft -- proposed redraft.

11 PROF SCHULHOFER: But, I think if  
12 Panel Members have the Statute in front of them  
13 then this will be easy to see.

14 So, issue number five addresses the  
15 question of how the term bodily harm is defined  
16 and that plays a central role because it's the  
17 basis for the core offense under 120(b)(1)(B),  
18 committing a sexual act upon another person by  
19 causing bodily harm.

20 That sounds straightforward, but  
21 several practitioners who testified to your Panel  
22 said that the term was confusing at trial because

1 of the way that bodily harm is defined.

2 The definition's Subsection 120(g)(3)  
3 gives bodily harm a dual meaning. It says both  
4 physical injury, which is the everyday meaning of  
5 bodily harm and, in addition, any sexual act  
6 without consent even without other physical  
7 injury.

8 So, our Committee was asked on issue  
9 number five to consider whether the definition in  
10 120(g)(3) should be clarified in light of this  
11 dual meaning.

12 Most of the presenters before our  
13 Subcommittee -- go to the next -- oh no, I'm  
14 sorry, go back. Yes, right there.

15 Most of the presenters recommended  
16 against changing the definition of bodily harm  
17 and they also opposed changing the role that  
18 bodily harm plays as the factor that triggers  
19 liability under 120(b)(1)(B). And, they took  
20 that view for two reasons.

21 One is that most of them felt that the  
22 dual meaning of bodily harm is very well

1 understood by practitioners. And, most of them  
2 worried that amending Article 120 could  
3 destabilize the case law and create unforeseen  
4 consequences.

5 Our conclusion really breaks down into  
6 three parts.

7 First of all, we agreed that the  
8 practitioners do understand that bodily harm  
9 includes both physical injury and sexual contact  
10 without consent.

11 Nonetheless, and this was our second  
12 conclusion, that concept of bodily harm differs  
13 from the ordinary use of the term in the English  
14 language. And, therefore, it can be confusing  
15 for court-martial members.

16 And, our third conclusion was that the  
17 term also can be confusing for ordinary Service  
18 personnel for whom Article 120 provides an  
19 important basis for training and education.

20 So, our recommendation is that we  
21 amend Article 120 in two ways.

22 The first is instead of using non-

1 consent to define bodily harm and then using  
2 bodily harm to define the offense, we can just go  
3 directly to using non-consent to define the  
4 offense.

5 So, the first recommendation -- go  
6 back to slide, I think it must 11, no next one.  
7 So, our first recommendation as it's in that PDF  
8 is to change the language of 120(b)(1)(B)  
9 regarding bodily harm and, instead, define the  
10 offense as committing a sexual act upon another  
11 person without the consent of that person.

12 And then, the second part of our  
13 recommendation takes us back to issue number five  
14 as it was posed to us which was whether the  
15 definition of bodily harm requires clarification.

16 And, when you go back to that  
17 definitional issue, it turns out that the change  
18 to (b)(1)(B) means that we no longer need to  
19 clarify the definition of bodily harm because we  
20 actually don't need to define bodily harm at all  
21 because the term is no longer doing any work in  
22 the Statute.

1           So, our recommendation -- the second  
2 part of our recommendation is simply to eliminate  
3 bodily harm from 120(g) and simply define the  
4 offense as it's now stated in the redline, any  
5 person who commits a sexual act upon another  
6 person without the consent of that person. That  
7 would be the core offense under 120(b)(1)(B).

8           So, that -- if we can go to the next  
9 slide -- with consent as the central role in the  
10 statutory scheme, that takes us back to what was  
11 posed as issue number one which is whether the  
12 definition of consent is unclear or ambiguous.

13           The current definition in 120(g) is  
14 comprehensive, but some phrases in the definition  
15 seem to contradict others and some of the phrases  
16 are, at best, ambiguous.

17           For example, if you focus on 120(g)(8)  
18 subparagraph A, the second sentence there says  
19 that lack of resistance does not constitute  
20 consent. But, it also goes on to say that  
21 submission resulting from a variety of  
22 circumstances -- force, threat of force or

1 placing another person in fear, submission  
2 resulting from those circumstances does not  
3 constitute consent.

4 So, that could imply that submission  
5 without the presence of those circumstances would  
6 constitute consent which would be contradicting  
7 the first part of that sentence.

8 And, certainly, we -- our Committee  
9 thought contradicting the Congressional intent in  
10 that language. So, that was the confusion and  
11 ambiguity that your Panel referred to us.

12 And, that takes us to slide 12, which  
13 we have there.

14 A majority of the presenters whom we  
15 heard agreed that the definition of consent was  
16 unclear and should be amended. And our  
17 Subcommittee concluded in the same way that the  
18 definition is confusing because it retains  
19 vestiges of outdated rape law and it could be  
20 interpreted improperly to require a victim to  
21 physically resist an attacker before the fact-  
22 finder could conclude that there was a lack of

1 consent.

2 So, our Committee's recommendation  
3 would retain most of the current definition, but  
4 it would remove repetitive and contradictory  
5 language about resistance.

6 Resistance would still be relevant for  
7 the fact-finder, but the proposed change would  
8 clarify that lack of resistance does not  
9 constitute consent.

10 And then, you'd have our revised  
11 definition there.

12 We think it's not a substantive change  
13 of meaning, but it eliminates -- it restates and  
14 re-punctuates in a way that makes clear exactly  
15 what was intended.

16 And, I think you have to go to the  
17 next slide to the last part of (G)(8)(C), takes  
18 away that last clause which, again, led to the  
19 same type of potential contradiction.

20 So then, we're ready for issue number  
21 seven which is whether fear should be defined to  
22 acknowledge both subjective and objective

1 factors.

2 At your JPP hearings, some of the  
3 witnesses expressed two concerns. One of them  
4 was that the definition of fear in subsection  
5 (g)(7) doesn't give enough weight to the  
6 subjective fear of the victim.

7 And, their second concern was that  
8 that definition doesn't allow sufficient scope  
9 for a prosecutor when submission results from  
10 abuse of authority or exercise of authority.

11 So, that was the issue as it was  
12 referred to us.

13 A majority of the presenters that we  
14 heard recommended no changes to 120(g)(7), at  
15 least in the context of prosecutions under  
16 120(a)(3), 120(b)(1)(A), those are the rape and  
17 sexual assault involving completed sexual  
18 penetration.

19 And the parallel offenses in 120(c)  
20 and 120(d) for sexual contact short of  
21 penetration.

22 Those presenters recommended no change

1 with respect to those sections when the accused  
2 has been charged with placing the victim in fear.

3 Our Committee -- our Subcommittee  
4 agreed with those presenters that no change is  
5 necessary to the current requirements that the  
6 fear of the victim has to be both a personal  
7 subjective fear and also a fear that's  
8 objectively reasonable.

9 So, our presenters and our Committee  
10 did not find persuasive that concern about not --  
11 about giving insufficient weight to subjective  
12 fears by themselves.

13 On the second concern about whether  
14 the concept of fear allows enough scope for  
15 situations where a victim submits to a perceived  
16 authority of a more senior officer, that problem  
17 really is raised more specifically in issue six  
18 and in issues 12 through 17. So, those issues  
19 will be addressed by my colleague, Dean Anderson,  
20 later in our presentation.

21 The next issue, eight, your Panel  
22 raised the question whether the definition of

1 force in subsection (g)(5) is too narrow. The  
2 concern, I believe, was that some uses of force  
3 -- for example, merely brandishing a weapon  
4 without using it might fall outside the  
5 definition in (g)(5).

6 The presenters before our Subcommittee  
7 did not share that concern. They felt the  
8 definition works properly and adequately. So,  
9 they recommended no change.

10 And, our Subcommittee concluded that  
11 no change was necessary, especially because of  
12 the way -- the amendments that we make in  
13 response to issue number one on the definition of  
14 consent.

15 So, in light of those recommended  
16 amendments to the definition of consent, we no  
17 longer need to have concern about the definition  
18 of force in (g)(5).

19 Then, issue ten is the last issue that  
20 I will be addressing, raises the question whether  
21 a defendant's knowledge of the victim's  
22 incapacity to consent should be a required

1 element of the offense.

2 In the hearings before your Panel,  
3 some witnesses argued that requiring the  
4 prosecution to prove that the defendant knew or  
5 should have known of the victim's incapacity puts  
6 an undue burden on the prosecutor, and they  
7 argued or they expressed the concern that this  
8 could give insufficient protection to victims who  
9 are incapacitated if a defendant can argue that  
10 he didn't realize it and shouldn't have realized  
11 it or claims of that nature.

12 We can go to the next -- yes -- no, I  
13 think we had it -- yes. That's right.

14 On this last slide with respect to  
15 Issue 10, among the presenters that our Committee  
16 heard, a majority recommended no changes to  
17 120(b)(2) or 120(b)(3), which are the provisions  
18 that currently require the Government to prove  
19 both the victim's incapacity and that the accused  
20 knew or reasonably should have known of that  
21 incapacity.

22 Our Subcommittee shared that view that

1 the Government should be continued -- continue to  
2 be required to prove those two elements, both  
3 incapacity to consent and that the accused knew  
4 or reasonably should have known.

5 And, that concludes the five issues  
6 that I will be presenting.

7 Thank you very much.

8 CHAIR HOLTZMAN: Thank you very much,  
9 Professor.

10 The next presenter is Ms. Jill Wine-  
11 Banks. Thank you so much for coming here and  
12 sharing your views with us.

13 MS. WINE-BANKS: Thank you for  
14 allowing me the opportunity to present this.

15 I have a diverse group of issues and  
16 some of them were hotly contested with opinions  
17 ranging wildly to some that were almost  
18 unanimously viewed by everyone as either needing  
19 no change or definitely requiring change.

20 The issue first on my list is whether  
21 the consent and mistake of fact as to consent  
22 should be specifically included.

1                   You can go to the next slide.

2                   Those defenses were originally  
3 included in the 2007 version of 120 but were  
4 eliminated in 2012. And, some of our testifiers  
5 thought that it is available under the  
6 Constitution and under due process, under other  
7 ordinary rules of evidence.

8                   And, some thought that it had to be  
9 defined to be limited, that it was already too  
10 broadly available.

11                   But, the majority recommended  
12 clarification and inclusion in the Statute or in  
13 the Manual for Courts-Martial and -- rather than  
14 in the Statute.

15                   And, our recommendation is that it  
16 should be clarified in the Manual -- yes, should  
17 be clarified, that it is available as an attack  
18 on the Government's proof as to consent and that  
19 mistake of fact should be clearly delineated as a  
20 defense available for the defendant in the Manual  
21 for Courts-Martial.

22                   For issue three, which is my next

1 issue, which was defining incapable of  
2 consenting. This was pretty much unanimous that  
3 everyone who testified said that it needed to be  
4 amended and it needed to be clearly defined, that  
5 it's one of the few undefined terms in 120. It  
6 appears, but had no definition.

7 And, a working group was developed to  
8 work on defining that. I was on that working  
9 group and we looked at the Federal Statute 2242,  
10 but thought that that wasn't appropriate, that it  
11 was a little too narrow.

12 And, we then had a new case come down,  
13 the Pease case, and we looked at that and we  
14 thought the language of the decision really  
15 helped us to define the incapable of consenting.

16 And so, we are now recommending that  
17 we add a definition based pretty much on the  
18 Pease case.

19 Though we changed a word or two, which  
20 we felt really reflected what was intended.

21 And, we also -- that would go in the  
22 Statute, but we also wanted to add guidance to

1 the Manual for Courts-Martial and the Benchbook  
2 about the totality of circumstances that should  
3 be explored in determining whether a victim was  
4 incapable of consenting.

5 Our specific language, we recommend  
6 that incapable of consenting be defined and added  
7 to the Statute as a person is incapable of  
8 consenting if that person does not possess the  
9 mental ability to appreciate the nature of the  
10 conduct or does not possess the physical or  
11 mental ability to make or communicate a decision  
12 regarding such conduct.

13 And then, we wanted to have further  
14 guidance added to the Manual and the Benchbook  
15 that would say a totality of circumstances  
16 standard applies when assessing whether a person  
17 was incapable of consenting.

18 In deciding whether a person was  
19 incapable of consenting, many factors should be  
20 considered and weighed to the extent that they  
21 are known, including but not limited to that  
22 person's decision-making ability, ability to

1 foresee and understand consequences, awareness of  
2 the identity of the person with whom they are  
3 engaging in the conduct, the level of their  
4 consciousness, the amount of alcohol or other  
5 intoxicants ingested, tolerance to the ingestion  
6 of alcohol or other intoxicants because the  
7 testimony clearly showed that there were cases  
8 where someone with a .4 was not drunk in the  
9 sense of having any impairment to their ability  
10 to speak, walk, function, think, whereas most  
11 people at that level would be unconscious.

12 And then, finally, also the ability to  
13 walk, talk and engage in other purposeful  
14 physical movement.

15 So, that was our recommendation on  
16 that issue.

17 The next issue is issue four which is,  
18 is the definition of administration of a drug or  
19 intoxicant overbroad?

20 And, the current law reads -- and I'm  
21 going to read that because we're recommending no  
22 change, that, "[a] person who commits a sexual

1 act upon another person by administering to that  
2 person by force or threat of force or without the  
3 knowledge or consent of that person, a drug,  
4 intoxicant or similar substance and thereby  
5 substantially impairs the ability of that other  
6 person to appraise or control conduct, is guilty  
7 of rape and shall be punished..."

8 We felt that the use of the word by  
9 administering the intoxicant was sufficient to  
10 make it a specific enough intent that no specific  
11 intent needed to be added and that it would only  
12 confuse the issue and compound the changes to the  
13 Statute to do so.

14 So, we wanted to leave it exactly the  
15 way it was and that the mens rea was sufficiently  
16 established there by the use of the word "by."

17 Issue nine was the definition of  
18 sexual act and sexual contact. And, we were  
19 asked to look at whether it was either too narrow  
20 or too broad in the definition.

21 And, the majority of presenters  
22 recommended some modification of the definitions.

1 And, we concluded that both did need  
2 clarification and we have written a new  
3 definition of both, which are now on the screen.

4 And, if you look at the terminology,  
5 there was a lot of confusion in the way it was  
6 previously drafted and we tried to make it more  
7 logically organized by saying that sexual act  
8 first in (a) is penetration. In (b), it's  
9 contact.

10 And, the penetration had to be of the  
11 penis into another sex organ and/or contact of  
12 the mouth to one of the sexual organs.

13 And (c) is a penetration, however  
14 slight, by any part of the body or by an object.

15 And, that is how we wanted to redefine  
16 it. Contact, we said -- we just changed the word  
17 genitalia and defined what that included.

18 And then, we eliminated the second  
19 part because it was really repetitive. We just  
20 added the intent to the first part and combined  
21 them into one thought and included the use of, or  
22 by an object.

