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
# TABLE OF CONTENTS

Deliberations: Retaliation Against Victims of Sexual Assault Crimes .......................... 9

Deliberations: Review of the Restitution and Compensation Draft Report .............................. 93

Break

JPP Subcommittee Presentation: Overview of Article 120 Analysis, Conclusions and Recommendations. .................. 97

JPP Members Discussion with JPP Subcommittee Members to Review Article 120 Recommendations ..................... 158

Public Comment ........................................................................... 233

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

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

The Panel also has a Subcommittee. The JPP Subcommittee was established by the Department to assist the JPP with its statutory taskings. The JPP Subcommittee's tasked with making recommendations to the JPP. The products delivered to the JPP by its Subcommittee do not reflect the views or final recommendation to the JPP, to Congress, or the Secretary of Defense.
Rather, the work of the Subcommittee is presented to the full JPP during its public meetings for deliberation by the JPP, to inform its own report and recommendations for submission to Congress and the Department of Defense.

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

Thank you. Madam Chair?

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

The Judicial Proceedings Panel was created by the National Defense Authorization Act
for Fiscal Year 2013 as amended by the National Defense Authorization Acts for Fiscal Years 2014 and 2015. Our mandate is to conduct an independent review and assessment of judicial proceedings conducted under the Uniform Code of Military Justice involving adult sexual assault and related offenses since the most recent amendment to Article 120 of the UCMJ in 2012.

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

Our staff has prepared additional materials based on our previous discussions on these issues, which we will use to assist us in today's deliberations. Following our deliberation sessions, we will hear from the JPP Subcommittee about its recently completed review of Article 120 of the UCMJ. The Subcommittee
submitted its final report to the JPP earlier this week, and we are very pleased that many Subcommittee Members are able to join us here today to explain their assessment and discuss their review and recommendations with Members of the JPP.

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

Finally, each public meeting of the Judicial Proceedings Panel includes time to receive comments and input from the public. The Panel received one such request from Edward Bartlett, President of the Center for Prosecutor Integrity, for today's meeting. The submission was provided to the Panel Members and we will hear from Dr. Bartlett at the end of the day.
All written materials received by the Panel for today's meeting and previous meetings are available on the JPP's website at jpp.whs.mil.

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

LTC MCGOVERN: Good morning, ma'am.

CHAIR HOLTZMAN: Good morning.

LTC MCGOVERN: Can you all hear me?

I apologize, I have a cold.

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

(Laughter.)

LTC MCGOVERN: We have five main issues we would like for you all to comment on today to either provide insights, conclusions or recommendations. Three of these issues were previously on your deliberation materials, which we have been working through the last few meetings. And, the first one is actually new
based on the input we received from the RFIs that we submitted to the Services, and received back their responses back last week.

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

One of the questions posed to the Services was, should there be such an option if there's this form for sexual assault victims in retaliation. The Services responses are found at Response 92-C, as in Charlie, and there were mixed reviews. A few of the Services thought it would be a good idea, so that they could informally go through their chain of command and -- as they are now with the command management groups.
Others thought that it may be redundant and a bit confusing, because there's multiple types of retaliation. So, today, if we could get your thoughts and opinions on the processes that could be available for Servicemembers if there is a standardized form implemented to report retaliation.

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

LTC MCGOVERN: Yes, ma'am.

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

LTC MCGOVERN: DoD SAPRO, or the DoD response, initially, was that they felt it would be helpful to resolve -- alternative dispute resolution similar to the EO process, for a more efficient resolution of those lower claims. The Army also agreed. The Air Force was unclear what
that may look like. The Navy was not in favor but suggested, if it is going to be available, then maybe it would be helpful for those non-criminal, or non-actionable under the UCMJ, type offenses. And, the Coast Guard was open to the possibility as well.

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

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

The Army, and DoD, and Coast Guard
thought it would be beneficial for the victim to have these reporting options, again, giving the command the option to resolve the case at the lowest level just like they can with an informal EO complaint. Admiral Tracey or Mr. Taylor may be able to provide some insights on the informal versus formal.

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

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

And so it didn't seem to me that the establishment of a parallel process for retaliation was going to preclude a Sailor from working directly with their immediate chain of
command to resolve the issue, but the Navy seemed
to think that it would. And, I didn't believe in
EO complaints even that you were precluded from
getting resolution at an immediate leader level.
Am I wrong in that? I don't remember that as
being precluded.

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

VADM TRACEY: And, again, maybe
refresh me, or maybe Mr. Taylor does remember
this better than I do. What's the formal
difference between the formal and the informal processes in EO?

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

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

LTC MCGOVERN: Correct.

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

But, this formal and informal -- formal reporting process is one that gives a -- there's an oversight level applied to the formal reporting that is not applied to the informal
reporting, but there's a record kept of both. I don't know that that's any clearer.

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

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

LTC MCGOVERN: Yes, ma'am.

JUDGE JONES: Okay.

LTC MCGOVERN: And, in comparison, not a very good analogy, but it's just as we have restricted or unrestricted. It is providing people options, so that they do come forward and
knowing how far that report will then go and to 
who it goes to. So, an informal report won't go 
as far as the formal report.

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

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

JUDGE JONES: Right.

LTC MCGOVERN: So, you never actually 
have to go to your command, you can go to this EO 
Advisor at your unit level, or the superior 
levels, and it would be similar here with the 
SACRs. I believe if they're the ones maintaining 
the records that you could go to them and say,
well, I don't want to make a big deal of this, but I do want to file something, because I think there is something going on here.

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

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

And, maybe you would go ahead, maybe you wouldn't, but the point would be that the employer would have the opportunity to do something about the problem. I mean, I think we
should do whatever we want to do, or need to do,
to encourage victims to come in and talk to
whoever they should about reprisal.

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

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

    JUDGE JONES: So, you would -- so now,
you would go to your SARC and say, I don't really
want a formal report filed, I just want to tell
you about this and then the SARC would note that
it was an informal report? I'm just trying to
figure out how this works.

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

JUDGE JONES: So, maybe this should be

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

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

COL GREEN: I think one of the key
aspects with the informal EO resolution is the
opportunity for facilitated resolution with the
EO Advisor. And so, in the EO context, it offers
you someone to assist you with a complaint
perhaps against your command, or a complaint
environment.

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

JUDGE JONES: Okay, and it wouldn't be
restricted, obviously. It's just a lower level
of help?
COL GREEN: Correct.

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

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

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

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

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

MR. TAYLOR: Right.

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

JUDGE JONES: And, is that going to require a separate form or is there a way to put
it on the same form that they're already using?

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

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

COL GREEN: In the EO process, that's correct, ma'am. The informal is an election
where I can seek informal resolution of my complaint, and if the complainant is unsatisfied with what happens through the informal resolution process in the EO realm, they can then file a formal, or then they can request formal resolution which then goes to the documented investigation.

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

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

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

LTC MCGOVERN: Correct. And, again, with the analogy to the EO, it is then referred to the command, if it's an informal, and, if it's
more formal, then it would be whether it's a recommendation for -- for going to the command for a formal investigation or to the IG.

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

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

So, I think if we look at it in that
context, I mean, it doesn't change the nature of
the complaint or the treatment of the complaint
at all, it just gives the victims some options
for how it potentially is considered and
resolved.

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

LTC MCGOVERN: And, those --

CHAIR HOLTZMAN: How would that work?

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

But the SARC already speaks to the
victim prior to each command management group and
after, so that communication -- or according to
the regulations, that communication and those processes are in place.

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

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

CHAIR HOLTZMAN: Any other thoughts? Questions? Comments?

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

COL GREEN: I think so. And one of --

I think this issue does cross one of the other
issues the Panel's been discussing, is what
organization should be responsible for resolving
complaints of retaliation or reprisal, and
whether that should be the purview of the IG, or
the MCIO, or the command?

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

MR. TAYLOR: I would just like to add
two thoughts to that. One is that I think
anytime we're trying to remedy a wrong, the more alternatives we give to the victim to seek some kind of remedy that's satisfactory to the victim is a good thing.

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

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

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

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

VADM TRACEY: I agree with Mr. Taylor
that this would give effectively a three tiered
process for a victim being able to deal with
retaliation. And I think the more opportunities
to get it done at the lowest possible level, with
the least additional cause for people to
ostracize the victim, the better for the victim
and the more likely that you're actually going to
get resolution.

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

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

LTC MCGOVERN: It has the option of
going to the higher command, or over to the IG,
ma'am.
JUDGE JONES: And, the SARC would obviously know all about this, and make it a formal -- or still formal or informal? Although, at that stage, I would assume the person would want formal, but who knows.

LTC MCGOVERN: Right.

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

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

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

LTC MCGOVERN: Absolutely.

CHAIR HOLTZMAN: And, would that be a
decision of the victim whether he or she wanted
to go to the IG or the MCIO? How do you see
that?

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

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

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

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

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

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

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

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

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

LTC MCGOVERN: It is a monitoring
agency, but, yes, ma'am, if things are not happening, the installation commander who's the Case Management Group commander could certainly say this needs further action, should be elevated to another level.

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

LTC MCGOVERN: If I can give you a different example. A soldier reports that there was a bar fight and there was an assault the night before. The commander always has the option to do a commander's inquiry, which is an
informal type of process. He can call a few Soldiers in, say what happened last night? And, from there, assess, do we need to do something more? Can we get to the bottom of this? Do we need to inform the MPs?

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

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

The commander decides to look at it and try to resolve it at the command level, but changes his mind because the injuries are too serious, or there's more facts. So, I guess in my mind, I just don't know what informal is really guaranteeing.

LTC MCGOVERN: It presents a --

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

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

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

LTC MCGOVERN: Right, no, because by restricted we mean it doesn't go to the command.

Now, informal, really, is just a proposal to expedite closure and resolution of these types of social retaliation which are not actionable under the UCMJ, because they're being bullied on Facebook, they're not being included in group
events, they don't -- they can't pinpoint something under the regulatory definition, but they believe there's retaliation going on.

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

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

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

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

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

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

JUDGE JONES: Right.

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

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

JUDGE JONES: I just don't want them to think that, oh, it's informal, everything's going to be okay. It's going to go very quietly and, you know, and we're encouraging them to report it. But, if their true goal is -- I don't
know what their true goal is, but I don't know
that informal and formal makes much difference.

LTC MCGOVERN: Okay.