1           So, those were the changes we  
2 recommended to those definitions.

3           And, the final issue I think that I  
4 have is issue 11. And, that was one where the  
5 testimony was all over the place and had a wide  
6 range of opinions.

7           It was added -- there was an indecent  
8 act added to Article 120 in 2007 and that  
9 eliminated the need for the Government to prove a  
10 prejudice to good order or Service-discrediting  
11 conduct.

12           And then, in 2012, it was removed from  
13 120 but it wasn't added back to 134 or anywhere  
14 else in the Statute.

15           We understood that there is pending a  
16 proposal to add it back to 134, and so our  
17 recommendation is that it not be added back to  
18 120 and that there -- we took no position on 134  
19 because that was not within our jurisdiction,  
20 that is another group presenting it.

21           But, we felt very strongly that 120  
22 was not the appropriate place to add it back in

1 without the elements of Service-discrediting or  
2 prejudice to good order, that it could easily go  
3 awry and be overbroadly interpreted and would  
4 lead to sex offender registration which has  
5 catastrophic consequences for the defendant and  
6 that it would not be necessary to do that, that  
7 the 134 could be an appropriate place for it.

8 So, we recommended that it not be  
9 readded back in.

10 And, I think, Dean Anderson, you were  
11 going to take the next issues.

12 DEAN ANDERSON: Okay.

13 So, there were a series of questions  
14 around coercive sexual offenses generally and, in  
15 particular, sexual offenses involving the abuse  
16 of authority.

17 And so, we make one recommendation for  
18 statutory amendment and five recommendations for  
19 no change.

20 And, in order to understand this, I  
21 actually think I want to set up three kinds of  
22 scenarios first and have you think about those

1 before we turn to the specific questions and the  
2 statutory change that we suggest.

3 The first situation I'll ask you to  
4 consider is just consensual sexual relationships  
5 between a trainer and a trainee, that both  
6 individuals conceive of and experience as  
7 consensual. Inappropriate in military context,  
8 inappropriate in the training context, but what  
9 to do with those is one question.

10 The second scenario is on the other  
11 end of the spectrum, where a trainer says engage  
12 in sex with me or I will physically harm you or I  
13 will ruin your military career, get you thrown  
14 out of the military.

15 That's a fairly easy case, that's  
16 either rape in the first instance if it's, I will  
17 physically harm you or I will ruin your military  
18 career, that's probably under sexual assault.

19 The third scenario -- and it's also  
20 rare that someone says, you know, engage in sex  
21 with me or I will physically harm you or engage  
22 in sex with me or I will ruin your military

1 career, making that an explicit threat of that  
2 kind of wrongful action.

3 The third scenario is more common, and  
4 that is engage in sexual behaviors with me with  
5 some implicit use of authority. So, because I am  
6 your commander, because you have no choice,  
7 because I will make you do pushups or cleaning  
8 detail, because you must do this.

9 And there's no explicit threat and  
10 there's no threat of physical fear.

11 So, these three very different  
12 scenarios, motivate questions about whether or  
13 not Article 120 sufficiently covers these three  
14 kinds of scenarios and appropriately grades them,  
15 or whether or not they shouldn't be part of  
16 Article 120 at all.

17 So, those are -- those three scenarios  
18 I think, will help us get through a lot of the  
19 questions that the JPP posed to us.

20 So, if you look at the series of  
21 questions, the issues are about what is  
22 threatening wrongful action? And, I'm going to

1 go a little bit slower on these because this is a  
2 complicated part of the Statute.

3 If you look at the Statute itself, the  
4 redline that you've got, threatening wrongful  
5 action is on the second page and, let's see,  
6 that's threatening with fear -- right, so that's  
7 where it comes up as wrongful action.

8 So, the question is whether or not  
9 under what is originally seven, threatening or  
10 placing that other person in fear. The term  
11 threatening or placing that other person in fear  
12 means communication or action that is of  
13 sufficient consequence to cause a reasonable fear  
14 that noncompliance will result in the victim or  
15 another person being subjected to the wrongful  
16 action contemplated by the communication or  
17 action.

18 Not a model of statutory clarity.

19 And, one of the questions posed to us, was that  
20 latter part of the definition, threatening  
21 wrongful action, should that be further defined?  
22 Because, it wasn't clear what that referred to

1 and there was some confusion about this.

2 Now, this provision only comes up as  
3 part of sexual assault, which is (b)(1)(A), by  
4 threatening or placing the other person in fear.  
5 And, this is the definition that this refers to.  
6 Okay? So, that's one question.

7 The next question is, what do we do  
8 with the current practice of charging  
9 inappropriate relationships? These are -- when  
10 we got testimony on this question, it was largely  
11 about the consensual inappropriate relationships,  
12 and that is that they were mostly charged outside  
13 the scope of Article 120.

14 And, we had questions about whether or  
15 not that was the right place for them to land or  
16 should they land in Article 120?

17 I'm just trying, right now, to talk  
18 about what these questions meant and how they  
19 relate to one another.

20 The next question was the ability to  
21 effectively charge coercive sexual relationships  
22 or abuse of authority under 120. In other words,

1 do these provisions under 120, which clearly  
2 prohibit physical violence -- threats of physical  
3 violence and then prohibit something called  
4 threatening or placing that other person in fear  
5 defined as something about wrongful action.

6 Is that sufficient to handle, kind of,  
7 the more coercive non-consensual sexual  
8 relationships?

9 And, the definition of threatening or  
10 placing that other person in fear, this is issue  
11 14, is essentially the same as issue six. What  
12 do we do with that definition that's somewhat  
13 confusing?

14 So then, the next question, issue 15,  
15 is whether or not there should be a new provision  
16 under Article 120 to specifically address  
17 coercive sexual relationships and those involving  
18 abuse of authority.

19 Our answer to that was yes, and we'll  
20 talk about why.

21 And then, relationships -- the next  
22 question, issue 16, was relationships between

1 basic training instructors and trainees, whether  
2 or not it should be per se strict liability and  
3 that should be explicit in Article 120. That was  
4 the question sent to us.

5 Spoiler alert, we said the answer to  
6 that was no, that we rejected strict liability,  
7 we'll come to why.

8 And then, should coercive sexual  
9 relationships currently charged under other  
10 Articles, not 120, be added to the list of those  
11 offenses that trigger sex offender registration?  
12 And, we said no on that.

13 So, let's go through each of these  
14 issues.

15 Threatening wrongful action, is it too  
16 ambiguous or too narrow? This is the definition  
17 that I just read at the outset. It comes up  
18 under sexual assault, not under rape. It's about  
19 (b)(1)(A), threatening or placing the other  
20 person in fear.

21 And the question is whether or not as  
22 part of that definition, which includes

1 threatening wrongful action, should we further  
2 explicate what that means?

3 I don't think any of us were enamored  
4 with how a threatening or placing another person  
5 in fear was defined, but I don't think any of us  
6 -- I know that we concluded that there was very  
7 little to be gained by further explication in  
8 that provision.

9 So, we thought that we would be more  
10 effective and deft by creating a different  
11 provision. We'll talk about where and why when  
12 we get there. But, we decided not to change the  
13 definition of threatening wrongful action.

14 So, our recommendation is that what it  
15 says there, that we have no changes and that we  
16 wanted to develop a different provision on this  
17 and a new subsection under Article 120(b)(1),  
18 we'll talk about that.

19 We actually didn't think that this  
20 provision (1)(a), threatening or placing another  
21 person in fear, was the best provision to capture  
22 all of these kinds of inappropriate uses of

1 authority to coerce sexual behavior.

2 It's perfectly fine for what it is,  
3 but it's inadequate to fully capture that kind of  
4 coercive relationship that we heard about.

5 Issue 12 is about the current practice  
6 of charging inappropriate relationships or  
7 maltreatment in different Articles other than  
8 120, is that appropriate and effective when  
9 sexual contact is involved?

10 A majority of the folks who presented  
11 to us felt that the current practice was  
12 appropriate and effective and we determined that  
13 the use of other provisions other than Article  
14 120 can be appropriate and effective, in  
15 particular, in circumstances where the  
16 relationship is inappropriate but consensual --  
17 conceived of as consensual by the participants  
18 themselves.

19 So, we recommended no changes on that  
20 particular issue. Again, rejecting a kind of  
21 strict liability, this is a sex offender  
22 situation for consensual relationships.

1           Issue 13 is about whether or not the  
2           2012 version of the UCMJ affords prosecutors the  
3           ability to effectively charge these coercive  
4           sexual relationships.

5           We heard from a number of folks that  
6           these were charged outside the scope of 120 and  
7           many people thought that that was appropriate. A  
8           majority of the presenters stated that they have  
9           the opportunity to make these charges outside the  
10          scope of 120.

11          We concluded that we do have these  
12          opportunities -- prosecutors do have  
13          opportunities to charge outside of 120. And,  
14          yet, there are kinds of coercion that are not  
15          currently captured in 120 that we believe are --  
16          should be captured in 120 because they are sexual  
17          offenses. It is a sexual assault.

18          So, we make a recommendation for a new  
19          subsection which I'll direct you to now. It's  
20          under sexual assault. It's probably the --  
21          arguably, one of the largest changes we made,  
22          maybe the largest change that we recommended

1 because it creates a new provision.

2 So, the notion here would be that  
3 sexual assault -- I'm looking at Article  
4 120(b)(1)(E), sexual assault, any person subject  
5 to this chapter who commits a sexual act upon  
6 another person by using position, rank or  
7 authority to secure compliance by the other  
8 person.

9 This is different than it was  
10 conceived of in 2007. It's different than it was  
11 conceived of in 2012. But, we think better  
12 captures that third category I talked about  
13 earlier.

14 The first is consensual relationships.  
15 We don't think they belong in Article 120. We  
16 don't think they're sexual offenses in that way.  
17 They can be charged as inappropriate under other  
18 provisions of the UCMJ.

19 The second category that I articulated  
20 at the outset or that I offered at the outset was  
21 a physical threat, a threat of physical violence  
22 or a threat to ruin the career. That's fairly

1 easy under Article 120.

2 But the third circumstance, in which  
3 someone uses their position, rank or authority to  
4 secure compliance by the other person is not  
5 currently captured -- sufficiently captured by  
6 the way that the Statute is currently written.

7 So, we make a recommendation to this  
8 Panel that there be a new provision under  
9 120(b)(1)(E), which is a different theory of  
10 liability that forced sexual assault in which  
11 someone has used position, rank or authority to  
12 secure compliance -- sexual compliance, by  
13 another person.

14 Okay, I'm sure we'll have questions  
15 about that, but it relates to all the other  
16 issues that kind of come under this rubric. So,  
17 I'll get through those other issues.

18 Issue 14 is, should the definition of  
19 threatening or placing that other person in fear  
20 be amended to ensure that coercive sexual  
21 relationships or those involving an abuse of  
22 authority are covered under the existing 120?

1           We felt like there was diminishing  
2 returns, as I mentioned, in terms of redefining  
3 threat or placing that other person in fear which  
4 is the first provision under sexual assault.

5           We felt like that was fine for what it  
6 was but didn't fully capture circumstances in  
7 which someone uses their position, rank or  
8 authority to secure compliance to sexual  
9 behavior.

10           So, we recommended, along with a  
11 majority of the presenters, that this not be  
12 revised.

13           Issue 15 is, should a new provision be  
14 added to 120 to address coercive sexual  
15 relationships and, as I mentioned, this is the  
16 new provision that we've offered.

17           A majority of the presenters before us  
18 indicated that they recommended against doing  
19 this and talked about their ability to prosecute  
20 or defend under other provisions than --  
21 provisions other than Article 120.

22           Nevertheless, we felt like there was

1 sufficient evidence in front of us that coercive  
2 sexual relationships exist, that they are an  
3 abuse of authority and that there should be  
4 another theory under Article 120 through which  
5 they could be captured because they were sexual  
6 offenses, not just inappropriate relationships  
7 that were consensual.

8 So, our recommendation, as I  
9 mentioned, is this provision 120(b)(1)(E) about  
10 using position, rank or authority to secure  
11 compliance.

12 I will also -- just on this note that  
13 we chose the words very carefully. We went  
14 through a lot of different ways of trying to  
15 define this to capture what the behavior was that  
16 we wanted to capture.

17 The using position, rank or authority  
18 suggests an intentional deployment of that  
19 authority to secure compliance. So, this isn't a  
20 willy-nilly broad provision. This is about  
21 someone who uses their authority to secure  
22 compliance to sexual acts. We intended it to be

1 fairly narrow but broader than what 120 currently  
2 captures.

3 The Issue 16 is should sexual  
4 relationships between basic training instructors  
5 and trainees be treated as per se illegal or  
6 strict liability offenses?

7 The response to this by many was by  
8 most of the folks who presented in front of us  
9 was against the strict liability theory and  
10 making it an Article 120 offense. We agreed with  
11 that.

12 One could debate the theoretic  
13 possibilities of what consent means under  
14 conditions of authority like this and that is  
15 interesting intellectually, but that the people  
16 conceive of it as consensual themselves persuaded  
17 us that these relationships do exist.

18 And some of them are conceived of as  
19 consensual by the participants themselves  
20 convinced us that a strict liability was  
21 overbroad, would reach conduct that would -- that  
22 the criminal law and the Uniform Code of Military

1 Justice should not reach and that could be better  
2 attended to in provisions that were designed to  
3 enhance structures of command and morale rather  
4 than prohibit sexual offenses.

5 This is an -- these are inappropriate  
6 relationships, but they should not per se be  
7 prohibited under Article 120.

8 Issue 17, I think we're winding down,  
9 is as an alternative to further amending Article  
10 120, should coercive sexual relationships  
11 currently charged under other Articles, other  
12 provisions of UCMJ, be added to the list of  
13 offenses that would trigger sex offender  
14 registration?

15 We were uniformly against this idea.  
16 Felt that we -- the Panel felt fairly strongly  
17 that the use of sex offender registration, we did  
18 not want that to be overbroad. There was a risk  
19 that is overbroad now and there was no reason to  
20 include those relationships that were considered  
21 consensual relationships that would be  
22 appropriately and effectively charged in other

1 provisions of the UCMJ to trigger sex offender  
2 registration for those kinds of relationships.

3           Either it's a coercive relationship in  
4 which a person deploys their rank and authority  
5 to secure compliance or it's not. And that's the  
6 demarcation, we believe, between an offense that  
7 should be a registered sexual offense under  
8 Article 120 and an offense that is -- that  
9 undermines good conduct and morale and the  
10 command structure that should be attended to  
11 elsewhere and not trigger sex offender  
12 registration.

13           Thank you.

14           CHAIR HOLTZMAN: Well, first of all,  
15 thank you very much Members of this Panel. Thank  
16 you, Colonel Hines and Mr. Marsh, too, for your  
17 assistance.

18           Before we turn to questions, I want to  
19 commend the Chair of this Subcommittee, Judge  
20 Barbara Jones for the extraordinary leadership  
21 that she has shown in getting the Subcommittee to  
22 this point.

1           And, also wanted to indicate that  
2           there are some Members of the Subcommittee who  
3           aren't presenters who are lurking in the  
4           audience. I'd like to introduce them as well,  
5           Brigadier General James Schwenk and Ms. Laurie  
6           Kepros.

7           And, I don't know if we'll hear from  
8           you, but if you feel that you need to make a  
9           contribution, and oral contribution, I'm sure the  
10          rest of the Panel would welcome your thoughts.

11          Okay, so let's turn to questions from  
12          the Panel. We'll start Admiral Tracey?

13          VADM TRACEY: I had only one. On the  
14          three scenarios that you constructed, where would  
15          an offer of positive treatment fall in those  
16          three scenarios? I will relieve you of standing  
17          watches or what have you as an inducement to a  
18          sexual relationship?

19          DEAN ANDERSON: So, the history of the  
20          provision about defining the threat or placing  
21          the other person in fear, historically, in an  
22          earlier version, as you know, included a

1 provision that said that -- that was explicit  
2 about positive and negative inducements.

3 And, we deliberated at some length  
4 about positive and negative inducements and  
5 whether or not we should reimport that kind of  
6 language into the Statute, whether or not we  
7 should leave it out.

8 We ultimately concluded that it was a  
9 bit of a detraction because it focused on the  
10 benefit to the victim rather than the more  
11 important question which was the mental state of  
12 the alleged offender and whether or not he or she  
13 deployed their own rank and authority to coerce  
14 or rather to secure compliance.

15 So, in the scenario that you've  
16 offered, it would depend on whether or not the  
17 person was using their authority to secure  
18 compliance.

19 The provision itself does not make a  
20 distinction between positive and negative  
21 inducements, but one would have to conclude --  
22 come to the conclusion that what was being used

1 was one's authority and rank and the reason for  
2 the use of that authority and rank would be to  
3 secure compliance to sex.

4 So, there may be scenarios in which  
5 what you've offered up is exactly that. There  
6 may be scenarios in which it's not. There would  
7 have to be a connection. The prosecutor would  
8 have to be able to prove beyond a reasonable  
9 doubt that this was the use of position and  
10 authority to secure compliance to the sexual  
11 behavior.

12 VADM TRACEY: Thank you.

13 CHAIR HOLTZMAN: Mr. Taylor?

14 MR. TAYLOR: I would also like to  
15 commend the work of the Subcommittee. Although  
16 we got this rather late in the game and I haven't  
17 had a chance to really digest it, just from a  
18 quick read, it's obvious that a lot of thought, a  
19 lot of careful considerations went into it.

20 I'd like to pick up on maybe your last  
21 point for at least my first question and that is  
22 this issue of strict liability.

1           As you know, we had a lot of testimony  
2 really from various groups about the fact that,  
3 in their view at least, it was virtually  
4 impossible in a training environment,  
5 particularly initial entry training, for a new  
6 recruit to have any understanding about what the  
7 bounds were or the permissible limits of  
8 authority might be with a person who held  
9 complete sway over him or her under those  
10 circumstances.

11           DEAN ANDERSON: Yes, sir.

12           MR. TAYLOR: So, would you just talk  
13 more about that please?

14           DEAN ANDERSON: So, that's -- we had  
15 testimony on that exact issue. We deliberated at  
16 length about where, if any, bright lines might be  
17 drawn and we certainly understood that it's very  
18 difficult under the current Statute to make  
19 headway with a case of a sexual offense in a  
20 training context.

21           And, wanted to provide -- to develop  
22 a provision that was not dependent upon the

1 context of the trainer/trainee.

2 As soon as we started to go there,  
3 that this was about trainer/trainees, then it  
4 was, well, what about recruiters? What about --  
5 and then there were a number of other what abouts  
6 that came forward.

7 Then we thought, oh jeppers, you know,  
8 just focusing on the relationship between the two  
9 doesn't get to the underlying issue which is  
10 whether or not they're trying to use, whether or  
11 not the offenders are trying to deploy their  
12 authority, rank and position in order to secure  
13 compliance to sex.

14 And, what we concluded was that in the  
15 trainer/trainee context, a person who routinely  
16 preys upon -- we're really looking to deter  
17 predation and someone who routinely uses their  
18 authority as a trainer to obtain, to secure  
19 compliance from a trainee that that would be  
20 something that we wanted the Statute to capture.

21 However, circumstances in which the  
22 trainee, although naive, ignorant and delusional,

1 perhaps, chooses to engage in a consensual  
2 relationship where the trainer has not -- there  
3 is not evidence that the trainer has used his or  
4 her authority to secure that compliance.

5 So, rather than look -- we were very  
6 persuaded, Mr. Taylor, that there's a particular  
7 concern around these issues in the training  
8 context and, frankly, in the recruitment context.  
9 Those are the two big contexts that came up.

10 Try as we might to craft a rule that  
11 would include only those circumstances, we  
12 failed. And we felt like it was not just that we  
13 couldn't think it up but that the parameters were  
14 too unwieldy.

15 We felt, well, what about the training  
16 context? And then, someone said, well, what  
17 about six weeks after training? You're still in  
18 a relationship with this person who was the  
19 trainer and we just thought, oh, it would be too  
20 specific to craft a strict liability offense for  
21 those contexts.

22 And, we wanted to be more circumspect

1 and narrower in carving, nevertheless, expanding  
2 the reach of Article 120 and carving a new theory  
3 about the use of rank to obtain sex.

4 MS. WINE-BANKS: If I could add one  
5 point to what Dean Anderson has said.

6 One of the -- some of the testimony we  
7 heard that particularly persuaded me and I think  
8 other Members of the Subcommittee was that we  
9 were demeaning the trainee, that trainees could  
10 actually separate the attraction they might have  
11 for the power of the trainer and, in recognition  
12 of the sway that that trainer had over them, but  
13 that they might actually for a consensual  
14 attraction to the person and engage in a  
15 consensual relationship.

16 And, that by making it a per se crime,  
17 we were eliminating the judgment of the trainee.

18 Now, we recognize that it is  
19 completely inappropriate and should subject the  
20 person to expulsion from the Service for engaging  
21 in an appropriate relationship, but labeling a  
22 person as a sex criminal and having him or her

1 have to register as a sex criminal was a  
2 consequence that we thought was inappropriate,  
3 that release from the Service would certainly be  
4 an adequate punishment and that we should not go  
5 further and label them as a sex criminal.

6 MR. TAYLOR: Would anyone else like to  
7 add to that?

8 DEAN ANDERSON: I will say that that  
9 was probably the hardest question -- set of  
10 questions that we tackled and we spent a lot of  
11 time deliberating on it. That's not in defense  
12 of where we landed, but it's just to say that we  
13 recognize that these are very serious moral  
14 complexities.

15 There are serious moral complexities  
16 that surround these issues and questions of  
17 autonomy and what autonomy means in the context  
18 of training, we tried to deliberate on very  
19 seriously.

20 And, also kept our focus on what is  
21 the problem with those circumstances? And, it  
22 really -- we kept coming back to it's the use of

1 the military authority to obtain sex. And,  
2 that's what we wanted to get to.

3 And, we realize that the opportunity  
4 for using one's military authority to obtain sex  
5 is much greater in many circumstances in which  
6 you're in training, it's a brand new recruit,  
7 completely new world, totally controlled by the  
8 trainer.

9 We certainly recognize that but did  
10 not feel it was appropriate to carve out a  
11 special provision for those circumstances.

12 PROF SCHULHOFER: I would just add one  
13 other point. When basically, primarily to  
14 underscore the last point that Jill Wine-Banks  
15 just made.

16 Because, many of us started from the  
17 position that these relationships are  
18 inappropriate per se and why should we be  
19 wringing our hands and creating headaches for  
20 people trying to draw these ambiguous lines about  
21 whether the threat -- whether the action  
22 threatened is wrongful or not, whether the person

1 is using or not using and how it's perceived,  
2 this shouldn't be happening period. So, why get  
3 into all that?

4 And, the consideration that I think  
5 moved many of us who started from that position  
6 were two things.

7 First of all, that where these  
8 relationships are inappropriate, not only can the  
9 person be discharged from Service, but there are  
10 other provisions of the UCMJ that are generally  
11 available and the testimony before us was that in  
12 these other inappropriate relationships where  
13 they couldn't prove a threat of wrongful action,  
14 they still had Article 92 or Article 93 or  
15 Article 134 available to achieve a just result.

16 And that moving it -- so that would be  
17 point number one. There are other avenues for  
18 prosecution.

19 And, point number two, moving it into  
20 120 instead triggers sex offender registration  
21 which I think all of us on our Subcommittee were  
22 persuaded is generally overbroad and certainly

1 inappropriate in the case of some of these  
2 relationships where the military training  
3 instructor may be violating his expectations and  
4 he's doing something inappropriate.

5 But if the initiative has come from  
6 the trainee, which is something we heard to the  
7 surprise of some of us, in the 21st Century, this  
8 happens maybe more than one would expect.

9 And that to label the senior officer  
10 a sex offender in that situation comes back to  
11 the point that Jill Wine-Banks just made, it's  
12 completely inappropriate to treat -- to put  
13 someone like that on a sex offender registry.

14 So, those were I think the two  
15 considerations that moved us to think it can be  
16 prosecuted elsewhere and this 120 would not be  
17 the right place for it.

18 MR. TAYLOR: Well, that's all very  
19 helpful. Thank you very much.

20 I have to say that, even though I  
21 won't say I shall not be moved, I'm not yet  
22 moved. So, I'm still probably where you were

1 when you first were thinking about this subject.

2 But, one question that does occur to  
3 me is that there is a distinction, in my mind at  
4 least, between the ability to say no for a person  
5 who is in initial entry training and, therefore,  
6 new to the environment, new to the culture on the  
7 one hand.

8 And training that continues later in  
9 one's career, let's say at a professional level.  
10 Perhaps it could be in a residency or it could be  
11 in any number of environments, an instructor  
12 pilot training a new pilot.

13 So, do you see any distinction in the  
14 way you think about it between brand new people  
15 learning the culture, not understanding the big  
16 picture and those who are pretty well along maybe  
17 several years into their career and then, again,  
18 in these training relationships?

19 DEAN ANDERSON: One thing I will say,  
20 Mr. Taylor, in response to that question is that  
21 this provision is not a theory of consent or non-  
22 consent rather. So, it's not a question of

1 whether or not the trainee says no or says yes.  
2 That is the provision that of causing bodily harm  
3 that has been changed to without consent.

4 And, Ms. Kepros argues that these  
5 kinds of relationships could be conceptualized as  
6 non-consensual relationships under that  
7 provision, (b)(1)(B).

8 I think the majority of the  
9 Subcommittee came to a slightly different  
10 conclusion and that that is that these are not --  
11 we're not focused on the question of consent or  
12 non-consent at the outset, that the  
13 conceptualization of the offense itself is about  
14 using position, rank or authority to obtain the  
15 sexual behavior, to obtain the sexual act.

16 So, absolutely, I think unanimously  
17 across the Committee, I can say -- the  
18 Subcommittee, I can confidently say that we  
19 understood that there are very different  
20 abilities to say no and yes in different  
21 contexts.

22 And, certainly, understood that in the

1 training context or the very early or right after  
2 the training context or the very early stages of  
3 recruitment into the military, that it's an  
4 overwhelming experience that is all consuming and  
5 one's ability to have autonomy of any kind is  
6 greatly reduced, if not to the vanishing point.

7 We wanted this provision to focus on  
8 what in essence is the mens rea and actus reus of  
9 the defendant and that is whether or not he or  
10 she is using their authority to obtain that sex.

11 Notwithstanding your very valid point  
12 which is that the ability to consent or not  
13 consent is very different in these different  
14 contexts.

15 What that would mean, obviously,  
16 you're an attorney, you know what that would mean  
17 is that it would be charged under (E) as using  
18 position, rank or authority and then it becomes a  
19 question of consent as a defense because the  
20 Panel did come to the conclusion that consent was  
21 a defense.

22 How that shakes out, well, then you

1 get to whether or not consent is freely given to  
2 the conduct at issue by a competent person. And  
3 then, those questions of whether or not it's  
4 freely given in the context of the training, that  
5 would then be what is -- the evidence has to  
6 merit and argument over.

7 MR. TAYLOR: Anyone else like to add  
8 to that? That was a very eloquent answer. Thank  
9 you very much.

10 DEAN ANDERSON: Well, thank you.

11 PROF SCHULHOFER: As we learned day  
12 after day in our Panel, when Dean Anderson  
13 speaks, it is invariably eloquent and  
14 comprehensive and persuasive.

15 So, I would just add a footnote which  
16 is to make perhaps -- try to focus on the area  
17 where your question really might make a  
18 difference under our scheme.

19 Because if, let's say in a situation  
20 of advanced training such as a flight instructor,  
21 for example, and let's say that the flight  
22 instructor invites the trainee out for drinks or

1 over to his apartment after hours.

2 If the flight instructor says, I'm  
3 going to wash you out if you don't cooperate or  
4 words to that effect, that would be threatening  
5 wrongful action and it's already covered under --  
6 I believe that would be (b)(1)(A), placing the  
7 other person in fear which is threatening  
8 wrongful action. So, that one's taken care of.

9 He might say you can -- I'll make sure  
10 you get the best assignment, you get the chance  
11 to fly this trainer before anybody else. That  
12 would be under (E), that would be using his  
13 position, rank or authority to secure compliance.  
14 So, that would be covered as well.

15 The one case that I think perhaps  
16 you're concerned about and I was concerned about  
17 and I think everyone on our Panel was concerned  
18 about is the situation where nothing is  
19 articulated.

20 MR. TAYLOR: Exactly.

21 PROF SCHULHOFER: And, that's why I  
22 started from the position which is perhaps where

1 you still are which is well, for heaven's sakes,  
2 it should not be going on, let's just prohibit  
3 it.

4 And, that situation, nothing is  
5 articulated or nothing can be proved beyond a  
6 reasonable doubt could not be prosecuted under  
7 120.

8 However, it could still be prosecuted  
9 under other Articles.

10 MR. TAYLOR: Thank you. That's very  
11 helpful. I'll pass for now.

12 CHAIR HOLTZMAN: Judge Jones?

13 Or should we take -- it's 12:00.  
14 Should we take a break?

15 LTC COL HINES: Yes, ma'am. We've got  
16 an hour for lunch and then the entire afternoon.

17 And, I would just throw out, Ms.  
18 Kepros, as you know, has attached her  
19 supplemental and dissenting commentary that's at  
20 the report page 59. And so, in the afternoon,  
21 we'd like to have her have the opportunity to  
22 come up to the table along with General Schwenk

1 to further the discussion.

2 CHAIR HOLTZMAN: Great. Well, we look  
3 forward to that.

4 So, we'll take an hour break now for  
5 lunch. Okay, thanks very much.

6 (Whereupon, the above-entitled matter  
7 went off the record at 12:01 p.m. and resumed at  
8 1:08 p.m.)