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

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

JUDGE JONES: I just don't want to
promise the reporter something that they're not
getting. That's all. If you think calling it
informal and intending for it to be an informal
resolution will increase reporting, I think
that's a great idea. But, I think everyone has
to be warned that it's still, you know, it's
going to be reviewed and it's going to become
part of the information database, that's all.

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

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

Because there are a lot of things to
take into consideration and the EO process has
been thought out as well as the appeals. I have
a handout that shows those processes, and it
takes some thought. So, that's why I would
recommend, in general, that if this could
facilitate or increase reporting and expedite
resolution of some of these cases of retaliation
to get them to stop, it might be worth
recommending.
CHAIR HOLTZMAN: And, should we append to that suggestion or recommendation that within a year this be reviewed to determine how effective it is?

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

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

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

CHAIR HOLTZMAN: Do we have something
clear enough for us to vote on?

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

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

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

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

CHAIR HOLTZMAN: Okay. So, we are
going to table -- I mean, basically, as I gather,
there seems to be consensus in favor of doing --
creating this other option, but we are looking
for language from you --

LTC MCGOVERN: Yes, ma'am.

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

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

But the -- and they reported in 2014
the results of that, concluding that they were
limited in what they could do because they had to
take into account the constitutional limits that
you can't force people to be friends or associate
with each other. And, therefore, their
definitions of ostracism and maltreatment require
this specific intent element to interfere, almost
to the level of obstruction of justice.
So, for instance, ostracism is the exclusion of social acceptance, privilege or friendship with the intent to discourage reporting of a criminal offense or otherwise discourage the due administration of justice. Maltreatment has similar language.

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

So, right now, according to their definitions, they aren't able to take any action under the UCMJ for a lot of the social
retaliation that's going on on the Internet or within units.

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

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

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

JUDGE JONES: So, am I right, though, that something that might not -- conduct that might not rise to this level which is quite specific and is going to be something that's, you
know, a threshold that has to be reached before
you can proceed?

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

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

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

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

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

JUDGE JONES: Only administrative?
LTC MCGOVERN: -- counseling, verbal or oral, letter of reprimand which can be in their file for inappropriate conduct, but not an Article 15 or --

JUDGE JONES: Okay.

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

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

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

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

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

    They didn't require a specific --

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

    LTC MCGOVERN: Right.

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

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

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

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

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

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

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

JUDGE JONES: Of not to affect that.
CHAIR HOLTZMAN: Right.

JUDGE JONES: No.

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

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

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

CHAIR HOLTZMAN: Well, if we just took
out the specific intent part, but you had all
those other parts like, could cause mental or
physical harm and was abusive, how do we have a
First Amendment issue there? Just curious.

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

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

But, if I said, if you included
everything in the definition of maltreatment but
you took out the specific intent, how are you
creating a problem under the First Amendment? I
mean, maybe I'm just not smart enough to figure
that out, but I just would really like to have an
answer to that one.
COL GREEN: Well, and I think, ma'am, more important -- even more pertinently to the military environment is -- I mean there are restrictions to freedom of association, restrictions to freedom of speech within the military context.

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

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

But, I thought that scenarios that would be categorized as maltreatment would include assignment of particularly unpleasant duties on an unreasonable frequency to the individual, you know, something that's not shared evenly across the unit and so forth.
Are those the things that are
categorized as maltreatment?

LTC MCGOVERN: Yes, ma'am. And,

usually, it involves a senior/subordinate
relationship. Here, for retaliation --

VADM TRACEY: And they specifically
exclude that, right?

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

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

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

But, their definition requires the
reason that there was a specific intent in that
specialist decision to assign her to clean all
the weapons was to keep her from continuing to report, to try to get her to drop out of the process.

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

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

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

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

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

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

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

LTC MCGOVERN: No.

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

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

So, what's your answer, Colonel McGovern?
LTC MCGOVERN: I don't have an opinion one way or the other, ma'am. I'm just raising the issue to you all to see if you do think it's too narrow. It sounds like you believe for --

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

LTC MCGOVERN: Yes, ma'am.

CHAIR HOLTZMAN: -- that statement?

LTC MCGOVERN: Right.

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

VADM TRACEY: Just the language sounds like it's -- maltreatment is prohibited.
CHAIR HOLTZMAN: Yes, exactly.

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

VADM TRACEY: That's ostracism.

LTC MCGOVERN: Right.

VADM TRACEY: Maltreatment is --

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

VADM TRACEY: Badly.

LTC MCGOVERN: Yes, treat them badly.

CHAIR HOLTZMAN: Abusive, isn't that the word -- one of the words, abuse and causing mental or physical injury? I mean, aren't those requirements? This seems, you know, sort of serious.
LTC MCGOVERN: Yes, ma'am.

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

MR. TAYLOR: No, that's fine.

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

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

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

LTC MCGOVERN: If you all -- if I can refer you all to Tab 3 of your reading materials. This is the 2014 report that DoD provided which explains their definitions and the limitations.
They believe that the freedom of association is a cherished right under the First Amendment. It is on page eight, that discussion.

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

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

LTC MCGOVERN: Correct.

VADM TRACEY: Which really is talking about ostracism.

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

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

JUDGE JONES: So, can I just ask a
question then on maltreatment? If you take out the specific intent, that just means you don't have to prove that specific intent. But, if you've proved everything else, you still have maltreatment, right?

LTC MCGOVERN: Correct.

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

LTC MCGOVERN: It would then be --

JUDGE JONES: It speaks to retaliation.

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

JUDGE JONES: And, this is punishable under?

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

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

LTC MCGOVERN: Article 92 because
these definitions are in the regulation and
they're punitive under the regulations.

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

LTC MCGOVERN: Right.

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

LTC MCGOVERN: Yes, ma'am.

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

LTC MCGOVERN: Ninety-three.

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

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

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

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

LTC MCGOVERN: Can we take one step back?

CHAIR HOLTZMAN: Sure.

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

CHAIR HOLTZMAN: How do Members of the Panel --

LTC MCGOVERN: Because there is the freedom of association and freedom of speech?

But, as far as maltreatment, you can't think of
an example why the specific intent should be required? Is that correct?

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

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

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

LTC MCGOVERN: Okay, thank you.

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

CHAIR HOLTZMAN: The maltreatment definition.
LTC MCGOVERN: -- the maltreatment definition.

CHAIR HOLTZMAN: Excellent.

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

LTC MCGOVERN: Yes, ma'am.

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

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

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

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

So, do you have any thoughts on
whether or not there should it be a specific
offense of retaliation in the UCMJ? And, if so,
should it just be -- should be for social and
professional retaliation or just professional
retaliation?

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

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

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

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

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

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

MR. TAYLOR: But, it seems to me that
we are at least putting in -- in the process of
putting in place a number of tracking mechanisms.
So, it seems to me that the retaliation
definition and a statute that's specifically
criminal wouldn't necessarily add more
information to what we should already be getting
through the reporting system now. But, is that
correct?
LTC MCGOVERN: DSAIDs should be tracking the reports coming in and the closure of a case. I do not know for certain whether DSAIDs records the actual action that's taken against the offender.

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

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

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

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

VADM TRACEY: So, I think what Mr. Taylor is suggesting, I think is right that we were suggesting that we put in place this reporting process that the SARC would become the keeper of the entire record around the victim's experience. And so, I would expect that those systems that are capturing data will be expanded
to include the visibility on whether victims are experiencing retaliation and whether that's being dealt with in a timely and satisfactory manner.

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

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

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

MR. TAYLOR: Well, I may have missed it because this came up during the October meeting, but I know it was on the list, the deliberation guide list, and I actually thought
that we had said that any tracking system should include outcomes and results. So, that's why I asked the question the way I did.

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

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

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

CHAIR HOLTZMAN: Well, do we have any indication from the military as to whether it would be easier to track what's happening with
regard to retaliation if it were in a separate
section of the criminal code? Because, if it is,
then maybe that is a good reason to have it.

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

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

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

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

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

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

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

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

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

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

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

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

LTC MCGOVERN: Well, every time an MCIO gets the case, gets the initial report, at least in the Army, the CID titles the person under the offenses alleged. So, they're being
titled under Article 92 for disobeying a
regulation rather than titled under an offense
for retaliation.

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

LTC MCGOVERN: Correct.

MR. TAYLOR: Okay.

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

I don't have to count it in the UCMJ
system, I'm counting it -- and I want to
understand about retaliation specific to sexual
assault victims, I don't want to muddy the water
with the fact that I have a UCMJ Article for retaliation and all kinds of retaliation get captured in it.

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

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

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

MR. TAYLOR: I agree.

VADM TRACEY: Same here.

LTC MCGOVERN: Okay.

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

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

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

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

LTC MCGOVERN: Yes, ma'am.

Julie Carson is our legislative expert, but the Legal Justice for Servicemembers Act was proposed last year, which contained provisions to expand the Military Whistleblower
Act as well as other retaliation proposals. It was not incorporated into the FY16 NDAA.

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

Kind of convoluted.

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

So, if someone has experienced sexual assault but then they repeatedly came up hot on a urinalysis for cocaine, they were administratively discharged. And the command's
response was, well, that would have happened regardless because she was coming up hot for cocaine even prior to the sexual assault.

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

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

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

    The civilian proposal or the proposal is under the Legal Justice for Servicemembers Act make it more similar to the civilian standard where they just have to show by clear and convincing evidence rather than a preponderance
of the evidence that that adverse action would have occurred otherwise.

Have I sufficiently confused you?

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

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

JUDGE JONES: Clear and convincing sounds a lot tougher.

LTC MCGOVERN: It does.

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

JUDGE JONES: It's a lot tougher.

CHAIR HOLTZMAN: So, how is it --

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

LTC MCGOVERN: Right.

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

LTC MCGOVERN: Well, and in this case,

it's the whistleblower in her allegation --

JUDGE JONES: What is it that the

whistleblower has to prove? That this would not

have happened but for the retaliation?

LTC MCGOVERN: Correct.

JUDGE JONES: And, the standard --

LTC MCGOVERN: By a preponderance of

the evidence.

CHAIR HOLTZMAN: That's now the

preponderance of the evidence?

LTC MCGOVERN: Right.

JUDGE JONES: Right.

LTC MCGOVERN: That's for the

military. We made -- Julie made a chart that

shows for DoD civilians, they can come back with

clear and convincing evidence or the agency can

come back -- has to come back with clear and

convincing evidence that that would have occurred

otherwise.

CHAIR HOLTZMAN: So, in other words,
what's being proposed is that it's -- the Agency have a higher standard, tougher standard to show --

LTC MCGOVERN: To counter.