9 CHAIR HOLTZMAN: Well I just want to  
10 note for the record that the Subcommittee Panel  
11 has expanded, and we are very honored to have the  
12 presence of Dean Lisa Schenck and also Laurie  
13 Rose Kepros and -- I am sorry, and Brigadier  
14 General (Retired) James Schwenk, in addition to  
15 Dean Michelle Anderson, Professor Stephen  
16 Schulhofer, and Ms. Jill Wine-Banks.

17 Should we begin with Ms. Kepros's  
18 views? I think that is probably a good idea, so  
19 welcome.

20 MS. KEPROS: Thank you, Madam Chair,  
21 and hello, JPP.

22 I really appreciate the chance to

1 share some of my views on the issues that the  
2 Subcommittee has been analyzing over the last six  
3 or eight months.

4 I captioned my document "Supplemental  
5 and Dissenting Commentary" because I think the  
6 work and the recommendations of the Subcommittee  
7 has been really quality. It has been a very  
8 thoughtful process based on a lot of evidence, a  
9 searching examination of how the Statute  
10 functions, where there have been problems in how  
11 it functions.

12 But the gist of the position that I  
13 have taken here is that I think more can be done  
14 and that even further improvements can be made.

15 And the starting point in my analysis  
16 necessarily is the significant consequences of  
17 being a sex offender in America today. There has  
18 been reference in the earlier presentation to the  
19 consequences of the Sex Offender Registry, but as  
20 I summarized in my written remarks, that is just  
21 the tip of the iceberg.

22 The consequences go as far as

1 preventing people from accessing a homeless  
2 shelter; preventing people from entering their  
3 own child's school to meet with staff at parent-  
4 teacher conferences; the consequences go as far  
5 as not being allowed to stand in certain  
6 locations because of their proximity to schools  
7 or other designated facilities; and they just  
8 seem to grow and vary by jurisdiction, every  
9 year, every jurisdiction, every day, in new ways  
10 that we never could have foreseen.

11           And I know in my state, and I suspect  
12 in pretty much all of the other states, a  
13 military adjudication for a sex crime triggers  
14 just as many consequences as a civilian  
15 conviction of a sex offense. And given that, I  
16 can't think of a more consequential label to put  
17 on someone, I think it's very important that this  
18 Statute be the absolute best product that we can  
19 put forth for our Servicemembers, that we  
20 delineate behavior that is going to carry all of  
21 these consequences and sanctions in the most  
22 precise way we possibly can and with the utmost

1 respect for the constitutional rights of these  
2 individuals who have literally dedicated their  
3 lives to protecting us and our country.

4           So from that context, I kind of start  
5 with the general premise, Article 120 is really  
6 confusing, and it is really confusing to me, and  
7 although I am a civilian, I am an expert in  
8 sexual assault law. It is literally all I do all  
9 day. I train and advise over 800 public  
10 defenders in the State of Colorado who are  
11 representing individuals accused of sex crimes,  
12 so I see every kind of scenario, and it has taken  
13 me months and study and listening carefully to  
14 the testimony of all the witnesses that have been  
15 presented to our Subcommittee just to kind of  
16 wrap my head around how this Statute operates  
17 within the context of the military justice  
18 system.

19           So, you know, I won't go into great  
20 detail. I did attach kind of an early draft that  
21 I had formulated of maybe a different way to  
22 understand this kind of crime. That is the

1 attachment to I think it's Enclosure -- excuse  
2 me, I am not looking at the right document --  
3 it's something to -- Enclosure, yes, it's  
4 Enclosure to Attachment A, and it's not worked  
5 out. It was just a rough draft that I shared at  
6 some point in the conversation with the  
7 Subcommittee I think in June. We didn't work on  
8 this, so it does not reflect a lot of the other  
9 improvements that have been suggested by this  
10 Subcommittee.

11 But I just offer that as sort of a  
12 place to start thinking about maybe what else  
13 could be done to improve this Statute, and the  
14 premise of my suggestion is that the thing that  
15 really best defines sexual misconduct is the  
16 absence of consent. So what I propose is a model  
17 where the fundamental baseline criminal activity  
18 is some type of sexual conduct that occurs  
19 without consent.

20 And then I have offered a much broader  
21 definition of consent than what the Subcommittee  
22 has proposed in which it gets into both consent

1 and lack of consent as well as the circumstances  
2 where a person would be unable to give consent,  
3 whether it's as a result of intoxication, mental  
4 incapacity, or some other kind of impairment.

5 So again, I am just sort of offering  
6 that as a model and not saying that that is  
7 necessarily something I am asking the JPP to  
8 recommend going forward, but I think you can take  
9 a look at that and say, well, this might be a  
10 little more understandable to someone who is not  
11 a lawyer, who has not had the opportunity to  
12 study all the case law, who has not had the  
13 opportunity to closely study the Rules in the  
14 Manual for Courts-Martial.

15 You know, this is something that, it  
16 resonates more with just I think a gut  
17 expectation of what is not okay, and that is this  
18 non-consensual type of sexual activity.

19 So in the course of the testimony we  
20 heard, and I referenced some of it in my report,  
21 you know, we heard a lot of people are looking to  
22 Article 120 for guidance, and of course, that

1 includes prosecutors and defense counsel and  
2 military judges, and those folks found -- I  
3 actually found them to be quite comfortable with  
4 Article 120 for most purposes. Often they would  
5 say, you know, we get it, we use this in this  
6 situation, we use that in that situation. But I  
7 don't think that necessarily captures the  
8 universe of people who are considering Article  
9 120, and we heard as much from Major Bateman, who  
10 provides training to the JAG officers, who  
11 provides training to the judges, and provides  
12 training to the lawyers who have to then go to  
13 command structures and explain to them here are  
14 the Rules and here is what you can and can't do.

15           And she certainly found many examples  
16 where people were still confused, where it is not  
17 something that is easily conveyed to laypeople.  
18 I think our Subcommittee had concern about how  
19 Members are understanding language, and when  
20 Professor Schulhofer explained our reasoning  
21 about recommending changes to the term "bodily  
22 harm," to me, that is a model of what was right

1 about what our Subcommittee is recommending  
2 because it takes a concept that requires multiple  
3 layers of interpretation and definition and turns  
4 it back into pretty accessible English, right?

5 We take that concept of bodily harm,  
6 and we say no, actually, what we're talking about  
7 is a lack of consent, and again, that's a thing  
8 that I think makes sense to most people, and you  
9 don't need to do all this kind of legal gyrations  
10 to get to some understanding of what the language  
11 means.

12 I continue to find, and I used it as  
13 an example in my written remarks, the very first  
14 offense that is described in Article 120(a)(1) so  
15 confusing: "Any person subject to this chapter  
16 who commits a sexual act upon another person by  
17 using unlawful force against that other person is  
18 guilty of rape."

19 Well, okay, that doesn't sound that  
20 confusing, except "unlawful force" is a term of  
21 art, and it is defined to have a meaning that is  
22 different from a common understanding of the word

1 "force" in English. The term "unlawful" is not  
2 clearly defined. We heard from Major Bateman  
3 about confusion even among judicial candidates  
4 about the availability of consent defenses and  
5 whether consent can negate unlawful if there is  
6 consensual forceful sexual behavior going on.

7 And these are just some of the kinds  
8 of problems that we know are -- have arisen in  
9 the Statute, and I think despite the helpful  
10 recommendations of the Subcommittee, we could do  
11 more to further clarify.

12 You know, we have made a  
13 recommendation as a Subcommittee with respect to  
14 Issue 2 that the MCM, the Manual for Courts-  
15 Martial, be amended to make it clear that the  
16 defenses of consent in mistake of fact as to  
17 consent are available, but again, the average  
18 Servicemember who is not a lawyer is not cross-  
19 referencing all these sources. It's not in the  
20 Statute. It's not clear. And using the term  
21 "unlawful" just kind of throws this whole  
22 question for the lay reader about what are we

1 actually talking about, and what is the role that  
2 consent plays in analyzing these behaviors?

3 If you just make the crime one where  
4 there is no consent, then you know, and you don't  
5 need to go through these multiple layers of  
6 analysis.

7 And the constitutional basis for the  
8 concerns that I am raising is the due process  
9 clause. It protects all of us from lack of  
10 notice. It protects all of us from arbitrary,  
11 capricious enforcement. Not having vagueness is  
12 a good thing constitutionally speaking, and it is  
13 something that the American court system has  
14 routinely recognized as an important value in our  
15 constitutional jurisprudence.

16 One of the concerns that was discussed  
17 in the presentation this morning and that did  
18 recur often in the testimony that we heard from  
19 witnesses is whether or not large-scale or  
20 larger-scale modifications to Article 120 were a  
21 good or a bad thing, and the concern was we just  
22 keep amending this Statute every time. Every

1 time we change it, new prosecutions have to be  
2 brought under different versions of this Statute  
3 depending on the date ranges involved. Sometimes  
4 there are court-martials [sic] involving multiple  
5 different statutory schemes at the same time.  
6 That is very confusing to judges and lawyers and  
7 panel members.

8 And those are serious concerns and  
9 certainly concerns that the Subcommittee embraced  
10 in choosing to do a more scalpel-like analysis in  
11 its recommendations, but I did supply you with  
12 what I thought was a very powerful point from  
13 Major Bateman, and I have quoted her at the  
14 bottom of page 63 to 64 of my comments, because  
15 she notes that there is -- this is not a settled  
16 thing. This is an area of law that is evolving,  
17 that will continue to evolve, and that is a  
18 natural consequence of applying real-life factual  
19 situations to the law.

20 And we should not be afraid to make  
21 changes where we can see there is value in doing  
22 so because it is going to change anyway. We

1 heard testimony from Colonel Terri Zimmermann  
2 from the Marine Corps. She makes similar  
3 comments. It's just going to keep changing. The  
4 Statute is going to keep evolving regardless.  
5 Why not do it in a more deliberate and thoughtful  
6 way? Why not try to make a Statute that is  
7 accessible to as many Servicemembers as possible?

8           And hopefully we would get the added  
9 benefit of having clear expectations and making  
10 it more realistic to expect people to understand  
11 what is expected of them and to conform their  
12 behavior in an appropriate manner, and one issue  
13 I did also reference in my comments that we heard  
14 about, I counted at least six witnesses that I  
15 found referenced it, which was that they had  
16 heard in the course of prevention training that  
17 Servicemembers were being advised that if someone  
18 has had at least one alcoholic beverage, that  
19 person is not capable of giving consent to sexual  
20 activity.

21           Everyone agrees that is not the law.  
22 Everyone agrees that is not what Article 120

1 says. However, it came up over and over and over  
2 again, and because the Statute doesn't set forth  
3 any clear definition, and again, I think the  
4 recommendation of the Subcommittee to define  
5 "capable of appraising" is helpful at addressing  
6 that concern, but when you have that kind of  
7 uncertainty about where are the lines in what is  
8 expected, and when people are hearing at training  
9 about a line that frankly is really out of step  
10 with contemporary social life, it's not  
11 realistic. It's not how people are living in  
12 American society broadly, and I certainly would  
13 not expect the military to be significantly  
14 different in that regard.

15 To say, you know, one drink and you  
16 can't give consent to sexual activity, it's so  
17 out of step with practice that it loses  
18 legitimacy. And isn't it better that we set  
19 expectations in a realistic yet respectful place  
20 and not continue to have the confusion that the  
21 Statute permits to drive this sort of  
22 misunderstanding and misinformation, and really,

1 you know, failing to address where we could make  
2 real improvements in the choices that people are  
3 making and how they conduct themselves?

4 So that is kind of my first issue. My  
5 second issue has to do with what I see as an  
6 inadequate suggestion in the Subcommittee's  
7 recommendation concerning Issue 1, which has to  
8 do with the improvements that were made to the  
9 definition of consent.

10 I agree with the recommendations of  
11 the Subcommittee. The concern I have has to do  
12 with what becomes, I think some discrepancies and  
13 inconsistencies in the definition that we end up  
14 with, and that is that in that Subsection A of  
15 the definition of consent -- and you might want  
16 to look at the red line draft that is attached to  
17 the Subcommittee's recommendations to see what I  
18 am referencing -- in Subsection A there are  
19 comments and instructions along the lines of lack  
20 of verbal or physical resistance does not  
21 constitute consent.

22 Later, it says in Subsection A as

1 proposed by the Subcommittee, an expression of  
2 lack of consent through words or conduct means  
3 there is no consent. There is further language  
4 as it goes on that talks about how manner of  
5 dress does not constitute consent.

6 But then if you go down to Subsection  
7 C of that draft definition, it says look at the  
8 totality of the circumstances. Look at all of  
9 the circumstances and everything that is going  
10 on. And my concern with respect to those three  
11 examples I gave within Subsection A is that it is  
12 not obvious to the person who is trying to apply  
13 that definition what is the relationship, if any,  
14 between the Subsection A comments and the  
15 Subsection C comments.

16 And my concern about this I think was  
17 sort of borne out by an example that we heard  
18 from Major Bateman in her training on Article  
19 120. And that was that if someone said I will  
20 never have sex with you, and then a period of  
21 months, days, hours, passes, is the fact that  
22 person made that statement now creating a

1 scenario where they cannot give consent to sexual  
2 activity? What if it's sexual activity that  
3 person has initiated himself or herself?

4 It's unclear. And I think although I  
5 agree with the statement that lack of verbal or  
6 physical resistance does not constitute consent,  
7 I think it's important that it be clear in the  
8 Statute, as the Subcommittee has indicated it  
9 intends in its commentary in the report, that the  
10 lack of resistance is among the things that we  
11 should be considering in assessing the presence  
12 or absence of consent because it is certainly the  
13 case that if there is truly consensual sexual  
14 activity occurring, there is probably not going  
15 to be resistance in most cases, you know?

16 That is a pretty useful piece of  
17 information to have in doing that analysis. By  
18 the same token, if manner of dress is something  
19 that parties have used historically to  
20 communicate their interest or lack of interest in  
21 sexual activity, that should be something that is  
22 being considered. No, it is not a proxy for

1 consent. It does not mean because I wore x I now  
2 am consenting. But it is among the factors that  
3 should be considered, along with all of the other  
4 circumstances.

5           There are people who have gotten into  
6 long-term relationships who have certain  
7 expectations and patterns and are presuming  
8 consent in some circumstances based on, again,  
9 the historical practices and behaviors. Is that  
10 consent? Not necessarily. But it's among the  
11 things that should be considered in assessing the  
12 totality of the circumstances.

13           So I drafted some, you know, possible  
14 alternative language around that. Some of it  
15 could be changes to C, to make it clearer that  
16 those circumstances described in A are still part  
17 of the picture. I think we could also draft A  
18 slightly differently just so it's clearer that,  
19 again, none of those things mean there is  
20 consent, but they are relevant to consent, and  
21 they are things that the fact-finder should not  
22 find precluded from weighing in their evaluation.

1           I think it would be a real miscarriage  
2 of justice if somebody were to say, well, the  
3 person said I will never have sex with you but  
4 then initiated sex, and we say, well, it says in  
5 A that a statement of non-consent means there is  
6 no consent, and therefore that can never evolve  
7 or change under, you know, other circumstances or  
8 through the evolution of the relationship,  
9 perhaps.

10           The next issue that I have addressed  
11 in my comments has to do with mens rea, and I am  
12 going to talk about this sort of globally at  
13 first because throughout Article 120(b)(2) and  
14 (3), there is this kind of recurring language  
15 where the accused is required to be culpable, not  
16 just to know, but also to be culpable if he or  
17 she reasonably should have known about certain  
18 circumstances that are part of the context of the  
19 sexual activity.

20           And I thought it was interesting that  
21 even since the last in-person meeting of the  
22 Subcommittee, we have seen legislative action in

1 Congress with respect to the federal statutes  
2 concerning mens rea, and there are now House and  
3 Senate bills that have been introduced to try to  
4 bring the issue of mens rea back in a more  
5 explicit way in federal statute, that there is a  
6 real national concern around the role of mens  
7 rea, and that we not lose track of the importance  
8 that people who are going to be held criminally  
9 culpable be intending the bad behavior, or be in  
10 a position to try to meaningfully effectuate the  
11 bad behavior, and that that is the thing that we  
12 find unacceptable as a society, that there be  
13 that specific intention.

14 Another development in this area of  
15 law that occurred even while our Subcommittee was  
16 meeting was the decision that came out June 1st  
17 of 2015 from the United States Supreme Court  
18 called *Elonis*. I don't know the pronunciation,  
19 but it's E-L-O-N-I-S, and the citation, and lots  
20 of quotes from it are in my comments.

21 And I think that case is quite  
22 interesting because the Supreme Court really

1 explicitly discusses the ongoing viability and  
2 importance of mens rea in criminal jurisprudence.  
3 They express concern over, as was the case in Mr.  
4 Elonis's prosecution, having a merely negligent  
5 mens rea, and that is what we have in Article  
6 120(b)(2) and (3), reasonably should know, that's  
7 mere negligence, just like what Mr. Elonis was  
8 prosecuted for.

9           They said that is not good enough, and  
10 they recount case after case from the United  
11 States Supreme Court where the importance of mens  
12 rea has been affirmed and reaffirmed by the  
13 Court, and they ultimately conclude that mere  
14 negligence is a civil standard. It's not good  
15 enough for a criminal prosecution. It's not good  
16 enough for when the government is going to take  
17 away your liberty or saddle you with other  
18 punitive consequences, that it really needs to be  
19 something more volitional than that, more  
20 intentional than that.

21           And I think again you see this concern  
22 in the federal legislation that has been recently

1 introduced. In one of the bills, the default  
2 mens rea is knowingly. In the other, the default  
3 mens rea is willfully. It's not this kind of  
4 reasonably should have known standard. There  
5 really is a concern that the accused know, had a,  
6 you know, ability to perceive this situation.

7 And one of the reasons I believe that  
8 becomes particularly important in the context of  
9 Article 120 is that we heard about many scenarios  
10 where both of the parties who are engaging in  
11 sexual activity are impaired in some respect or  
12 intoxicated in some respect, and it seems to be  
13 one of the most common factual situations that  
14 the military attorneys are dealing with, and I  
15 just don't know, at the end of the day, how can  
16 we fairly assign culpability if both parties  
17 reasonably should have known that the other  
18 person was impaired, and yet both parties who  
19 maybe were incapable of consenting engaged in the  
20 sexual activity?

21 And then I wonder, is it just an  
22 accident of how the behavior was reported, or how

1 it came to the attention of the authorities, that  
2 one party is labeled an accused, and the other  
3 party is labeled a victim, when they have done  
4 the exact same behavior?

5 There was even a concern articulated  
6 in the testimony of Colonel Zimmermann that she  
7 has noticed in her practice that it tends to be  
8 men who are being charged over women, even though  
9 both parties are engaging in the same conduct,  
10 and I think could be subject to the same kind of  
11 culpability as the Statute is currently drafted.

12 But another concern that arises  
13 because of that has to do with Rule 916(L)2 Rule  
14 for Courts-Martial that talks about the relevancy  
15 of voluntary intoxication evidence and how that  
16 can bear on somebody's mental state, and that  
17 evidence is not a defense to engaging in arguably  
18 illegal sexual behavior, but it is relevant to  
19 assessing whether or not the culpable mental  
20 state is present.

21 But it is only relevant according to  
22 the Rule in the cases where the elements are

1 actual knowledge, specific intent, willfulness,  
2 the kind of culpable mental state that I believe  
3 the Subcommittee should be recommending for  
4 Article 120 throughout, and not this mere  
5 negligence standard of reasonably should have  
6 known, because that evidence becomes irrelevant  
7 if the standard is mere negligence, reasonably  
8 should have known standard, but it's just not  
9 fair.

10 It is just not fair that that not be  
11 considered by the fact-finder, particularly where  
12 both parties are using substances, particularly  
13 if they are doing so voluntarily. It should all  
14 be part of analyzing what is the moral  
15 culpability here as well as the legal  
16 culpability, and hopefully, those two interests  
17 would converge to some extent.

18 I have as kind of subsections to the  
19 conversation on mens rea pulled out a few areas  
20 where the JPP tasked us with speaking to issues  
21 relevant to mens rea. You did hear in the  
22 earlier presentation about Issue 4, which

1 actually had to do with lessening the mens rea,  
2 and the Subcommittee did not recommend that, but  
3 I continue to suggest that we should do even more  
4 to make sure that the person have actual  
5 knowledge of the, you know, victim's  
6 vulnerability.

7           With respect to Issue 4, the question  
8 arose in the context of Article 120(a)(5), which  
9 criminalizes someone intentionally administering  
10 a drug or alcohol or some kind of mind-altering  
11 substance with the objective of committing a  
12 sexual assault on them.

13           And we received a suggestion from  
14 Colonel Grammel, who is a retired Army judge. He  
15 had drafted some language that we should require  
16 that administration of the drug or intoxicant be  
17 for the purpose of impairing the victim's  
18 capacity.

19           I support his recommendation, and to  
20 me, there are a couple reasons for that. One is  
21 I think it's important, and it's just fair,  
22 again, to distinguish someone who is acting in a

1 premeditated manner to create a scenario where  
2 they intend to sexually abuse someone, and  
3 recognize that behavior is distinct from the  
4 behavior that is criminalized separately in  
5 Article 120(b) -- what is it -- (1)(3A), where if  
6 the person is impaired through any mechanism, and  
7 then someone takes advantage of that situation,  
8 it is still an offense, but it is an offense that  
9 carries a maximum punishment of 30 years  
10 imprisonment instead of life in prison, as you  
11 can get with the premeditated type of offense.

12           There was an argument that I think is  
13 credible that the use of the word "by," you know,  
14 shows that's the intent, that that is sufficient  
15 in the Statute to explain that, but I don't see  
16 the harm in being more explicit about it if there  
17 is consensus that that is what we intend, and  
18 that we do want that to be two different types of  
19 crimes and two different levels of culpability.  
20 If that is what everybody means, then we might as  
21 well say so as explicitly as possible.

22           And then the second concern, again,

1 relates to this Rule for Courts-Martial  
2 916(L)(2), and what evidence is or is not  
3 admissible concerning the voluntary intoxication  
4 of the accused, because I think, in my mind, it  
5 looks different to have someone who is impaired  
6 and is now trying to get other people drunk  
7 versus somebody who isn't. There is just a  
8 different kind of planning, premeditation.

9           These are distinctions we recognize in  
10 law. We certainly punish more harshly in  
11 general, first-degree murder with a premeditated  
12 killing from someone who, you know, exercises  
13 very harmful and bad judgment, but more in the  
14 heat of the moment. Those are different levels  
15 of culpability that we tend to recognize, and I  
16 think that kind of distinction can appropriately  
17 be drawn in this context.

18           The other kind of issue that I thought  
19 was relevant to consideration of mens rea had to  
20 do with the definition that the Subcommittee has  
21 proposed for incapable of consenting. Again, I  
22 support there being a definition. I think this

1 is a great first effort.

2 We won't really know how well it works  
3 until we start applying real life to it, and that  
4 is always going to be the case with statutes, but  
5 to me, that also is one of the reasons that a  
6 knowing, actual knowledge standard, would be more  
7 appropriate, rather than saying here is a new  
8 definition of incapable of consenting, let's just  
9 assume that there is going to be some way for  
10 somebody to know whether or not -- or a  
11 reasonable person should know whether or not that  
12 standard might be met when it has not been  
13 applied in any way, and despite our best efforts,  
14 when there may be overbreadth in that language,  
15 we just don't know yet.

16 And again, this returns me to the  
17 concerns about the potential injustice where you  
18 have two intoxicated parties, and the risk of  
19 having someone say it's not relevant that the  
20 person was voluntarily intoxicated, when they  
21 really could tell us a lot about their  
22 intentions, what was going on.

1           The -- the response to my concerns  
2 here inevitably from prosecutors is always these  
3 are really hard cases to prove, right? This is  
4 always the answer. And I am not unsympathetic to  
5 that. I understand that concern. But I think we  
6 need to remember that things get proven in court  
7 not just based on direct evidence, but that  
8 prosecutors also have at their disposal  
9 circumstantial evidence, that Panel Members  
10 understand how things work in the world, and take  
11 those things into consideration.

12           And for that reason, I don't see a  
13 risk of wrongful acquittals flowing from making  
14 it more explicit in the Statute what we are  
15 expecting of people.

16           The last issue that I have spoken to  
17 in my comments has to do with Issue 11 concerning  
18 whether or not indecent acts should be returned  
19 to the UCMJ as an enumerated offense. The  
20 Subcommittee has recommended that it not go into  
21 120 as an enumerated offense, and we have been  
22 alerted to the Department of Defense proposal to

1 add a provision to Article 134.

2 I have not reached a final opinion on  
3 this. I feel like maybe perhaps as a civilian, I  
4 am not as well-versed on this topic as I would  
5 like to be to render a formal opinion.

6 But I just did want to flag a few of  
7 the concerns I have, or things that I would want  
8 to investigate more fully before I reached a  
9 position in support of Article 134.

10 One of those is to be certain that  
11 anything that is described and drafted is to  
12 cover behavior we intend to cover, and that it be  
13 as narrow as would be appropriate. There are  
14 things that historically, the military has  
15 punished under indecent acts provisions that are  
16 normative sexual behavior, that is, sexual  
17 activity in the presence of a third person.

18 Again, it may not be something anybody  
19 is looking to advertise or promote, but it is not  
20 considered deviant behavior. It is not  
21 considered criminal in a civilian context. It is  
22 not the kinds of thing most states would put

1 somebody on a sex offender registry for engaging  
2 in. And I am just concerned about kind of the  
3 universe of what could be captured in an overly  
4 broadly defined offense, or the amount of  
5 unchecked discretion that could be given to  
6 prosecutors in that context.

7 I have that concern particularly I  
8 think in this era where there is such ready  
9 access to recording devices, to images. My state  
10 has had a lot of recent national attention around  
11 sexting by teenagers who are using their cell  
12 phones to take and exchange consensual nude  
13 images, and they have been subject to the risk of  
14 prosecution under my state's child pornography  
15 laws.

16 I am not saying this is an equivalent  
17 thing, but I think it's those same kind of  
18 technologies and habits that are new that we are  
19 still all kind of coming to terms with as a  
20 society in terms of our expectations, and I just  
21 worry that things that are being done in the  
22 broader society and may be considered normal

1 among young Servicemembers not land them into a  
2 bad situation criminally that is just sort of out  
3 of their ignorance, inexperience, or lack of  
4 forethought to the possible consequences of this  
5 behavior.

6 The other concern I have has to do  
7 with the fact that we heard from prosecutors  
8 about how they have been able to address some  
9 kind of inappropriate behavior through some of  
10 the other Articles, through some of the other  
11 mechanisms available at their disposal, and, you  
12 know, I am very concerned that we not generate  
13 new crimes where there are already adequate tools  
14 to address the need.

15 And my final concern kind of brings me  
16 back to where I started, which is the reality  
17 that if you call something indecent, and that's  
18 the name of the crime, I believe there is a very  
19 real risk that even if the military does not  
20 trigger any kind of sex offender registration  
21 consequences, that someone may enter a civilian  
22 jurisdiction, law enforcement or the courts may

1 just see that terminology, assume it is more  
2 traditional sexual misconduct, and then  
3 inappropriately trigger registration requirements  
4 for the person.

5 In my state, they don't care if the  
6 sending jurisdiction treated it as a registerable  
7 offense or not. They do their own analysis, and  
8 I understand that to be the case in many other  
9 jurisdictions.

10 So I just kind of wanted to put those  
11 issues on the table. One other final thing I  
12 just wanted to make a comment on because it arose  
13 in this morning's presentation had to do with the  
14 Subcommittee's recommendation to create that  
15 Subsection(1)(E), and as Dean Anderson accurately  
16 relayed, I have said I am not sure we necessarily  
17 need that because I think it is prosecutable  
18 under what's currently the bodily harm section,  
19 or what the Subcommittee has recommended be  
20 called a non-consent section.

21 And we actually did hear from  
22 prosecutors who described how they have been able

1 to prosecute some of those situations under  
2 (b)(1)(B), and the reason they can do so, and the  
3 reason I believe they will continue to be able to  
4 do so and could do so whether there was a (1)(E)  
5 or not, is that the definition of consent, even  
6 as it currently exists, requires an agreement  
7 that is freely given, and that is simply not the  
8 case if there is a power differential or a  
9 coercive scenario, and again, because we have  
10 heard from prosecutors who have said they have  
11 successfully prosecuted in the situations that  
12 have really, you know, concerned them, that it  
13 does appear to be an abuse of power kind of  
14 situation.

15 So I just wanted to lay that out to  
16 share, I think that's another reason why some of  
17 these questions around for example strict  
18 liability, they are not without remedy where  
19 there is evidence supporting an Article 120-type  
20 remedy.

21 CHAIR HOLTZMAN: Mr. Taylor?

22 MR. TAYLOR: Yes, well thank you very

1 much for not only your service on the  
2 Subcommittee, but your previous testimony here  
3 before the JPP.

4 I was curious to know whether your  
5 draft definition of consent to which you referred  
6 earlier includes any factors that would not  
7 otherwise be included within the totality of the  
8 circumstances.

9 Because I note that on page 77, you  
10 start listing the different factors, and I was  
11 trying to decide if there were any there that  
12 would not fit within totality of the  
13 circumstances. Or did you just intend this to be  
14 a more robust listing of the kinds of factors  
15 that would go into circumstances? If you could  
16 help me out with that, please.