CHAIR HOLTZMAN: -- to show that the whistleblower was acting -- was not acting as -- to show that the whistleblower was not acting as a whistleblower on the proposal would create a tougher standard -- make it harder to show that the whistleblower wasn't acting as a whistleblower.

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

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

So, by a preponderance of evidence,
the IG determines the commander was wrong and the
whistleblower was correct.

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

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

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

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

MR. TAYLOR: Well, I mean that's an
important point because while I think this Legal
Justice for Servicemembers Act has some salient
provisions, it also has some that are very
troubling.

LTC MCGOVERN: Right.

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

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

LTC MCGOVERN: No, the guide contains
the standard.

MR. TAYLOR: So, it's the guide? I
didn't think this was a matter of statute, that
this was the standard. So, if that's the case,
then why wouldn't it be logical to put the
military member on at least as good a position as
a civilian member of the Department of Defense
and adopt the same standard?
CHAIR HOLTZMAN: What's the rationale for the difference?

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

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

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

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

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

LTC MCGOVERN: Tab 6 in your reading materials.

JUDGE JONES: Right.
LTC MCGOVERN: The first page.

JUDGE JONES: Okay.

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

JUDGE JONES: Oh, four elements, I see.

LTC MCGOVERN: Right. So --

JUDGE JONES: Thank you. Thanks.

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

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

So the whole fourth element is slightly different as well.

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

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

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

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

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

CHAIR HOLTZMAN: Yes.

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

LTC MCGOVERN: Yes, ma'am.

CHAIR HOLTZMAN: Anybody disagree with that?

JUDGE JONES: No.

CHAIR HOLTZMAN: Okay.

LTC MCGOVERN: Okay, and --

CHAIR HOLTZMAN: I'm beginning to
sound like Justice Kennedy.

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

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

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

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

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

CHAIR HOLTZMAN: Yes.

MS. GUPTA: First, the strategy must
include bystander intervention programs

emphasizing the importance of guarding against retaliation.

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

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

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

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

MS. GUPTA: Correct.

CHAIR HOLTZMAN: I mean, I don't know whether we need to -- do we need to -- which is something we were going to recommend anyway. Do
we need to recommend that also as part of our recommendation that it be -- I mean do we have to categorize that as a response to the NDAA?

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

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

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

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

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

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

VADM TRACEY: I would recommend that, yes.

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

MR. TAYLOR: Right, I agree.

JUDGE JONES: -- pieces here.

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

LTC MCGOVERN: Okay, thank you.

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

CHAIR HOLTZMAN: Good. So, should we take a ten minute break?
MR. TAYLOR: Please.

CHAIR HOLTZMAN: Great.

JUDGE JONES: Agreed.

LTC MCGOVERN: Thank you.

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

CHAIR HOLTZMAN: Are we prepared to commence? Okay.

COL GREEN: Yes, ma'am.

CHAIR HOLTZMAN: Colonel Green, sir?

COL GREEN: Ma'am, we have time --

briefly on the schedule this morning for the Panel to discuss and --

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

Thank you.

COL GREEN: Yes, ma'am.

In previous meetings, the Panel has essentially concluded its deliberations on the
topics involving restitution and compensation for
victims of sexual assault.

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

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

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

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

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

CHAIR HOLTZMAN: Oh, okay.

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

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

So, I can send those out to the Panel Members if the Panel is comfortable substantively that the report reflects its conclusions and the Panel Members can either meet telephonically, can confirm by email that they're comfortable with the administrative changes that have been made and those updates, however the Panel Members want
to deal with that in terms of finalizing the
report.

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

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

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

COL GREEN: Yes, ma'am.

CHAIR HOLTZMAN: Is that okay with the

Members?

JUDGE JONES: Yes.

MR. TAYLOR: Yes.
CHAIR HOLTZMAN: Admiral?

VADM TRACEY: I'm good.

CHAIR HOLTZMAN: Good, thank you.

Okay, thank you.

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

CHAIR HOLTZMAN: Great. Thank you very much.

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

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

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

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

CHAIR HOLTZMAN: Or Colonel Hines?

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

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

CHAIR HOLTZMAN: Excellent. Thank you very much.

Dean Anderson, welcome.

DEAN ANDERSON: Good morning.

CHAIR HOLTZMAN: Good morning.

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

We were pleased to have many Members, two of whom are obviously on the JPP and led the
Committee, take a look at these many issues and I won't go through the list of people on our Committee, but it was ably staffed by a number of people who contributed and a number of whom are here.

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

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

We met seven times over the course of a series of months, had many, many presenters in front of us, all of whom gave us a tremendous amount of experience and wisdom that we could reflect upon.
Retired military trial judges, senior
prosecutors and defense counsel, appellate,
governmental, government and defense counsel,
civilian prosecutors and defense counsel, general
and flag officers and command at the Services' entry level training installations which became very important in terms of abuse of authority, an analysis of that, Staff Judge Advocates to training commanding officers, Chair of the Joint Services Committee at the time of the current version of Article 120 -- that the current version of Article 120 was drafted.

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

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

It was an extensive group of presenters and they gave us quite a bit to think
about and changed many of our minds about many of the issues that we approached.

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

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

We were careful to ensure that our conclusions and recommendations were responsive specifically to the 17 issues you sent to us and did not try to go further than those 17 issues. There are many things one could do with Article 120, but we tried to hew carefully to the directive you had sent us.
And, we also include in the report alternate views on the issues that we made conclusions on.

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

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

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

In terms of the definition of the terms and the defenses and the offense of indecent acts, we have four recommendations for statutory amendments, one recommendation for an
amendment simply in the Manual for Courts-Martial. We didn't believe that a statutory amendment was necessary on that issue and we'll go into it, and then, five recommendations for no change.

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

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

So, I'll turn it over to Stephen Schulhofer -- Professor Schulhofer.
PROF SCHULHOFER: Thank you very much.

Thank you for inviting us here today.

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

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

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

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

That's bodily harm is issue number five. The definition of consent is issue number one. The definition of fear is issue seven and then the definition of force, issue eight and the mens rea issue is issue number ten.
I want to start with bodily harm because that term plays a central role in the scheme of liability under Article 120.

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

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

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

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

That sounds straightforward, but several practitioners who testified to your Panel said that the term was confusing at trial because
of the way that bodily harm is defined.

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

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

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

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

One is that most of them felt that the dual meaning of bodily harm is very well
understood by practitioners. And, most of them
worried that amending Article 120 could
destabilize the case law and create unforeseen
consequences.

Our conclusion really breaks down into
three parts.

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

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

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

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

The first is instead of using non-
consent to define bodily harm and then using bodily harm to define the offense, we can just go directly to using non-consent to define the offense.

So, the first recommendation -- go back to slide, I think it must 11, no next one.

So, our first recommendation as it's in that PDF is to change the language of 120(b)(1)(B) regarding bodily harm and, instead, define the offense as committing a sexual act upon another person without the consent of that person.

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

And, when you go back to that definitional issue, it turns out that the change to (b)(1)(B) means that we no longer need to clarify the definition of bodily harm because we actually don't need to define bodily harm at all because the term is no longer doing any work in the Statute.
So, our recommendation -- the second part of our recommendation is simply to eliminate bodily harm from 120(g) and simply define the offense as it's now stated in the redline, any person who commits a sexual act upon another person without the consent of that person. That would be the core offense under 120(b)(1)(B).

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

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

For example, if you focus on 120(g)(8) subparagraph A, the second sentence there says that lack of resistance does not constitute consent. But, it also goes on to say that submission resulting from a variety of circumstances -- force, threat of force or
placing another person in fear, submission
resulting from those circumstances does not
constitute consent.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Those presenters recommended no change
with respect to those sections when the accused has been charged with placing the victim in fear.

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

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

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

The next issue, eight, your Panel raised the question whether the definition of
force in subsection (g)(5) is too narrow. The concern, I believe, was that some uses of force -- for example, merely brandishing a weapon without using it might fall outside the definition in (g)(5).

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

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

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

Then, issue ten is the last issue that I will be addressing, raises the question whether a defendant's knowledge of the victim's incapacity to consent should be a required
element of the offense.

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

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

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

Our Subcommittee shared that view that
the Government should be continued -- continue to be required to prove those two elements, both incapacity to consent and that the accused knew or reasonably should have known.

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

Thank you very much.

CHAIR HOLTZMAN: Thank you very much, Professor.

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

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

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

The issue first on my list is whether the consent and mistake of fact as to consent should be specifically included.
You can go to the next slide.

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

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

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

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

For issue three, which is my next
issue, which was defining incapable of consenting. This was pretty much unanimous that everyone who testified said that it needed to be amended and it needed to be clearly defined, that it's one of the few undefined terms in 120. It appears, but had no definition.

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

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

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

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

And, we also -- that would go in the Statute, but we also wanted to add guidance to
the Manual for Courts-Martial and the Benchbook about the totality of circumstances that should be explored in determining whether a victim was incapable of consenting.

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

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

In deciding whether a person was incapable of consenting, many factors should be considered and weighed to the extent that they are known, including but not limited to that person's decision-making ability, ability to
foresee and understand consequences, awareness of
the identity of the person with whom they are
engaging in the conduct, the level of their
consciousness, the amount of alcohol or other
intoxicants ingested, tolerance to the ingestion
of alcohol or other intoxicants because the
testimony clearly showed that there were cases
where someone with a .4 was not drunk in the
sense of having any impairment to their ability
to speak, walk, function, think, whereas most
people at that level would be unconscious.

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

So, that was our recommendation on
that issue.

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

And, the current law reads -- and I'm
going to read that because we're recommending no
change, that, "[a] person who commits a sexual
act upon another person by administering to that person by force or threat of force or without the knowledge or consent of that person, a drug, intoxicant or similar substance and thereby substantially impairs the ability of that other person to appraise or control conduct, is guilty of rape and shall be punished..."

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

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

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

And, the majority of presenters recommended some modification of the definitions.
And, we concluded that both did need clarification and we have written a new definition of both, which are now on the screen.

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

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

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

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

And then, we eliminated the second part because it was really repetitive. We just added the intent to the first part and combined them into one thought and included the use of, or by an object.
So, those were the changes we recommended to those definitions.

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

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

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

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

But, we felt very strongly that 120 was not the appropriate place to add it back in
without the elements of Service-discrediting or prejudice to good order, that it could easily go awry and be overbroadly interpreted and would lead to sex offender registration which has catastrophic consequences for the defendant and that it would not be necessary to do that, that the 134 could be an appropriate place for it.