17 MS. KEPROS: Thank you, Mr. Taylor.

18 I actually intended to try to capture  
19 all of the concepts that were in the existing  
20 Statute because my concern was those had been  
21 listed for some specific reason, that there were  
22 people who felt these should be highlighted so

1 that the fact-finder understands the kinds of  
2 things that might be bearing in their decision,  
3 or more explicitly, that people not be resorting  
4 to applying inappropriate weight to certain  
5 considerations, such as there was not resistance,  
6 therefore it was consensual, which is obviously  
7 not the case and not something that we would want  
8 the law to say.

9 So I think the concept of totality of  
10 the circumstances is probably better, to be  
11 honest. That is my personal opinion because I  
12 think it has got the kind of breadth that real  
13 life presents us with. But my reason for  
14 including it was more out of deference to some of  
15 the prior thinking on the issue.

16 I think an alternate way to go could  
17 be to try to describe the framework as totality  
18 of the circumstance, and then to provide  
19 examples, or to do so perhaps in a jury  
20 instruction. You know, I think there are other  
21 ways that we could try to get at that concept.

22 MR. TAYLOR: Well that was sort of

1        what I was thinking because it seems to me that  
2        there is always a danger from a viewpoint of  
3        legislative or regulatory drafting that if you  
4        have a list that doesn't have some sort of  
5        flexibility, like any other similar circumstance,  
6        then you always run the risk that someone will  
7        say oh, you can't mention that one because it  
8        wasn't on the list. So would you agree with  
9        that?

10                    MS. KEPROS: I totally agree with  
11        that. That is a concern that I share, and I have  
12        no doubt that for all the thought that has gone  
13        into identifying these circumstances, there is  
14        always something else that is going to happen  
15        that we haven't thought of.

16                    MR. TAYLOR: And Madam Chair, I have  
17        a question that I would like to direct to the  
18        larger group here, but if you would like to first  
19        focus on her testimony, that would be fine, or  
20        however you would like to proceed.

21                    CHAIR HOLTZMAN: Why don't you just  
22        ask the question?

1 MR. TAYLOR: Well thank you.

2 I was very intrigued by your argument  
3 regarding "should have known," and how you  
4 thought that was constitutionally at least not  
5 desirable, if not a problem.

6 And I just wanted to ask any Member of  
7 the Subcommittee who I guess didn't see this as a  
8 problem how you would answer that argument. Yes,  
9 Dean Anderson?

10 DEAN ANDERSON: So on the more global  
11 mens rea issues and Subsection (B)(2) and (3),  
12 which Ms. Kepros talks about, I want to just note  
13 that we were not asked explicitly by the JPP to  
14 answer or to address those particular issues,  
15 although it came up at times in our dialogue, the  
16 question.

17 We did not receive direct testimony on  
18 it. We did not engage in specific deliberations  
19 on those two sub-provisions and on whether or not  
20 that was the appropriate mens rea because it  
21 wasn't directed at us explicitly by the JPP.

22 We were asked to deliberate on the

1 definition of consent and whether or not that was  
2 appropriate, and made some changes to that which  
3 raised -- and also on the question of mistake of  
4 fact as to consent -- and so we made explicit  
5 deliberations and heard testimony on that.

6 But I just want to point out that we  
7 did not -- were not asked specifically to address  
8 those issues.

9 MR. TAYLOR: That being the case, does  
10 anyone have an opinion that they would like to  
11 offer?

12 MS. WINE-BANKS: I think some of our  
13 discussion focused on what evidence would it take  
14 to prove reasonably should have known, and what  
15 evidence would it take to prove actual knowledge,  
16 and the difficulty of proving the actual  
17 knowledge, whereas the circumstantial evidence,  
18 the surrounding circumstances, whereby any person  
19 observing the conduct and condition of the victim  
20 would definitely reach the conclusion.

21 And so that in some ways, we concluded  
22 that actual knowledge was almost imputed by the

1 strong enough proof of reasonably should have  
2 known, and that that would meet constitutional  
3 standards.

4 PROF. SCHULHOFER: And as it states in  
5 our report, two Members of the -- of our  
6 Subcommittee dissented from the acceptance of the  
7 reasonably should have known standard. One was  
8 Ms. Kepros, and I was the other one.

9 So I might say a word about that.  
10 First of all, I think Dean Anderson is absolutely  
11 right that the thrust of the question presented  
12 to us from your Panel was should the accused's  
13 knowledge of a victim's capacity to consent be a  
14 required element?

15 The focus was on whether that --  
16 whether the standard of mens rea should be made  
17 more -- less restrictive than it already is, and  
18 we all agreed that it should not be reduced from  
19 what it already is.

20 I think it was Ms. Kepros and I who  
21 raised the question that, although we were clear  
22 that mens rea should not be diluted, nonetheless,

1 implicit in this question is whether the  
2 reasonably should have known standard was already  
3 too permissive.

4           And the -- in that respect, I am very  
5 glad that Ms. Kepros presented a forceful and  
6 comprehensive statement of what this issue is  
7 because this is really -- the notion of punishing  
8 somebody for negligence in the context of a  
9 serious crime is virtually unknown in American  
10 criminal law, and this is a situation where  
11 you're talking about particularly severe  
12 penalties, a maximum of 30 years imprisonment  
13 under Subsection (B), and sex offender  
14 registration, which has, even if the person  
15 benefits from a shorter sentence, as you've  
16 already heard, literally catastrophic  
17 consequences.

18           And I don't think any of us on our  
19 Panel would disagree that the consequences of  
20 registration are literally life-destroying.

21           So in that context, why would you be  
22 imposing punishment on someone when the panel

1 members, the court-martial panel members, are not  
2 able to conclude that the person was subjectively  
3 culpable? That is a situation, as I said, that  
4 with rare exceptions is unknown in our criminal  
5 law.

6 One of the arguments we heard in  
7 support of the position was that the victim is  
8 just as abused whether the person realized it or  
9 not, and that is true in every case where you  
10 have a victim of harmful conduct.

11 Even in the law of homicide, even when  
12 the victim is dead, we do not impose criminal  
13 punishment for ordinary negligence. In a  
14 homicide prosecution, you have to prove either  
15 recklessness, or at a minimum, gross negligence,  
16 and that's not for murder.

17 You can't -- this is the equivalent of  
18 convicting somebody for murder, and for murder,  
19 you have to be able to prove knowledge. It is  
20 true, as Ms. Wine-Banks said, often the evidence  
21 is sufficient to infer knowledge, and that is  
22 fine, I don't think -- I don't disagree with

1 that, I don't think Ms. Kepros has any problem  
2 with that.

3 The problem that arises is when the  
4 evidence does not permit the jury to infer actual  
5 knowledge. It's not strong enough. There are  
6 reasons, be it mutual intoxication or something  
7 else, there are reasons why the members are not  
8 comfortable saying that that person knew. All  
9 they can say is he was negligent.

10 And that is, even as I mentioned, even  
11 in homicide, if somebody is convicted of  
12 involuntary manslaughter, that requires gross  
13 negligence, and the punishment is a lot less than  
14 this. It's not punishment for murder. That  
15 might be a four-year maximum, or a six-year  
16 maximum, with no registration.

17 So this is why the Supreme Court has  
18 recently issued opinion after opinion, not only  
19 *Elonis*, but many others, not suggesting that this  
20 is unconstitutional, but suggesting that it is  
21 highly undesirable and should never be inferred,  
22 if there is any other way to work around it.

1           The Supreme Court has said it.  
2           Senator Hatch has been strongly supporting this  
3           mens rea reform act in Congress to create a  
4           strong presumption against it.

5           So Congress can do it if it wishes, in  
6           its wisdom. Your Panel can recommend it if you  
7           wish to do so in your wisdom. My concerns are  
8           two things: one has already been stressed very  
9           eloquently by Laurie Kepros, and that is the  
10          unfairness to the defendant. I think we should  
11          not lose sight of that.

12          I think the impetus for the enterprise  
13          that all of us have been engaged in is the  
14          concern that victims are not adequately  
15          protected. That is what started this. That is  
16          why -- I believe that is your reason for  
17          existence.

18          All of us on the Panel, I think, have  
19          worked in this area precisely because we come to  
20          it with that concern. But obviously, it can't be  
21          the only thing to think about. It has to be  
22          constrained by some sense of balance and

1 fairness.

2 The other part of it that I -- I think  
3 a distinct concern has to do with the legitimacy  
4 of our system. And if -- if you endorse a system  
5 where -- where it starts to become routine, it  
6 may not have been routine in the past because  
7 there was a great deal more prosecutorial  
8 discretion, there was greater willingness on the  
9 part of commanding officers to say I am not going  
10 to authorize, I am not going to convene a general  
11 court-martial, that, as you know, that world is  
12 changing now.

13 We're in a -- in a world where if the  
14 -- if the facts can support a charge, there is  
15 going to be much greater likelihood that it be  
16 brought.

17 And I really worry about impeding the  
18 legitimacy of our system if we start to get into  
19 a world where Servicemembers are routinely  
20 exposed to the possibility of -- of very, very  
21 severe punishment and sex offender registration  
22 for common, immature, excessively intoxicated

1 behavior that 18-year-olds are going to be doing,  
2 you know, regardless.

3 It's not good for the military's  
4 esteem in our society. I think it is not  
5 ultimately good for recruiting. I am not saying  
6 you won't get recruits, but it's not good, and my  
7 concern, I know it's not shared by many victim  
8 advocates, but my concern from a purely victims'  
9 point of view is that if you really want to stop  
10 sexual assault, it has to be a very clear message  
11 that the behavior we're punishing is absolutely  
12 unacceptable, intolerable behavior.

13 And you can't communicate that message  
14 if you get into a world where you're routinely  
15 exposing people to criminal punishment for what  
16 amounts to carelessness that they should have  
17 known.

18 So I don't see that there is any case  
19 anybody would be legitimately concerned about  
20 where court-martial members can't be convinced  
21 from the evidence that he -- that they can infer  
22 that he or she, as the case may be, that he not

1       only was negligent, but that he must have -- he  
2       himself must have been aware of the risk.

3                 That is all that would -- would be  
4       required under this revision, and the cases that  
5       can't meet that standard, in my judgment, I think  
6       it's bad not only for fairness, I think it's very  
7       ultimately -- these pendulums swing back and  
8       forth in terms of what our society is concerned  
9       about, and the impetus for your Panel has come  
10      from very justified awareness about the  
11      ineffectiveness of victim protection, but we're  
12      already seeing a backlash in the press about  
13      overreaction and campuses going haywire and so  
14      on. We haven't heard that yet, but if we want to  
15      avoid that kind of going to the opposite extreme,  
16      I think we have to be very clearly grounded.

17                 And for that reason, I very much  
18      support this idea that I think negligence does  
19      not have a place in any criminal offense of this  
20      severity.

21                 MR. TAYLOR: Dean Anderson?

22                 DEAN ANDERSON: So I want to put these

1        comments in context a little bit. I have the  
2        utmost respect for Ms. Kepros and Professor  
3        Schulhofer, and I want to emphasize first that  
4        again, we did not hear testimony on this  
5        question, specifically on the question of  
6        reasonableness and negligence as a standard,  
7        number one.

8                Number two, I want to underscore that  
9        the Statute itself in general is not a negligence  
10       statute. On the contrary, it has two provisions,  
11       as far as I am reading it right now, that  
12       identify negligence as the standard. Those  
13       provisions are (B)(2) and (B)(3), the sexual  
14       assault provisions.

15               These are provisions that deal with  
16       particularly vulnerable victims. (B)(2) is about  
17       victims who are asleep, unconscious, or otherwise  
18       unaware that a sexual act is happening. (B)(3)  
19       -- in other words a highly vulnerable victim --  
20       (B)(3) is about someone who is impaired due to  
21       intoxicants. That's (a). Or (b), a mental  
22       disease or defect or physical disability.

1                   Now, standard rules of statutory  
2 construction would suggest that the rest of the  
3 Statute is not a negligence statute because it is  
4 silent on the question of mental state, and if  
5 that is true, the general principles of criminal  
6 law absolutely are going to require recklessness  
7 or worse -- in other words, recklessness or a  
8 more serious mental state.

9                   These two provisions, though, are  
10 about specific vulnerable victims who are being  
11 approached at a time when their vulnerability  
12 means that they are incapable of consent. In  
13 other words, they are not just vulnerable victims  
14 generally or people who are vulnerable, but it is  
15 their vulnerability the Statute requires that  
16 makes them incapable of consent, makes them meet  
17 the statutory definition of incapable of consent.

18                   So it seems to me that the original  
19 drafters of this provision who identified the  
20 mental state as negligence, were attempting to  
21 protect particularly vulnerable victims.

22                   Additionally, they would -- as we all

1 know, alcohol is a factor in these cases.  
2 Willful blindness of the facts around consent is  
3 a factor in these cases. And we have a  
4 challenging difficulty of proving beyond a  
5 reasonable doubt.

6 It's an appropriate challenge. It's  
7 an appropriate difficulty. But the challenge is  
8 to prove beyond a reasonable doubt the mental  
9 state of the defendant, and in these cases of  
10 particularly vulnerable victims, the statutory  
11 drafters made a decision to make these cases also  
12 include circumstances in which a reasonable  
13 person would have known that this victim was  
14 incapable of consent because they were asleep,  
15 because they were unconscious, because they were  
16 so intoxicated that they were incapable of  
17 consent, or because they had a mental disease or  
18 a defect that made them incapable of consent.

19 Now, I -- I want to stress that I am  
20 generating this -- this argument out of whole  
21 cloth because we did not have testimony on it,  
22 and although I think it's an important issue, I

1 think it's an important theoretical issue about  
2 the scope of criminal liability, for the Panel to  
3 at this point take our testimony and make  
4 conclusions about where the Statute should go on  
5 this matter I would suggest respectfully would be  
6 beyond the scope of what we were tasked to do.

7 DEAN SCHENCK: I would like to add to  
8 that --

9 MR. TAYLOR: Please.

10 DEAN SCHENCK: -- Dean Anderson's  
11 comment as well.

12 From a practitioner perspective, many  
13 of these cases in the military are of a he  
14 said/she said scenario, and the unit, everyone in  
15 the unit is drinking, so the witnesses are  
16 intoxicated, the parties are intoxicated.

17 But these vulnerable victims pretty  
18 much cannot remember, and so the proof  
19 requirement, if you took out the reasonably  
20 should have known, the accused merely would just  
21 have to take the stand and say I didn't know, and  
22 there would be an acquittal.

1           So that is the practitioner in me  
2 speaking. I of course understand the  
3 constitutional concerns, and also echo Dean  
4 Anderson and the other Panel Members that it  
5 would be something we could look at, it's just  
6 that we didn't, we didn't look at it, we didn't  
7 look at that constitutional issue.

8           MR. TAYLOR: I think I've consumed  
9 enough time. Madam Chair, could I discontinue  
10 this or --

11           PROF. SCHULHOFER: I'm sorry, just say  
12 one thing.

13           Throughout this process, I have been  
14 very much aware of how much I don't know about  
15 the military justice system, and I always feel  
16 need to -- for reticence on the subject, coming  
17 to closure on any of these issues. And I have  
18 learned an enormous amount. My eyes have been  
19 opened, and enormous respect for the military  
20 justice system.

21           But I do know the civilian system, and  
22 the problem that Dean Schenck just mentioned is

1 pervasive in the criminal justice system on the  
2 civilian side, and prosecutors deal with it all  
3 the time. It's a major concern that victims  
4 don't remember and can't testify, and prosecutors  
5 have developed strategies. What they call it --  
6 typically it's referred to as offender-centered  
7 prosecution, where they develop the evidence and  
8 they deal with this, and they are able to prove,  
9 in appropriate cases, they are perfectly able to  
10 prove either actual knowledge or willful  
11 blindness, which is equivalent in the law, and  
12 they do succeed.

13 MS. KEPROS: I shared, I think, this  
14 example in the course of our deliberations at one  
15 point, but it to me is just sort of  
16 quintessential in terms of things we just  
17 couldn't even have thought of when statutes were  
18 being drafted.

19 But to me, it's a great example of  
20 some of the danger inherent in the way the  
21 Statute is currently drafted, and again, the  
22 issue I raised earlier about losing the ability

1 to present voluntary intoxication evidence where  
2 the mens rea permits this negligence standard.

3 And it's a case that I heard about  
4 that ironically did involve cadets. They decided  
5 to attend a party at a university, a public  
6 university, and they, you know, took off for the  
7 weekend, and rented a hotel room, and proceeded  
8 to crash several parties at this university where  
9 they both became heavily intoxicated. That's  
10 pretty much not in dispute.

11 And as in the example that Dean  
12 Schenck described, the victim had no idea what  
13 happened other than she wakes up the next morning  
14 and feels that someone has had sex with her and  
15 is very concerned about it.

16 The other cadet who was with her was  
17 a male. They had a history of a romantic  
18 relationship, but they were not dating at that  
19 time, and they had actually gotten a hotel room  
20 together as part of this adventure.

21 He is concerned about her, takes her  
22 to the hospital to have a rape kit done. They

1 get DNA from the rape kit, and it turns out it is  
2 his DNA. And he is now being prosecuted in  
3 civilian court for sexually assaulting his  
4 friend.

5 It is pretty clear that neither of  
6 them know what on earth happened because they  
7 were probably both so seriously impaired, and  
8 it's a very difficult situation because my  
9 understanding through people affiliated with the  
10 case is that this victim does not want her friend  
11 being prosecuted for this, but feels tremendous  
12 institutional pressure to not recant an  
13 allegation or in any way step away from the  
14 process.

15 It has just become an impossible  
16 situation for both of them. I don't think in any  
17 sense that case is a typical case. I don't in  
18 any sense believe that. But I do think it is a  
19 very clean kind of extreme example of where there  
20 can be inequities if we don't allow this kind of  
21 evidence of voluntary intoxication to be brought  
22 to bear, and that is only going to be permitted

1 under the current Rules if it is a case where  
2 actual knowledge of the perpetrator is required.

3 CHAIR HOLTZMAN: Judge Jones?

4 JUDGE JONES: So in other words, in  
5 that situation -- well, what's the -- take me  
6 back to your scenario for a minute.

7 Certainly, he could prove he was -- he  
8 was intoxicated in your case, correct?

9 MS. KEPROS: My understanding is there  
10 are numerous witnesses that will say both of them  
11 were seriously intoxicated.

12 JUDGE JONES: Right, and that would  
13 negate mens rea in terms of knew, right,  
14 knowledge?

15 MS. KEPROS: It would be relevant  
16 under the Military Rules, and again, this is  
17 civilian prosecution --

18 JUDGE JONES: Right, no, that I  
19 realize, yes.

20 MS. KEPROS: It would be relevant  
21 under the Military Rules to whether or not he  
22 knew, but it would not be relevant as to whether

1 --

2 JUDGE JONES: It wouldn't save him  
3 from --

4 MS. KEPROS: -- or not he should have  
5 known.

6 JUDGE JONES: -- reasonably should  
7 have known?

8 MS. KEPROS: Right, and so the problem  
9 becomes whether or not that evidence is something  
10 the fact-finder is going to be instructed they  
11 are allowed to consider. And that is really  
12 troubling to me under that factual scenario.

13 JUDGE JONES: Well you know, it is  
14 interesting. I never did sexual assault cases,  
15 but so in other words, it would not -- if it's a  
16 reasonably should have known standard, that would  
17 negate proof of his voluntary intoxication. That  
18 is what you're saying?

19 MS. KEPROS: I am saying the way the  
20 Military Rule is drafted --

21 JUDGE JONES: Because of the Military  
22 Rule?

1 MS. KEPROS: Right, it is only  
2 relevant in cases --

3 JUDGE JONES: But if that Rule did not  
4 exist, you could charge this with either  
5 knowledge or reasonably should have known, and  
6 you could -- he could defend himself by saying I  
7 -- I was drunk, and a jury could either decide he  
8 didn't know or that it was unreasonable to figure  
9 out he knew -- for him to have known because he  
10 was so intoxicated. Or is this just crazy, what  
11 I have just said?

12 MS. KEPROS: I guess I just have a  
13 hard time --

14 JUDGE JONES: I am trying to decide if  
15 it's 916 --

16 PROF. SCHULHOFER: Judge --

17 JUDGE JONES: -- (L)2 that's the  
18 problem, or --

19 PROF. SCHULHOFER: Excuse me, but I  
20 think, Judge, it's not the Military Rule 916 or  
21 whatever it is. Under any system of law, you  
22 cannot negate negligence by showing that you were

1 drunk because drunk people are not reasonable by  
2 the law's definition.

3 So if it's a reasonably should have  
4 known standard, it's -- the question is what  
5 would a sober person have realized? And evidence  
6 that he was drunk is not even admissible. It  
7 probably would come in, but technically it's not  
8 relevant --

9 JUDGE JONES: Unless you have a --  
10 unless you have a knowledge- --

11 PROF. SCHULHOFER: Yes, right.

12 JUDGE JONES: -- -only standard.

13 PROF. SCHULHOFER: But if it's a  
14 negligence standard, evidence of intoxication by  
15 the defendant would not be relevant, and it would  
16 not even be admissible. If it somehow got in,  
17 the judge would very forcefully instruct the jury  
18 to disregard it.

19 DEAN SCHENCK: This is just me again  
20 speaking without having said this, but I'm not  
21 sure that this would be considered to be the mens  
22 rea element of this offense. I really -- and as

1 far as voluntary intoxication goes, the Rule  
2 you're citing in the Military Rules, that is when  
3 we're talking about a specific-intent offense  
4 under the military justice system.

5 A specific-intent offense goes to the  
6 -- to the mens rea element of the elements in the  
7 UCMJ, so the -- the coded Articles, the punitive  
8 Articles, they're all in sync. This Article 120  
9 is different, I believe, than the other elements  
10 of proof in the other UCMJ Articles, and I don't  
11 think we should sit here and try to speak to  
12 these things regarding what evidence would be  
13 admissible because I don't believe that Rule that  
14 you're citing to would be -- a judge would -- I  
15 believe judges would still allow the evidence to  
16 come in because it's not the mens rea element.

17 But it's something they haven't looked  
18 at, and so I really don't think we should sit  
19 here and go back and forth in this academic  
20 almost discussion on this just because the  
21 military justice system is very specific when  
22 you're talking about that -- that Rule you're

1 citing to and the evidence that can come in.

2 And the Military Rules of Evidence  
3 specifically, although we've taken out the  
4 constitutionally required language in the  
5 Military Rules of Evidence, certain others and  
6 case law I think might -- would -- might allow or  
7 cause some judges to allow that evidence to come  
8 in. You see what I mean? Just because of the  
9 way the punitive Articles are and the case law  
10 that we have.

11 And there may be other language that  
12 you could put in place of that. We didn't -- you  
13 know, we just didn't look at what the other  
14 states have. There might be other language that  
15 would be --

16 JUDGE JONES: Well, I think the big  
17 problem here was -- because I recall thinking  
18 about this when we were still a Subcommittee, but  
19 now we're a very important Subcommittee arrayed  
20 here today -- I remember thinking, look, Congress  
21 put this standard in. The Supreme Court in  
22 *Elonis* didn't say you couldn't -- Congress

1       couldn't do that. In fact, it specifically said  
2       that there was only a problem when Congress  
3       didn't put something in, and then, you know,  
4       there could be some discussion and debate.

5               And so I guess I am not sure I even  
6       fully appreciated that we weren't in a situation  
7       where we would have to respond to this question,  
8       but at the time, it seemed to me that -- that  
9       this was not an issue where we should delve into  
10      it, since we already had congressional intent  
11      with respect to this military Statute.

12             I -- we also got into academic  
13      conversations while we were there, very good  
14      ones.

15             PROF. SCHULHOFER: Judge, yes --

16             JUDGE JONES: And --

17             PROF. SCHULHOFER: -- I meant that in  
18      a complimentary way.

19             (Laughter.)

20             JUDGE JONES: I did, and no, I am --  
21      and I mean it back in a --

22             PROF. SCHULHOFER: Thank you.

1                   JUDGE JONES: -- complimentary way.  
2           And -- but I don't think we ever fully got to the  
3           -- to the end of this, or had enough discussion  
4           about it, to be perfectly honest, to -- to  
5           decide. We weren't focused on it. When we did  
6           become focused on it, it was of some concern, and  
7           then, you know, my own view was we know what  
8           Congress intended, we weren't really asked to  
9           look at this particular thing, but I think it is  
10          a cause of concern. I don't disagree at all.  
11          Just a question of whether we're going to try to  
12          stop now and look at this.

13                   Also, I was -- what did turn my head  
14          this morning, or I guess it was yesterday, when I  
15          was looking at some more of the information that  
16          came in, was something I was unaware of, which  
17          was what the Congress is doing now in terms of  
18          mens rea, although with respect to the civilian  
19          statutes.

20                   And of course, I think, as has been  
21          said by a number of you, we did approach this,  
22          many of us approached this from the standpoint of

1 doing less as opposed to more in the Statute for  
2 any number of reasons, unintended consequences,  
3 what have you.

4 So I guess really the only question at  
5 this point is do we look at this now as a  
6 freestanding issue and try to -- try to continue  
7 on, or do we -- and that's probably a question  
8 that involves this Panel --

9 MS. WINE-BANKS: The question is, does  
10 your schedule -- would it possibly allow us to  
11 have time to look at whether willful disregard,  
12 which is sort of how I read the reasonably should  
13 have known, if we substituted those words, or if  
14 we just have to go with the congressional intent  
15 of using the reasonably should have known, and a  
16 standard of proof that I think amounts to  
17 inferred actual knowledge.

18 But if your schedule would allow us  
19 the time to have another discussion of this,  
20 either by conference call or in an actual  
21 meeting, that might be --

22 JUDGE JONES: Yes, I would just defer

1 to the Panel because the Panel is our -- gives us  
2 our mandates, so --

3 CHAIR HOLTZMAN: Well, there is also  
4 maybe a legal question. Kyle, what is the --  
5 what is the status of this Subcommittee now that  
6 it has issued its report? This -- can we refer  
7 --

8 JUDGE JONES: That was the kiss of  
9 death with the RSP.

10 (Laughter.)

11 JUDGE JONES: Once we issued that  
12 report.

13 CHAIR HOLTZMAN: Are we allowed to  
14 refer a question back to them for further  
15 analysis, or are they finished?

16 COL GREEN: No, yes ma'am. The  
17 charter of the Subcommittee is at the discretion  
18 of the Panel, and the Chair has the ability to  
19 refer ongoing issues to the Subcommittee, whether  
20 those involve Article 120 or whether the Chair  
21 would wish to even expand that beyond Article  
22 120, not asking the Subcommittee's opinion on

1 that.

2 CHAIR HOLTZMAN: Okay. So we  
3 theoretically could do that?

4 COL GREEN: Yes ma'am.

5 CHAIR HOLTZMAN: As a legal matter.  
6 Is that something that Members of this Panel  
7 would want to have happen?

8 MR. TAYLOR: I think that would be  
9 very helpful.

10 CHAIR HOLTZMAN: I'd ask the Members  
11 of the Subcommittee how you feel about it, but --

12 JUDGE JONES: They look pretty eager  
13 to me.

14 (Laughter.)

15 VADM TRACEY: I'd ask --

16 CHAIR HOLTZMAN: Well maybe -- sorry.

17 VADM TRACEY: -- whether there were  
18 any other issues that were raised by Ms. Kepros  
19 that the Panel felt were outside their scope, and  
20 they didn't -- I don't know how to ask that  
21 question. I think that's what the question is.

22 PROF. SCHULHOFER: Yes, thank you,

1 Admiral. I would comment on one further thing.  
2 I apologize for commenting at length on so many  
3 points, but this really is a direct follow-on to  
4 Representative Holtzman's question about things  
5 that might bounce back because I am speaking of  
6 Issue 11, which is whether indecent acts should  
7 be added as an enumerated offense.

8 We learned very, very late in our  
9 deliberations that a proposal had already been  
10 published in the Federal Register. We were very  
11 troubled by it but did not have time to really  
12 delve into it in detail.

13 My personal view was that we should  
14 either come out against it or do what time really  
15 constrained us to do, which is to say that we  
16 could not offer an opinion.

17 We decided on the latter course, so  
18 one question -- of all the 17 questions that you  
19 put to us, the only -- there is one that we  
20 simply refused to answer, and that was number 11.

21 So with apologies, and I -- I know you  
22 won't take it as a sign of disrespect, we refused

1 to answer question number 11, but for the reasons  
2 that Ms. Kepros said, all of us were extremely  
3 troubled by the idea that there could be -- we  
4 did agree it shouldn't be an Article 120.

5 Nonetheless, the question was whether it should  
6 be added to the UCMJ as an enumerated offense.

7 It's not limited to 120.

8 And I think our concern was that as an  
9 enumerated offense, either DoD itself or the  
10 states would treat it as -- as triggering sex  
11 offender registration, and we had some very  
12 helpful Staff work from Kirt Marsh, but we were  
13 unable to see any situation where consenting --  
14 where sexual conduct by consenting adults in  
15 private should be an appropriate subject for  
16 criminal punishment under the UCMJ.

17 So if anything is to be referred back  
18 to us, I think that might be one where -- where  
19 some more thinking would -- would be helpful.

20 MS. WINE-BANKS: And there is one  
21 question in Issue 2. We didn't actually pose  
22 specific language. We just said we think that

1       there should be clarification, but we didn't  
2       propose clarifying language, and maybe with more  
3       time, we could add a specific language to be  
4       included in the Manual for Courts-Martial that  
5       would take care of that issue.