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

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

DEAN ANDERSON: Okay.

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

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

And, in order to understand this, I actually think I want to set up three kinds of scenarios first and have you think about those
before we turn to the specific questions and the statutory change that we suggest.

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

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

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

The third scenario -- and it's also rare that someone says, you know, engage in sex with me or I will physically harm you or engage in sex with me or I will ruin your military
career, making that an explicit threat of that kind of wrongful action.

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

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

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

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

So, if you look at the series of questions, the issues are about what is threatening wrongful action? And, I'm going to
go a little bit slower on these because this is a complicated part of the Statute.

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

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

Not a model of statutory clarity. And, one of the questions posed to us, was that latter part of the definition, threatening wrongful action, should that be further defined? Because, it wasn't clear what that referred to
and there was some confusion about this.

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

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

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

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

The next question was the ability to effectively charge coercive sexual relationships or abuse of authority under 120. In other words,
do these provisions under 120, which clearly prohibit physical violence -- threats of physical violence and then prohibit something called threatening or placing that other person in fear defined as something about wrongful action.

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

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

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

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

And then, relationships -- the next question, issue 16, was relationships between
basic training instructors and trainees, whether
or not it should be per se strict liability and
that should be explicit in Article 120. That was
the question sent to us.

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

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

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

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

    And the question is whether or not as
part of that definition, which includes
threatening wrongful action, should we further explicate what that means?

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

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

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

    We actually didn't think that this provision (1)(a), threatening or placing another person in fear, was the best provision to capture all of these kinds of inappropriate uses of
authority to coerce sexual behavior.

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

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

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

So, we recommended no changes on that particular issue. Again, rejecting a kind of strict liability, this is a sex offender situation for consensual relationships.
Issue 13 is about whether or not the 2012 version of the UCMJ affords prosecutors the ability to effectively charge these coercive sexual relationships.

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

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

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

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

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

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

The second category that I articulated at the outset or that I offered at the outset was a physical threat, a threat of physical violence or a threat to ruin the career. That's fairly
easy under Article 120.

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

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

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

Issue 14 is, should the definition of threatening or placing that other person in fear be amended to ensure that coercive sexual relationships or those involving an abuse of authority are covered under the existing 120?
We felt like there was diminishing returns, as I mentioned, in terms of redefining threat or placing that other person in fear which is the first provision under sexual assault.

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

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

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

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

Nevertheless, we felt like there was
sufficient evidence in front of us that coercive
sexual relationships exist, that they are an
abuse of authority and that there should be
another theory under Article 120 through which
they could be captured because they were sexual
offenses, not just inappropriate relationships
that were consensual.

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

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

The using position, rank or authority
suggests an intentional deployment of that
authority to secure compliance. So, this isn't a
willy-nilly broad provision. This is about
someone who uses their authority to secure
compliance to sexual acts. We intended it to be
fairly narrow but broader than what 120 currently captures.

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

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

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

And some of them are conceived of as consensual by the participants themselves convinced us that a strict liability was overbroad, would reach conduct that would -- that the criminal law and the Uniform Code of Military
Justice should not reach and that could be better attended to in provisions that were designed to enhance structures of command and morale rather than prohibit sexual offenses.

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

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

We were uniformly against this idea. Felt that we -- the Panel felt fairly strongly that the use of sex offender registration, we did not want that to be overbroad. There was a risk that is overbroad now and there was no reason to include those relationships that were considered consensual relationships that would be appropriately and effectively charged in other
provisions of the UCMJ to trigger sex offender registration for those kinds of relationships.

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

Thank you.

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

Before we turn to questions, I want to commend the Chair of this Subcommittee, Judge Barbara Jones for the extraordinary leadership that she has shown in getting the Subcommittee to this point.
And, also wanted to indicate that there are some Members of the Subcommittee who aren't presenters who are lurking in the audience. I'd like to introduce them as well, Brigadier General James Schwenk and Ms. Laurie Kepros.

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

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

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

DEAN ANDERSON: So, the history of the provision about defining the threat or placing the other person in fear, historically, in an earlier version, as you know, included a
provision that said that -- that was explicit about positive and negative inducements.

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

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

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

The provision itself does not make a distinction between positive and negative inducements, but one would have to conclude -- come to the conclusion that what was being used
was one's authority and rank and the reason for
the use of that authority and rank would be to
secure compliance to sex.

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

VADM TRACEY: Thank you.

CHAIR HOLTZMAN: Mr. Taylor?

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

I'd like to pick up on maybe your last
point for at least my first question and that is
this issue of strict liability.
As you know, we had a lot of testimony really from various groups about the fact that, in their view at least, it was virtually impossible in a training environment, particularly initial entry training, for a new recruit to have any understanding about what the bounds were or the permissible limits of authority might be with a person who held complete sway over him or her under those circumstances.

DEAN ANDERSON: Yes, sir.

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

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

And, wanted to provide -- to develop a provision that was not dependent upon the
context of the trainer/trainee.

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

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

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

However, circumstances in which the trainee, although naive, ignorant and delusional,
perhaps, chooses to engage in a consensual relationship where the trainer has not -- there is not evidence that the trainer has used his or her authority to secure that compliance.

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

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

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

And, we wanted to be more circumspect
and narrower in carving, nevertheless, expanding
the reach of Article 120 and carving a new theory
about the use of rank to obtain sex.

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

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

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

Now, we recognize that it is
completely inappropriate and should subject the
person to expulsion from the Service for engaging
in an appropriate relationship, but labeling a
person as a sex criminal and having him or her
have to register as a sex criminal was a consequence that we thought was inappropriate, that release from the Service would certainly be an adequate punishment and that we should not go further and label them as a sex criminal.

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

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

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

And, also kept our focus on what is the problem with those circumstances? And, it really -- we kept coming back to it's the use of
the military authority to obtain sex. And, that's what we wanted to get to.

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

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

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

Because, many of us started from the position that these relationships are inappropriate per se and why should we be wringing our hands and creating headaches for people trying to draw these ambiguous lines about whether the threat -- whether the action threatened is wrongful or not, whether the person
is using or not using and how it's perceived, this shouldn't be happening period. So, why get into all that?

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

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

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

And, point number two, moving it into 120 instead triggers sex offender registration which I think all of us on our Subcommittee were persuaded is generally overbroad and certainly
inappropriate in the case of some of these relationships where the military training instructor may be violating his expectations and he's doing something inappropriate.

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

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

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

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

I have to say that, even though I won't say I shall not be moved, I'm not yet moved. So, I'm still probably where you were
when you first were thinking about this subject.

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

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

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

DEAN ANDERSON: One thing I will say, Mr. Taylor, in response to that question is that this provision is not a theory of consent or non-consent rather. So, it's not a question of
whether or not the trainee says no or says yes.

That is the provision that of causing bodily harm
that has been changed to without consent.

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

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

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

And, certainly, understood that in the
training context or the very early or right after
the training context or the very early stages of
recruitment into the military, that it's an
overwhelming experience that is all consuming and
one's ability to have autonomy of any kind is
greatly reduced, if not to the vanishing point.

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

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

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

    How that shakes out, well, then you
get to whether or not consent is freely given to
the conduct at issue by a competent person. And
then, those questions of whether or not it's
freely given in the context of the training, that
would then be what is -- the evidence has to
merit and argument over.

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

DEAN ANDERSON: Well, thank you.

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

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

Because if, let's say in a situation
of advanced training such as a flight instructor,
for example, and let's say that the flight
instructor invites the trainee out for drinks or
over to his apartment after hours.

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

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

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

MR. TAYLOR: Exactly.

PROF SCHULHOFER: And, that's why I started from the position which is perhaps where
you still are which is well, for heaven's sakes, it should not be going on, let's just prohibit it.

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

However, it could still be prosecuted under other Articles.

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

CHAIR HOLTZMAN: Judge Jones?

Or should we take -- it's 12:00.

Should we take a break?

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

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

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

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

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

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

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

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

I really appreciate the chance to
share some of my views on the issues that the
Subcommittee has been analyzing over the last six
or eight months.

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

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

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

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

And I know in my state, and I suspect
in pretty much all of the other states, a
military adjudication for a sex crime triggers
just as many consequences as a civilian
conviction of a sex offense. And given that, I
can't think of a more consequential label to put
on someone, I think it's very important that this
Statute be the absolute best product that we can
put forth for our Servicemembers, that we
delineate behavior that is going to carry all of
these consequences and sanctions in the most
precise way we possibly can and with the utmost
respect for the constitutional rights of these
individuals who have literally dedicated their
lives to protecting us and our country.

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

So, you know, I won't go into great
detail. I did attach kind of an early draft that
I had formulated of maybe a different way to
understand this kind of crime. That is the
attachment to I think it's Enclosure -- excuse me, I am not looking at the right document -- it's something to -- Enclosure, yes, it's Enclosure to Attachment A, and it's not worked out. It was just a rough draft that I shared at some point in the conversation with the Subcommittee I think in June. We didn't work on this, so it does not reflect a lot of the other improvements that have been suggested by this Subcommittee.

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

And then I have offered a much broader definition of consent than what the Subcommittee has proposed in which it gets into both consent
and lack of consent as well as the circumstances where a person would be unable to give consent, whether it's as a result of intoxication, mental incapacity, or some other kind of impairment.

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

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

So in the course of the testimony we heard, and I referenced some of it in my report, you know, we heard a lot of people are looking to Article 120 for guidance, and of course, that
includes prosecutors and defense counsel and
military judges, and those folks found -- I
actually found them to be quite comfortable with
Article 120 for most purposes. Often they would
say, you know, we get it, we use this in this
situation, we use that in that situation. But I
don't think that necessarily captures the
universe of people who are considering Article
120, and we heard as much from Major Bateman, who
provides training to the JAG officers, who
provides training to the judges, and provides
training to the lawyers who have to then go to
command structures and explain to them here are
the Rules and here is what you can and can't do.

And she certainly found many examples
where people were still confused, where it is not
something that is easily conveyed to laypeople.
I think our Subcommittee had concern about how
Members are understanding language, and when
Professor Schulhofer explained our reasoning
about recommending changes to the term "bodily
harm," to me, that is a model of what was right
about what our Subcommittee is recommending
because it takes a concept that requires multiple
layers of interpretation and definition and turns
it back into pretty accessible English, right?

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

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

Well, okay, that doesn't sound that
confusing, except "unlawful force" is a term of
art, and it is defined to have a meaning that is
different from a common understanding of the word
"force" in English. The term "unlawful" is not clearly defined. We heard from Major Bateman about confusion even among judicial candidates about the availability of consent defenses and whether consent can negate unlawful if there is consensual forceful sexual behavior going on.

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

You know, we have made a recommendation as a Subcommittee with respect to Issue 2 that the MCM, the Manual for Courts-Martial, be amended to make it clear that the defenses of consent in mistake of fact as to consent are available, but again, the average Servicemember who is not a lawyer is not cross-referencing all these sources. It's not in the Statute. It's not clear. And using the term "unlawful" just kind of throws this whole question for the lay reader about what are we
actually talking about, and what is the role that consent plays in analyzing these behaviors?

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

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

One of the concerns that was discussed in the presentation this morning and that did recur often in the testimony that we heard from witnesses is whether or not large-scale or larger-scale modifications to Article 120 were a good or a bad thing, and the concern was we just keep amending this Statute every time. Every
time we change it, new prosecutions have to be brought under different versions of this Statute depending on the date ranges involved. Sometimes there are court-martials [sic] involving multiple different statutory schemes at the same time. That is very confusing to judges and lawyers and panel members.

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

And we should not be afraid to make changes where we can see there is value in doing so because it is going to change anyway. We
heard testimony from Colonel Terri Zimmermann from the Marine Corps. She makes similar comments. It's just going to keep changing. The Statute is going to keep evolving regardless. Why not do it in a more deliberate and thoughtful way? Why not try to make a Statute that is accessible to as many Servicemembers as possible?

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

Everyone agrees that is not the law. Everyone agrees that is not what Article 120
says. However, it came up over and over and over again, and because the Statute doesn't set forth any clear definition, and again, I think the recommendation of the Subcommittee to define "capable of appraising" is helpful at addressing that concern, but when you have that kind of uncertainty about where are the lines in what is expected, and when people are hearing at training about a line that frankly is really out of step with contemporary social life, it's not realistic. It's not how people are living in American society broadly, and I certainly would not expect the military to be significantly different in that regard.

To say, you know, one drink and you can't give consent to sexual activity, it's so out of step with practice that it loses legitimacy. And isn't it better that we set expectations in a realistic yet respectful place and not continue to have the confusion that the Statute permits to drive this sort of misunderstanding and misinformation, and really,
you know, failing to address where we could make real improvements in the choices that people are making and how they conduct themselves?

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

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

Later, it says in Subsection A as
proposed by the Subcommittee, an expression of lack of consent through words or conduct means there is no consent. There is further language as it goes on that talks about how manner of dress does not constitute consent.

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

And my concern about this I think was sort of borne out by an example that we heard from Major Bateman in her training on Article 120. And that was that if someone said I will never have sex with you, and then a period of months, days, hours, passes, is the fact that person made that statement now creating a
scenario where they cannot give consent to sexual activity? What if it's sexual activity that person has initiated himself or herself?

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

That is a pretty useful piece of information to have in doing that analysis. By the same token, if manner of dress is something that parties have used historically to communicate their interest or lack of interest in sexual activity, that should be something that is being considered. No, it is not a proxy for
consent. It does not mean because I wore x I now am consenting. But it is among the factors that should be considered, along with all of the other circumstances.

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

So I drafted some, you know, possible alternative language around that. Some of it could be changes to C, to make it clearer that those circumstances described in A are still part of the picture. I think we could also draft A slightly differently just so it's clearer that, again, none of those things mean there is consent, but they are relevant to consent, and they are things that the fact-finder should not find precluded from weighing in their evaluation.
I think it would be a real miscarriage of justice if somebody were to say, well, the person said I will never have sex with you but then initiated sex, and we say, well, it says in A that a statement of non-consent means there is no consent, and therefore that can never evolve or change under, you know, other circumstances or through the evolution of the relationship, perhaps.

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

And I thought it was interesting that even since the last in-person meeting of the Subcommittee, we have seen legislative action in
Congress with respect to the federal statutes concerning mens rea, and there are now House and Senate bills that have been introduced to try to bring the issue of mens rea back in a more explicit way in federal statute, that there is a real national concern around the role of mens rea, and that we not lose track of the importance that people who are going to be held criminally culpable be intending the bad behavior, or be in a position to try to meaningfully effectuate the bad behavior, and that that is the thing that we find unacceptable as a society, that there be that specific intention.

Another development in this area of law that occurred even while our Subcommittee was meeting was the decision that came out June 1st of 2015 from the United States Supreme Court called Elonis. I don't know the pronunciation, but it's E-L-O-N-I-S, and the citation, and lots of quotes from it are in my comments. And I think that case is quite interesting because the Supreme Court really
explicitly discusses the ongoing viability and
importance of mens rea in criminal jurisprudence.
They express concern over, as was the case in Mr.
Elonis's prosecution, having a merely negligent
mens rea, and that is what we have in Article
120(b)(2) and (3), reasonably should know, that's
mere negligence, just like what Mr. Elonis was
prosecuted for.

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

And I think again you see this concern
in the federal legislation that has been recently
introduced. In one of the bills, the default
mens rea is knowingly. In the other, the default
mens rea is willfully. It's not this kind of
reasonably should have known standard. There
really is a concern that the accused know, had a,
you know, ability to perceive this situation.

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

And then I wonder, is it just an
accident of how the behavior was reported, or how
it came to the attention of the authorities, that
one party is labeled an accused, and the other
party is labeled a victim, when they have done
the exact same behavior?

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

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

But it is only relevant according to
the Rule in the cases where the elements are
actual knowledge, specific intent, willfulness, the kind of culpable mental state that I believe the Subcommittee should be recommending for Article 120 throughout, and not this mere negligence standard of reasonably should have known, because that evidence becomes irrelevant if the standard is mere negligence, reasonably should have known standard, but it's just not fair.

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

I have as kind of subsections to the conversation on mens rea pulled out a few areas where the JPP tasked us with speaking to issues relevant to mens rea. You did hear in the earlier presentation about Issue 4, which
actually had to do with lessening the mens rea,
and the Subcommittee did not recommend that, but
I continue to suggest that we should do even more
to make sure that the person have actual
knowledge of the, you know, victim's
vulnerability.

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

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

I support his recommendation, and to me, there are a couple reasons for that. One is I think it's important, and it's just fair, again, to distinguish someone who is acting in a
premeditated manner to create a scenario where
they intend to sexually abuse someone, and
recognize that behavior is distinct from the
behavior that is criminalized separately in
Article 120(b) -- what is it -- (1)(3A), where if
the person is impaired through any mechanism, and
then someone takes advantage of that situation,
it is still an offense, but it is an offense that
carries a maximum punishment of 30 years
imprisonment instead of life in prison, as you
can get with the premeditated type of offense.

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

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

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

The other kind of issue that I thought was relevant to consideration of mens rea had to do with the definition that the Subcommittee has proposed for incapable of consenting. Again, I support there being a definition. I think this
is a great first effort.

We won't really know how well it works until we start applying real life to it, and that is always going to be the case with statutes, but to me, that also is one of the reasons that a knowing, actual knowledge standard, would be more appropriate, rather than saying here is a new definition of incapable of consenting, let's just assume that there is going to be some way for somebody to know whether or not -- or a reasonable person should know whether or not that standard might be met when it has not been applied in any way, and despite our best efforts, when there may be overbreadth in that language, we just don't know yet.

And again, this returns me to the concerns about the potential injustice where you have two intoxicated parties, and the risk of having someone say it's not relevant that the person was voluntarily intoxicated, when they really could tell us a lot about their intentions, what was going on.
The -- the response to my concerns here inevitably from prosecutors is always these are really hard cases to prove, right? This is always the answer. And I am not unsympathetic to that. I understand that concern. But I think we need to remember that things get proven in court not just based on direct evidence, but that prosecutors also have at their disposal circumstantial evidence, that Panel Members understand how things work in the world, and take those things into consideration.

And for that reason, I don't see a risk of wrongful acquittals flowing from making it more explicit in the Statute what we are expecting of people.

The last issue that I have spoken to in my comments has to do with Issue 11 concerning whether or not indecent acts should be returned to the UCMJ as an enumerated offense. The Subcommittee has recommended that it not go into 120 as an enumerated offense, and we have been alerted to the Department of Defense proposal to
add a provision to Article 134.

I have not reached a final opinion on this. I feel like maybe perhaps as a civilian, I am not as well-versed on this topic as I would like to be to render a formal opinion.

But I just did want to flag a few of the concerns I have, or things that I would want to investigate more fully before I reached a position in support of Article 134.

One of those is to be certain that anything that is described and drafted is to cover behavior we intend to cover, and that it be as narrow as would be appropriate. There are things that historically, the military has punished under indecent acts provisions that are normative sexual behavior, that is, sexual activity in the presence of a third person.

Again, it may not be something anybody is looking to advertise or promote, but it is not considered deviant behavior. It is not considered criminal in a civilian context. It is not the kinds of thing most states would put
somebody on a sex offender registry for engaging in. And I am just concerned about kind of the universe of what could be captured in an overly broadly defined offense, or the amount of unchecked discretion that could be given to prosecutors in that context.

I have that concern particularly I think in this era where there is such ready access to recording devices, to images. My state has had a lot of recent national attention around sexting by teenagers who are using their cell phones to take and exchange consensual nude images, and they have been subject to the risk of prosecution under my state's child pornography laws.

I am not saying this is an equivalent thing, but I think it's those same kind of technologies and habits that are new that we are still all kind of coming to terms with as a society in terms of our expectations, and I just worry that things that are being done in the broader society and may be considered normal
among young Servicemembers not land them into a bad situation criminally that is just sort of out of their ignorance, inexperience, or lack of forethought to the possible consequences of this behavior.

The other concern I have has to do with the fact that we heard from prosecutors about how they have been able to address some kind of inappropriate behavior through some of the other Articles, through some of the other mechanisms available at their disposal, and, you know, I am very concerned that we not generate new crimes where there are already adequate tools to address the need.

And my final concern kind of brings me back to where I started, which is the reality that if you call something indecent, and that's the name of the crime, I believe there is a very real risk that even if the military does not trigger any kind of sex offender registration consequences, that someone may enter a civilian jurisdiction, law enforcement or the courts may
just see that terminology, assume it is more
traditional sexual misconduct, and then
inappropriately trigger registration requirements
for the person.

In my state, they don't care if the
sending jurisdiction treated it as a registerable
offense or not. They do their own analysis, and
I understand that to be the case in many other
jurisdictions.