6                 DEAN SCHENCK: I just want to point  
7       out that in order to get to where we would want  
8       -- need to be with the indecent acts provision, I  
9       think I would recommend that the Staff provide  
10      testimony on this, for the individuals who don't  
11      have military history, military background, just  
12      because it is a very military-specific crime, and  
13      what comes to the -- you know, what gets tried  
14      under 134 requires some impact, either  
15      credibility -- brings discredit on the Service,  
16      or it disrupts the unit, so there is a specific  
17      element of proof in 134.

18                JUDGE JONES: I guess I would not --  
19      I agree that we got tremendously helpful  
20      information from the Staff all along on this one  
21      issue, and none of us could fully grasp it or  
22      make a decision.

1           I take that back. I think you know  
2 where you stand, Dean Schenck. No, and I mean  
3 that most respectfully because you've got the  
4 knowledge.

5           PROF. SCHULHOFER: If I could just  
6 add, Judge, just in five words.

7           The problem for many of us is that the  
8 military -- military history on this is very  
9 fraught, and --

10          JUDGE JONES: Well, here's my  
11 suggestion.

12          PROF. SCHULHOFER: -- it's a very  
13 problematic guide to what it ought to be after  
14 *Lawrence v. Texas*.

15          JUDGE JONES: Here is my thought on  
16 this. I think it would still take us a very long  
17 time to come to a substantive conclusion with  
18 respect to indecent act.

19                I think there is value, and I am -- I  
20 am offering this to the Chair of this Committee,  
21 to getting out the report in February, which I  
22 think was the -- the idea here.

1           I don't know that -- the other  
2           consideration with 11, indecent act, is I think  
3           we also sort of thought the horse may have left  
4           the barn since the executive order is probably  
5           going to go through before we would have made a  
6           decision. I have no problem whatsoever if -- if  
7           the JPP as a whole, the Panel here, wanted us to  
8           take a look at this, but I don't know that we  
9           would finish it in time.

10           I don't think that means we shouldn't  
11           look at it, but that would be fine if that is the  
12           mandate.

13           The other issue with respect to  
14           reasonably should have known, or should know, I  
15           -- I do think that is something that I would not  
16           mind considering at all, but again, I would not  
17           -- I don't believe I would -- well, I guess we  
18           can't. That is so related to the Statute that I  
19           don't know that -- well, perhaps we could get  
20           that decided in time.

21           But my concern is things tend to take  
22           on a life of their own, and we talked for a very

1 long time about this. I have my own concerns  
2 from some recent information and more thought  
3 about reasonably should have known.

4 But I'd really like to be able to do  
5 it so that we could still have a final  
6 recommendation and not slow the JPP itself down  
7 from making its recommendations in February, so I  
8 mean, we can -- if we can all accommodate our  
9 schedules, we are willing to do that, Madam  
10 Chair, it's my sense from looking at all the  
11 Subcommittee Members.

12 Was there a third one? Oh, language  
13 for 2. You know, I am perfectly happy with the  
14 way 2 is now. I don't -- I suppose if we could  
15 get to it in time, and we all had -- there was a  
16 groundswell of support to do more on that, we  
17 could also submit it.

18 And I think those are the three issues  
19 that have been raised, so really, the question is  
20 up to the -- this Panel.

21 CHAIR HOLTZMAN: Any -- well, I think  
22 that, I mean, my own personal view is that it

1 would be -- since people here seem to be willing,  
2 both the Chair and the Members of the  
3 Subcommittee, seem to be willing to pursue this  
4 further, and we have very focused issues, I don't  
5 see why we couldn't pursue two tracks at the same  
6 time, which is to put out the report that we were  
7 going -- I don't mean put out the report, but  
8 provide public notice of what we're planning to  
9 do, get public comment, and still at the same  
10 time have the Subcommittee go forward on these  
11 three points and be focused on getting a result  
12 for February.

13 So we would have the added benefit of  
14 some other -- possible benefit of some other  
15 opinions on that, but I am very flexible about  
16 how to proceed here. It just depends on --

17 JUDGE JONES: Yes, I suppose if you --  
18 if the intent is and will be for the Panel to get  
19 public comment on this Committee's --  
20 Subcommittee's proposals, it could go out as is,  
21 but it would have to -- I mean, for real benefit,  
22 we might have to signal the reasonably should

1 know issue.

2 CHAIR HOLTZMAN: We could.

3 JUDGE JONES: That's all.

4 CHAIR HOLTZMAN: We could.

5 JUDGE JONES: And then I think that  
6 would work, and in the interim, we might come  
7 back with a different proposal in that area, or  
8 not.

9 CHAIR HOLTZMAN: And maybe even on the  
10 issue of the --

11 JUDGE JONES: Indecent act?

12 CHAIR HOLTZMAN: We could flag those  
13 two for special attention because of the  
14 Committee still taking a look at those.

15 VADM TRACEY: Would the dissenting  
16 opinion be included in what went out for public  
17 comment?

18 JUDGE JONES: Oh, I think so, yes,  
19 absolutely, with Ms. Kepros's picture.

20 (Laughter.)

21 MS. KEPROS: Do I get to pick the  
22 picture?

1 (Laughter.)

2 JUDGE JONES: Yes, no, that was always  
3 the intent, that we would send it out with the  
4 main --

5 CHAIR HOLTZMAN: So that sounds like  
6 a --

7 JUDGE JONES: -- report.

8 CHAIR HOLTZMAN: -- that sounds like  
9 a plan.

10 JUDGE JONES: And when -- and I don't  
11 -- so I think we should -- we should do -- go  
12 forward on those two issues, and we can -- where  
13 is Colonel Hines? Oh, there you are. You're  
14 going to organize us for -- I think there's -- we  
15 need testimony on indecent act.

16 LTCOL HINES: Yes ma'am.

17 JUDGE JONES: And I know we have had  
18 some, but we need more, or maybe a primer,  
19 another one.

20 And we should -- we should have a  
21 conversation soon, and I would welcome  
22 suggestions from any and all of you, but probably

1 Professor Schulhofer, Ms. Kepros, perhaps Dean  
2 Anderson, on this reasonably should have known  
3 issue, and I -- I am very interested in what  
4 Congress is doing even though it's the civilian  
5 system, so Glen, maybe any information you can  
6 get surrounding that would be helpful that you  
7 could send to the entire Subcommittee.

8 LTCOL HINES: Yes ma'am.

9 CHAIR HOLTZMAN: So I think that that  
10 is what we will agree to do. But before we  
11 conclude, do you have, Judge Jones, any further  
12 questions that you want to ask?

13 JUDGE JONES: No, I don't.

14 CHAIR HOLTZMAN: So yes, I will -- the  
15 only point I want to make is I just want to say  
16 thank you to the Members of the Subcommittee,  
17 really, for doing an extraordinary job on a very,  
18 very difficult Statute. I think I have said  
19 many times that this Statute was really not the  
20 most elegantly crafted, brilliantly crafted  
21 Statute that I've ever seen, in fact, probably  
22 quite the contrary.

1           So I think looking at it as you have,  
2 with trying to do the least -- the least damage  
3 to the text, and with being as conservative as  
4 possible about changes, I think that's a very --  
5 you produced an amazing result.

6           On the other hand, I am very  
7 sympathetic to what Ms. Kepros has done by  
8 saying, you know, in the end, the Statute is  
9 really one that deserves wholesale reform, and so  
10 I am very glad she -- she presented this. Maybe  
11 at some point, maybe we won't have the chance,  
12 undoubtedly won't have the chance to -- to  
13 comment on that, but I hope at some point that  
14 some people start looking seriously at the whole  
15 Statute and saying maybe this needs to be  
16 completely reworked.

17           But I do think that the changes that  
18 the Subcommittee has recommended are very  
19 carefully thought through, without doing -- doing  
20 minimum damage to the -- to the Statute, creating  
21 some clarity and some really positive results, so  
22 I just want to say thank you very much.

1                   And so we'll -- we can conclude now?

2                   COL GREEN:   Ma'am, we have one public  
3                   comment --

4                   CHAIR HOLTZMAN:   Okay.

5                   COL GREEN:   -- request, and so maybe  
6                   if we took a few minutes --

7                   CHAIR HOLTZMAN:   Okay, so we'll take  
8                   a --

9                   COL GREEN:   -- just for a quick break,  
10                  and come back for that.

11                  CHAIR HOLTZMAN:   -- ten-minute break,  
12                  and then public comment.

13                  (Whereupon, the meeting went off the  
14                  record at 2:28 p.m. and resumed at 2:45 p.m.)

15                  CHAIR HOLTZMAN:   Before we hear from  
16                  the person during the public comment session, I  
17                  just want to point out that it is the intention  
18                  of JPP to circulate the report of the  
19                  Subcommittee for widespread public comment given  
20                  the fact that we're going to be suggesting  
21                  changes in the Statute, and so that's to be  
22                  expected.

1           How, where, and when -- when this will  
2 happen, we'll leave it to the Staff and further  
3 deliberations, but we certainly expect that to  
4 happen, and I would hope also that we could  
5 manage to provide briefings for the most  
6 interested members of the military and Congress  
7 on the proposals that will be coming out of the  
8 JPP and the Subcommittee.

9           Okay, thank you very much. Our next  
10 -- next on our Agenda is Public Comment. Our --  
11 we're going to be hearing from Christopher Perry,  
12 is that correct?

13           MR. BARTLETT: My name is E. Edward  
14 Bartlett.

15           CHAIR HOLTZMAN: Okay, E. Edward  
16 Bartlett, I am sorry.

17           MR. BARTLETT: With Center for  
18 Prosecutor Integrity.

19           CHAIR HOLTZMAN: Yes, Center for  
20 Prosecutor Integrity.

21           Mr. Bartlett, we have five minutes  
22 allocated for your testimony, presentation here.

1 Welcome, and you may begin.

2 MR. BARTLETT: Thank you so much.

3 Thank you for welcoming the public comments, and  
4 thanks in particular to the Staff of your  
5 Committee.

6 So the American system of legal  
7 justice is characterized by fundamental precepts  
8 that distinguish our system from approaches  
9 utilized in totalitarian societies. These  
10 principles include rule of law, separation of  
11 powers, and the presumption of innocence.

12 The presumption of innocence is  
13 implicit in the 5th, 6th, and 14th Amendments to  
14 the Constitution and has been explicitly affirmed  
15 by the U.S. Supreme Court in two different cases.

16 Unfortunately, the presumption of  
17 innocence has come under siege in recent decades  
18 in our country. Countless laws have been passed,  
19 have been enacted, that have enabled a growing  
20 number of prosecutions, convictions, and  
21 incarcerations. Now, sadly, the United States  
22 leads the rest of the world in terms of the

1 number and the percentage of our population  
2 currently behind bars.

3 In counteraction to that -- that  
4 decades-old trend, in the past 10 years, there  
5 has been a new social movement often termed the  
6 Innocence Movement. This movement has emerged to  
7 counter the pernicious effects of over-  
8 criminalization and overly aggressive  
9 prosecutorial activities.

10 For example, earlier this fall, the  
11 bipartisan Smarter Sentencing Act was introduced  
12 in both the Senate and the House. We heard  
13 testimony earlier this afternoon about the  
14 revival of congressional interest and concern  
15 about mens rea issues.

16 This is all part of this growing  
17 trend, not only in Congress, but in our -- in our  
18 society at large. So it's no surprise that our  
19 concerns about the loss, or at least the erosion,  
20 of the presumption of innocence has met with  
21 largely a sympathetic response from staff members  
22 of both the SASC and the HASC.

1           So in the military context, there is  
2 no doubt that some of the initiatives that have  
3 been instituted designed to address military  
4 sexual assault have been beneficial. That said,  
5 there is growing concern that essential due  
6 process protections have been eroded, and far too  
7 often, the presumption of innocence lost.

8           From 2012 to 2015, the NDAA included  
9 85 new provisions designed to address sexual  
10 assault in the military. These provisions have  
11 had the general effect of increasing the number  
12 of prosecutions, and, yes, convictions.

13           For some of these examples of these  
14 new provisions, complainants are afforded a  
15 series of quote "victims' rights" throughout the  
16 adjudication process.

17           Number two, the focus of Article 32  
18 assessments has been narrowed from an  
19 investigation now to a preliminary hearing to  
20 find probable cause.

21           Third, interviews of the complainant  
22 must take place in the presence of trial counsel

1 of the victim advocate.

2 Fourth, command officers are expected  
3 to refer sexual assault allegations to court-  
4 martial at the risk of losing their command  
5 position.

6 And five, complainants are represented  
7 by Special Victims' Counsel who advocate on  
8 behalf of the complainant and are permitted to  
9 appeal decisions by the trial judge regarding the  
10 admissibility of certain evidence.

11 Yet, it is important, and it is  
12 remarkable, to point out that not a single one of  
13 these 85 new provisions has served to expand,  
14 protect, or reaffirm the cardinal principle of  
15 the presumption of innocence.

16 There are some who have actually  
17 asserted that the focus of the Judicial  
18 Proceedings Panel should be to actually increase  
19 the number of convictions. They've actually said  
20 it in those words.

21 Having undertaken extensive research  
22 on the extent and devastating consequences of

1 wrongful convictions, the Center for Prosecutor  
2 Integrity believes that logic is fundamentally  
3 flawed. Instead, the focus of the JPP should be  
4 to enhance the accuracy and efficiency of the  
5 judicial proceedings.

6 To this end, the Center for Prosecutor  
7 Integrity has developed a number of  
8 recommendations to enhance the presumption of  
9 innocence.

10 Number one, to assure the proper use  
11 of the term "victim" and "perpetrator." Number  
12 two is clear delineation of the role of the SVC.  
13 Number three, repercussions for false reports.

14 Number four, same standards of  
15 admissibility of evidence. Number five,  
16 expertise of investigating officers. Number six,  
17 the importance of a unanimous verdict.

18 The JPP now stands at a legal  
19 crossroads. Will the military justice system  
20 seek to respect hundreds of years of legal  
21 precedent and work to restore the presumption of  
22 innocence, or will it go down the dangerous path

1 that totalitarian societies have pursued in  
2 presuming guilt of the defendant and removing  
3 fundamental due process protections?

4 Thank you very much for your interest  
5 and your concern to these issues.

6 CHAIR HOLTZMAN: Thank you very much  
7 for your testimony. Are there any Members of the  
8 Panel who wish to ask any questions?

9 (No audible response.)

10 CHAIR HOLTZMAN: Okay. Okay, hearing  
11 no requests, we again want to thank you so much  
12 for coming and appearing before us and providing  
13 us with your opinions and your expertise.

14 MR. BARTLETT: My pleasure.

15 CHAIR HOLTZMAN: And the -- Ms. Fried?

16 MS. FRIED: Yes, the meeting is  
17 closed.

18 CHAIR HOLTZMAN: Thank you very much.  
19 Thank you, Panel Members.

20 (Whereupon, the meeting went off the  
21 record at 2:53 p.m.)  
22

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