So I just kind of wanted to put those
issues on the table. One other final thing I
just wanted to make a comment on because it arose
in this morning's presentation had to do with the
Subcommittee's recommendation to create that
Subsection(1)(E), and as Dean Anderson accurately
relayed, I have said I am not sure we necessarily
need that because I think it is prosecutable
under what's currently the bodily harm section,
or what the Subcommittee has recommended be
called a non-consent section.

And we actually did hear from
prosecutors who described how they have been able
to prosecute some of those situations under (b)(1)(B), and the reason they can do so, and the reason I believe they will continue to be able to do so and could do so whether there was a (1)(E) or not, is that the definition of consent, even as it currently exists, requires an agreement that is freely given, and that is simply not the case if there is a power differential or a coercive scenario, and again, because we have heard from prosecutors who have said they have successfully prosecuted in the situations that have really, you know, concerned them, that it does appear to be an abuse of power kind of situation.

So I just wanted to lay that out to share, I think that's another reason why some of these questions around for example strict liability, they are not without remedy where there is evidence supporting an Article 120-type remedy.

CHAIR HOLTZMAN: Mr. Taylor?

MR. TAYLOR: Yes, well thank you very
much for not only your service on the
Subcommittee, but your previous testimony here
before the JPP.

I was curious to know whether your
draft definition of consent to which you referred
earlier includes any factors that would not
otherwise be included within the totality of the
circumstances.

Because I note that on page 77, you
start listing the different factors, and I was
trying to decide if there were any there that
would not fit within totality of the
circumstances. Or did you just intend this to be
a more robust listing of the kinds of factors
that would go into circumstances? If you could
help me out with that, please.

MS. KEPROS: Thank you, Mr. Taylor.

I actually intended to try to capture
all of the concepts that were in the existing
Statute because my concern was those had been
listed for some specific reason, that there were
people who felt these should be highlighted so
that the fact-finder understands the kinds of things that might be bearing in their decision, or more explicitly, that people not be resorting to applying inappropriate weight to certain considerations, such as there was not resistance, therefore it was consensual, which is obviously not the case and not something that we would want the law to say.

So I think the concept of totality of the circumstances is probably better, to be honest. That is my personal opinion because I think it has got the kind of breadth that real life presents us with. But my reason for including it was more out of deference to some of the prior thinking on the issue.

I think an alternate way to go could be to try to describe the framework as totality of the circumstance, and then to provide examples, or to do so perhaps in a jury instruction. You know, I think there are other ways that we could try to get at that concept.

MR. TAYLOR: Well that was sort of
what I was thinking because it seems to me that there is always a danger from a viewpoint of legislative or regulatory drafting that if you have a list that doesn't have some sort of flexibility, like any other similar circumstance, then you always run the risk that someone will say oh, you can't mention that one because it wasn't on the list. So would you agree with that?

MS. KEPROS: I totally agree with that. That is a concern that I share, and I have no doubt that for all the thought that has gone into identifying these circumstances, there is always something else that is going to happen that we haven't thought of.

MR. TAYLOR: And Madam Chair, I have a question that I would like to direct to the larger group here, but if you would like to first focus on her testimony, that would be fine, or however you would like to proceed.

CHAIR HOLTZMAN: Why don't you just ask the question?
MR. TAYLOR: Well thank you.

I was very intrigued by your argument regarding "should have known," and how you thought that was constitutionally at least not desirable, if not a problem.

And I just wanted to ask any Member of the Subcommittee who I guess didn't see this as a problem how you would answer that argument. Yes, Dean Anderson?

DEAN ANDERSON: So on the more global mens rea issues and Subsection (B)(2) and (3), which Ms. Kepros talks about, I want to just note that we were not asked explicitly by the JPP to answer or to address those particular issues, although it came up at times in our dialogue, the question.

We did not receive direct testimony on it. We did not engage in specific deliberations on those two sub-provisions and on whether or not that was the appropriate mens rea because it wasn't directed at us explicitly by the JPP.

We were asked to deliberate on the
definition of consent and whether or not that was appropriate, and made some changes to that which raised -- and also on the question of mistake of fact as to consent -- and so we made explicit deliberations and heard testimony on that.

But I just want to point out that we did not -- were not asked specifically to address those issues.

MR. TAYLOR: That being the case, does anyone have an opinion that they would like to offer?

MS. WINE-BANKS: I think some of our discussion focused on what evidence would it take to prove reasonably should have known, and what evidence would it take to prove actual knowledge, and the difficulty of proving the actual knowledge, whereas the circumstantial evidence, the surrounding circumstances, whereby any person observing the conduct and condition of the victim would definitely reach the conclusion.

And so that in some ways, we concluded that actual knowledge was almost imputed by the
strong enough proof of reasonably should have
known, and that that would meet constitutional
standards.

PROF. SCHULHOFER: And as it states in
our report, two Members of the -- of our
Subcommittee dissented from the acceptance of the
reasonably should have known standard. One was
Ms. Kepros, and I was the other one.

So I might say a word about that.

First of all, I think Dean Anderson is absolutely
right that the thrust of the question presented
to us from your Panel was should the accused's
knowledge of a victim's capacity to consent be a
required element?

The focus was on whether that --
whether the standard of mens rea should be made
more -- less restrictive than it already is, and
we all agreed that it should not be reduced from
what it already is.

I think it was Ms. Kepros and I who
raised the question that, although we were clear
that mens rea should not be diluted, nonetheless,
implicit in this question is whether the
reasonably should have known standard was already
too permissive.

And the -- in that respect, I am very
glad that Ms. Kepros presented a forceful and
comprehensive statement of what this issue is
because this is really -- the notion of punishing
somebody for negligence in the context of a
serious crime is virtually unknown in American
criminal law, and this is a situation where
you're talking about particularly severe
penalties, a maximum of 30 years imprisonment
under Subsection (B), and sex offender
registration, which has, even if the person
benefits from a shorter sentence, as you've
already heard, literally catastrophic
consequences.

And I don't think any of us on our
Panel would disagree that the consequences of
registration are literally life-destroying.

So in that context, why would you be
imposing punishment on someone when the panel
members, the court-martial panel members, are not able to conclude that the person was subjectively culpable? That is a situation, as I said, that with rare exceptions is unknown in our criminal law.

One of the arguments we heard in support of the position was that the victim is just as abused whether the person realized it or not, and that is true in every case where you have a victim of harmful conduct.

Even in the law of homicide, even when the victim is dead, we do not impose criminal punishment for ordinary negligence. In a homicide prosecution, you have to prove either recklessness, or at a minimum, gross negligence, and that's not for murder.

You can't -- this is the equivalent of convicting somebody for murder, and for murder, you have to be able to prove knowledge. It is true, as Ms. Wine-Banks said, often the evidence is sufficient to infer knowledge, and that is fine, I don't think -- I don't disagree with
that, I don't think Ms. Kepros has any problem
with that.

The problem that arises is when the
evidence does not permit the jury to infer actual
knowledge. It's not strong enough. There are
reasons, be it mutual intoxication or something
else, there are reasons why the members are not
comfortable saying that that person knew. All
they can say is he was negligent.

And that is, even as I mentioned, even
in homicide, if somebody is convicted of
involuntary manslaughter, that requires gross
negligence, and the punishment is a lot less than
this. It's not punishment for murder. That
might be a four-year maximum, or a six-year
maximum, with no registration.

So this is why the Supreme Court has
recently issued opinion after opinion, not only
*Elonis*, but many others, not suggesting that this
is unconstitutional, but suggesting that it is
highly undesirable and should never be inferred,
if there is any other way to work around it.
The Supreme Court has said it.

Senator Hatch has been strongly supporting this mens rea reform act in Congress to create a strong presumption against it.

So Congress can do it if it wishes, in its wisdom. Your Panel can recommend it if you wish to do so in your wisdom. My concerns are two things: one has already been stressed very eloquently by Laurie Kepros, and that is the unfairness to the defendant. I think we should not lose sight of that.

I think the impetus for the enterprise that all of us have been engaged in is the concern that victims are not adequately protected. That is what started this. That is why -- I believe that is your reason for existence.

All of us on the Panel, I think, have worked in this area precisely because we come to it with that concern. But obviously, it can't be the only thing to think about. It has to be constrained by some sense of balance and
fairness.

The other part of it that I -- I think a distinct concern has to do with the legitimacy of our system. And if -- if you endorse a system where -- where it starts to become routine, it may not have been routine in the past because there was a great deal more prosecutorial discretion, there was greater willingness on the part of commanding officers to say I am not going to authorize, I am not going to convene a general court-martial, that, as you know, that world is changing now.

We're in a -- in a world where if the -- if the facts can support a charge, there is going to be much greater likelihood that it be brought.

And I really worry about impeding the legitimacy of our system if we start to get into a world where Servicemembers are routinely exposed to the possibility of -- of very, very severe punishment and sex offender registration for common, immature, excessively intoxicated
behavior that 18-year-olds are going to be doing, you know, regardless.

It's not good for the military's esteem in our society. I think it is not ultimately good for recruiting. I am not saying you won't get recruits, but it's not good, and my concern, I know it's not shared by many victim advocates, but my concern from a purely victims' point of view is that if you really want to stop sexual assault, it has to be a very clear message that the behavior we're punishing is absolutely unacceptable, intolerable behavior.

And you can't communicate that message if you get into a world where you're routinely exposing people to criminal punishment for what amounts to carelessness that they should have known.

So I don't see that there is any case anybody would be legitimately concerned about where court-martial members can't be convinced from the evidence that he -- that they can infer that he or she, as the case may be, that he not
only was negligent, but that he must have -- he
himself must have been aware of the risk.

That is all that would -- would be
required under this revision, and the cases that
can't meet that standard, in my judgment, I think
it's bad not only for fairness, I think it's very
ultimately -- these pendulums swing back and
forth in terms of what our society is concerned
about, and the impetus for your Panel has come
from very justified awareness about the
ineffectiveness of victim protection, but we're
already seeing a backlash in the press about
overreaction and campuses going haywire and so
on. We haven't heard that yet, but if we want to
avoid that kind of going to the opposite extreme,
I think we have to be very clearly grounded.

And for that reason, I very much
support this idea that I think negligence does
not have a place in any criminal offense of this
severity.

MR. TAYLOR: Dean Anderson?

DEAN ANDERSON: So I want to put these
comments in context a little bit. I have the utmost respect for Ms. Kepros and Professor Schulhofer, and I want to emphasize first that again, we did not hear testimony on this question, specifically on the question of reasonableness and negligence as a standard, number one.

Number two, I want to underscore that the Statute itself in general is not a negligence statute. On the contrary, it has two provisions, as far as I am reading it right now, that identify negligence as the standard. Those provisions are (B)(2) and (B)(3), the sexual assault provisions.

These are provisions that deal with particularly vulnerable victims. (B)(2) is about victims who are asleep, unconscious, or otherwise unaware that a sexual act is happening. (B)(3) -- in other words a highly vulnerable victim -- (B)(3) is about someone who is impaired due to intoxicants. That's (a). Or (b), a mental disease or defect or physical disability.
Now, standard rules of statutory construction would suggest that the rest of the Statute is not a negligence statute because it is silent on the question of mental state, and if that is true, the general principles of criminal law absolutely are going to require recklessness or worse -- in other words, recklessness or a more serious mental state.

These two provisions, though, are about specific vulnerable victims who are being approached at a time when their vulnerability means that they are incapable of consent. In other words, they are not just vulnerable victims generally or people who are vulnerable, but it is their vulnerability the Statute requires that makes them incapable of consent, makes them meet the statutory definition of incapable of consent.

So it seems to me that the original drafters of this provision who identified the mental state as negligence, were attempting to protect particularly vulnerable victims.

Additionally, they would -- as we all
know, alcohol is a factor in these cases.

Willful blindness of the facts around consent is a factor in these cases. And we have a challenging difficulty of proving beyond a reasonable doubt.

It's an appropriate challenge. It's an appropriate difficulty. But the challenge is to prove beyond a reasonable doubt the mental state of the defendant, and in these cases of particularly vulnerable victims, the statutory drafters made a decision to make these cases also include circumstances in which a reasonable person would have known that this victim was incapable of consent because they were asleep, because they were unconscious, because they were so intoxicated that they were incapable of consent, or because they had a mental disease or a defect that made them incapable of consent.

Now, I -- I want to stress that I am generating this -- this argument out of whole cloth because we did not have testimony on it, and although I think it's an important issue, I
think it's an important theoretical issue about the scope of criminal liability, for the Panel to at this point take our testimony and make conclusions about where the Statute should go on this matter I would suggest respectfully would be beyond the scope of what we were tasked to do.

DEAN SCHENCK: I would like to add to that --

MR. TAYLOR: Please.

DEAN SCHENCK: -- Dean Anderson's comment as well.

From a practitioner perspective, many of these cases in the military are of a he said/she said scenario, and the unit, everyone in the unit is drinking, so the witnesses are intoxicated, the parties are intoxicated. But these vulnerable victims pretty much cannot remember, and so the proof requirement, if you took out the reasonably should have known, the accused merely would just have to take the stand and say I didn't know, and there would be an acquittal.
So that is the practitioner in me speaking. I of course understand the constitutional concerns, and also echo Dean Anderson and the other Panel Members that it would be something we could look at, it's just that we didn't, we didn't look at it, we didn't look at that constitutional issue.

MR. TAYLOR: I think I've consumed enough time. Madam Chair, could I discontinue this or --

PROF. SCHULHOFER: I'm sorry, just say one thing.

Throughout this process, I have been very much aware of how much I don't know about the military justice system, and I always feel need to -- for reticence on the subject, coming to closure on any of these issues. And I have learned an enormous amount. My eyes have been opened, and enormous respect for the military justice system.

But I do know the civilian system, and the problem that Dean Schenck just mentioned is
pervasive in the criminal justice system on the civilian side, and prosecutors deal with it all the time. It's a major concern that victims don't remember and can't testify, and prosecutors have developed strategies. What they call it -- typically it's referred to as offender-centered prosecution, where they develop the evidence and they deal with this, and they are able to prove, in appropriate cases, they are perfectly able to prove either actual knowledge or willful blindness, which is equivalent in the law, and they do succeed.

MS. KEPROS: I shared, I think, this example in the course of our deliberations at one point, but it to me is just sort of quintessential in terms of things we just couldn't even have thought of when statutes were being drafted.

But to me, it's a great example of some of the danger inherent in the way the Statute is currently drafted, and again, the issue I raised earlier about losing the ability
to present voluntary intoxication evidence where
the mens rea permits this negligence standard.

And it's a case that I heard about
that ironically did involve cadets. They decided
to attend a party at a university, a public
university, and they, you know, took off for the
weekend, and rented a hotel room, and proceeded
to crash several parties at this university where
they both became heavily intoxicated. That's
pretty much not in dispute.

And as in the example that Dean
Schenck described, the victim had no idea what
happened other than she wakes up the next morning
and feels that someone has had sex with her and
is very concerned about it.

The other cadet who was with her was
a male. They had a history of a romantic
relationship, but they were not dating at that
time, and they had actually gotten a hotel room
together as part of this adventure.

He is concerned about her, takes her
to the hospital to have a rape kit done. They
get DNA from the rape kit, and it turns out it is
his DNA. And he is now being prosecuted in
civilian court for sexually assaulting his
friend.

It is pretty clear that neither of
them know what on earth happened because they
were probably both so seriously impaired, and
it's a very difficult situation because my
understanding through people affiliated with the
case is that this victim does not want her friend
being prosecuted for this, but feels tremendous
institutional pressure to not recant an
allegation or in any way step away from the
process.

It has just become an impossible
situation for both of them. I don't think in any
sense that case is a typical case. I don't in
any sense believe that. But I do think it is a
very clean kind of extreme example of where there
can be inequities if we don't allow this kind of
evidence of voluntary intoxication to be brought
to bear, and that is only going to be permitted
under the current Rules if it is a case where
actual knowledge of the perpetrator is required.

CHAIR HOLTZMAN: Judge Jones?

JUDGE JONES: So in other words, in
that situation -- well, what's the -- take me
back to your scenario for a minute.

Certainly, he could prove he was -- he
was intoxicated in your case, correct?

MS. KEPROS: My understanding is there
are numerous witnesses that will say both of them
were seriously intoxicated.

JUDGE JONES: Right, and that would
negate mens rea in terms of knew, right,
knowledge?

MS. KEPROS: It would be relevant
under the Military Rules, and again, this is
civilian prosecution --

JUDGE JONES: Right, no, that I
realize, yes.

MS. KEPROS: It would be relevant
under the Military Rules to whether or not he
knew, but it would not be relevant as to whether
JUDGE JONES: It wouldn't save him from --

MS. KEPROS: -- or not he should have known.

JUDGE JONES: -- reasonably should have known?

MS. KEPROS: Right, and so the problem becomes whether or not that evidence is something the fact-finder is going to be instructed they are allowed to consider. And that is really troubling to me under that factual scenario.

JUDGE JONES: Well you know, it is interesting. I never did sexual assault cases, but so in other words, it would not -- if it's a reasonably should have known standard, that would negate proof of his voluntary intoxication. That is what you're saying?

MS. KEPROS: I am saying the way the Military Rule is drafted --

JUDGE JONES: Because of the Military Rule?
MS. KEPROS: Right, it is only relevant in cases --

JUDGE JONES: But if that Rule did not exist, you could charge this with either knowledge or reasonably should have known, and you could -- he could defend himself by saying I -- I was drunk, and a jury could either decide he didn't know or that it was unreasonable to figure out he knew -- for him to have known because he was so intoxicated. Or is this just crazy, what I have just said?

MS. KEPROS: I guess I just have a hard time --

JUDGE JONES: I am trying to decide if it's 916 --

PROF. SCHULHOFER: Judge --

JUDGE JONES: -- (L)2 that's the problem, or --

PROF. SCHULHOFER: Excuse me, but I think, Judge, it's not the Military Rule 916 or whatever it is. Under any system of law, you cannot negate negligence by showing that you were
drunk because drunk people are not reasonable by
the law's definition.

So if it's a reasonably should have
known standard, it's -- the question is what
would a sober person have realized? And evidence
that he was drunk is not even admissible. It
probably would come in, but technically it's not
relevant --

JUDGE JONES: Unless you have a --
unless you have a knowledge-- --

PROF. SCHULHOFER: Yes, right.

JUDGE JONES: -- only standard.

PROF. SCHULHOFER: But if it's a
negligence standard, evidence of intoxication by
the defendant would not be relevant, and it would
not even be admissible. If it somehow got in,
the judge would very forcefully instruct the jury
to disregard it.

DEAN SCHENCK: This is just me again
speaking without having said this, but I'm not
sure that this would be considered to be the mens
rea element of this offense. I really -- and as
far as voluntary intoxication goes, the Rule
you're citing in the Military Rules, that is when
we're talking about a specific-intent offense
under the military justice system.

A specific-intent offense goes to the
-- to the mens rea element of the elements in the
UCMJ, so the -- the coded Articles, the punitive
Articles, they're all in sync. This Article 120
is different, I believe, than the other elements
of proof in the other UCMJ Articles, and I don't
think we should sit here and try to speak to
these things regarding what evidence would be
admissible because I don't believe that Rule that
you're citing to would be -- a judge would -- I
believe judges would still allow the evidence to
come in because it's not the mens rea element.

But it's something they haven't looked
at, and so I really don't think we should sit
here and go back and forth in this academic
almost discussion on this just because the
military justice system is very specific when
you're talking about that -- that Rule you're
citing to and the evidence that can come in.

And the Military Rules of Evidence specifically, although we've taken out the constitutionally required language in the Military Rules of Evidence, certain others and case law I think might -- would -- might allow or cause some judges to allow that evidence to come in. You see what I mean? Just because of the way the punitive Articles are and the case law that we have.

And there may be other language that you could put in place of that. We didn't -- you know, we just didn't look at what the other states have. There might be other language that would be --

JUDGE JONES: Well, I think the big problem here was -- because I recall thinking about this when we were still a Subcommittee, but now we're a very important Subcommittee arrayed here today -- I remember thinking, look, Congress put this standard in. The Supreme Court in Elonis didn't say you couldn't -- Congress
couldn't do that. In fact, it specifically said that there was only a problem when Congress didn't put something in, and then, you know, there could be some discussion and debate.

And so I guess I am not sure I even fully appreciated that we weren't in a situation where we would have to respond to this question, but at the time, it seemed to me that -- that this was not an issue where we should delve into it, since we already had congressional intent with respect to this military Statute.

I -- we also got into academic conversations while we were there, very good ones.

PROF. SCHULHOFER: Judge, yes --

JUDGE JONES: And --

PROF. SCHULHOFER: -- I meant that in a complimentary way.

(Laughter.)

JUDGE JONES: I did, and no, I am -- and I mean it back in a --

PROF. SCHULHOFER: Thank you.
JUDGE JONES: -- complimentary way.
And -- but I don't think we ever fully got to the
-- to the end of this, or had enough discussion
about it, to be perfectly honest, to -- to
decide. We weren't focused on it. When we did
become focused on it, it was of some concern, and
then, you know, my own view was we know what
Congress intended, we weren't really asked to
look at this particular thing, but I think it is
a cause of concern. I don't disagree at all.
Just a question of whether we're going to try to
stop now and look at this.

Also, I was -- what did turn my head
this morning, or I guess it was yesterday, when I
was looking at some more of the information that
came in, was something I was unaware of, which
was what the Congress is doing now in terms of
mens rea, although with respect to the civilian
statutes.

And of course, I think, as has been
said by a number of you, we did approach this,
many of us approached this from the standpoint of
doing less as opposed to more in the Statute for any number of reasons, unintended consequences, what have you.

So I guess really the only question at this point is do we look at this now as a freestanding issue and try to -- try to continue on, or do we -- and that's probably a question that involves this Panel --

MS. WINE-BANKS: The question is, does your schedule -- would it possibly allow us to have time to look at whether willful disregard, which is sort of how I read the reasonably should have known, if we substituted those words, or if we just have to go with the congressional intent of using the reasonably should have known, and a standard of proof that I think amounts to inferred actual knowledge.

But if your schedule would allow us the time to have another discussion of this, either by conference call or in an actual meeting, that might be --

JUDGE JONES: Yes, I would just defer
to the Panel because the Panel is our -- gives us our mandates, so --

CHAIR HOLTZMAN: Well, there is also maybe a legal question. Kyle, what is the -- what is the status of this Subcommittee now that it has issued its report? This -- can we refer --

JUDGE JONES: That was the kiss of death with the RSP.

(Laughter.)

JUDGE JONES: Once we issued that report.

CHAIR HOLTZMAN: Are we allowed to refer a question back to them for further analysis, or are they finished?

COL GREEN: No, yes ma'am. The charter of the Subcommittee is at the discretion of the Panel, and the Chair has the ability to refer ongoing issues to the Subcommittee, whether those involve Article 120 or whether the Chair would wish to even expand that beyond Article 120, not asking the Subcommittee's opinion on
that.

CHAIR HOLTZMAN: Okay. So we theoretically could do that?

COL GREEN: Yes ma'am.

CHAIR HOLTZMAN: As a legal matter. Is that something that Members of this Panel would want to have happen?

MR. TAYLOR: I think that would be very helpful.

CHAIR HOLTZMAN: I'd ask the Members of the Subcommittee how you feel about it, but --

JUDGE JONES: They look pretty eager to me.

(Laughter.)

VADM TRACEY: I'd ask --

CHAIR HOLTZMAN: Well maybe -- sorry.

VADM TRACEY: -- whether there were any other issues that were raised by Ms. Kepros that the Panel felt were outside their scope, and they didn't -- I don't know how to ask that question. I think that's what the question is.

PROF. SCHULHOFER: Yes, thank you,
Admiral. I would comment on one further thing. I apologize for commenting at length on so many points, but this really is a direct follow-on to Representative Holtzman's question about things that might bounce back because I am speaking of Issue 11, which is whether indecent acts should be added as an enumerated offense.

We learned very, very late in our deliberations that a proposal had already been published in the Federal Register. We were very troubled by it but did not have time to really delve into it in detail.

My personal view was that we should either come out against it or do what time really constrained us to do, which is to say that we could not offer an opinion.

We decided on the latter course, so one question -- of all the 17 questions that you put to us, the only -- there is one that we simply refused to answer, and that was number 11.

So with apologies, and I -- I know you won't take it as a sign of disrespect, we refused
to answer question number 11, but for the reasons
that Ms. Kepros said, all of us were extremely
troubled by the idea that there could be -- we
did agree it shouldn't be an Article 120.
Nonetheless, the question was whether it should
be added to the UCMJ as an enumerated offense.
It's not limited to 120.

And I think our concern was that as an
enumerated offense, either DoD itself or the
states would treat it as -- as triggering sex
offender registration, and we had some very
helpful Staff work from Kirt Marsh, but we were
unable to see any situation where consenting --
where sexual conduct by consenting adults in
private should be an appropriate subject for
criminal punishment under the UCMJ.

So if anything is to be referred back
to us, I think that might be one where -- where
some more thinking would -- would be helpful.

MS. WINE-BANKS: And there is one
question in Issue 2. We didn't actually pose
specific language. We just said we think that
there should be clarification, but we didn't propose clarifying language, and maybe with more time, we could add a specific language to be included in the Manual for Courts-Martial that would take care of that issue.

DEAN SCHENCK: I just want to point out that in order to get to where we would want -- need to be with the indecent acts provision, I think I would recommend that the Staff provide testimony on this, for the individuals who don't have military history, military background, just because it is a very military-specific crime, and what comes to the -- you know, what gets tried under 134 requires some impact, either credibility -- brings discredit on the Service, or it disrupts the unit, so there is a specific element of proof in 134.

JUDGE JONES: I guess I would not -- I agree that we got tremendously helpful information from the Staff all along on this one issue, and none of us could fully grasp it or make a decision.
I take that back. I think you know where you stand, Dean Schenck. No, and I mean that most respectfully because you've got the knowledge.

PROF. SCHULHOFER: If I could just add, Judge, just in five words.

The problem for many of us is that the military -- military history on this is very fraught, and --

JUDGE JONES: Well, here's my suggestion.

PROF. SCHULHOFER: -- it's a very problematic guide to what it ought to be after Lawrence v. Texas.

JUDGE JONES: Here is my thought on this. I think it would still take us a very long time to come to a substantive conclusion with respect to indecent act.

I think there is value, and I am -- I am offering this to the Chair of this Committee, to getting out the report in February, which I think was the -- the idea here.
I don't know that -- the other consideration with 11, indecent act, is I think we also sort of thought the horse may have left the barn since the executive order is probably going to go through before we would have made a decision. I have no problem whatsoever if -- if the JPP as a whole, the Panel here, wanted us to take a look at this, but I don't know that we would finish it in time.

I don't think that means we shouldn't look at it, but that would be fine if that is the mandate.

The other issue with respect to reasonably should have known, or should know, I -- I do think that is something that I would not mind considering at all, but again, I would not -- I don't believe I would -- well, I guess we can't. That is so related to the Statute that I don't know that -- well, perhaps we could get that decided in time.

But my concern is things tend to take on a life of their own, and we talked for a very
long time about this. I have my own concerns from some recent information and more thought about reasonably should have known.

But I'd really like to be able to do it so that we could still have a final recommendation and not slow the JPP itself down from making its recommendations in February, so I mean, we can -- if we can all accommodate our schedules, we are willing to do that, Madam Chair, it's my sense from looking at all the Subcommittee Members.

Was there a third one? Oh, language for 2. You know, I am perfectly happy with the way 2 is now. I don't -- I suppose if we could get to it in time, and we all had -- there was a groundswell of support to do more on that, we could also submit it.

And I think those are the three issues that have been raised, so really, the question is up to the -- this Panel.

CHAIR HOLTZMAN: Any -- well, I think that, I mean, my own personal view is that it
would be -- since people here seem to be willing, both the Chair and the Members of the Subcommittee, seem to be willing to pursue this further, and we have very focused issues, I don't see why we couldn't pursue two tracks at the same time, which is to put out the report that we were going -- I don't mean put out the report, but provide public notice of what we're planning to do, get public comment, and still at the same time have the Subcommittee go forward on these three points and be focused on getting a result for February.

So we would have the added benefit of some other -- possible benefit of some other opinions on that, but I am very flexible about how to proceed here. It just depends on --

JUDGE JONES: Yes, I suppose if you -- if the intent is and will be for the Panel to get public comment on this Committee's -- Subcommittee's proposals, it could go out as is, but it would have to -- I mean, for real benefit, we might have to signal the reasonably should
Chair Holtzman: We could.

Judge Jones: That's all.

Chair Holtzman: We could.

Judge Jones: And then I think that

would work, and in the interim, we might come

back with a different proposal in that area, or

not.

Chair Holtzman: And maybe even on the

issue of the --

Judge Jones: Indecent act?

Chair Holtzman: We could flag those

two for special attention because of the

Committee still taking a look at those.

VADM Tracey: Would the dissenting

opinion be included in what went out for public

comment?

Judge Jones: Oh, I think so, yes,

absolutely, with Ms. Kepros's picture.

(Laughter.)

Ms. Kepros: Do I get to pick the

picture?
(Laughter.)

JUDGE JONES: Yes, no, that was always the intent, that we would send it out with the main --

CHAIR HOLTZMAN: So that sounds like a --

JUDGE JONES: -- report.

CHAIR HOLTZMAN: -- that sounds like a plan.

JUDGE JONES: And when -- and I don't -- so I think we should -- we should do -- go forward on those two issues, and we can -- where is Colonel Hines? Oh, there you are. You're going to organize us for -- I think there's -- we need testimony on indecent act.

LTCOL HINES: Yes ma'am.

JUDGE JONES: And I know we have had some, but we need more, or maybe a primer, another one.

And we should -- we should have a conversation soon, and I would welcome suggestions from any and all of you, but probably
Professor Schulhofer, Ms. Kepros, perhaps Dean Anderson, on this reasonably should have known issue, and I -- I am very interested in what Congress is doing even though it's the civilian system, so Glen, maybe any information you can get surrounding that would be helpful that you could send to the entire Subcommittee.

LTCOL HINES: Yes ma'am.

CHAIR HOLTZMAN: So I think that that is what we will agree to do. But before we conclude, do you have, Judge Jones, any further questions that you want to ask?

JUDGE JONES: No, I don't.

CHAIR HOLTZMAN: So yes, I will -- the only point I want to make is I just want to say thank you to the Members of the Subcommittee, really, for doing an extraordinary job on a very, very difficult Statute. I think I have said many times that this Statute was really not the most elegantly crafted, brilliantly crafted Statute that I've ever seen, in fact, probably quite the contrary.
So I think looking at it as you have,
with trying to do the least -- the least damage
to the text, and with being as conservative as
possible about changes, I think that's a very --
you produced an amazing result.

On the other hand, I am very
sympathetic to what Ms. Kepros has done by
saying, you know, in the end, the Statute is
really one that deserves wholesale reform, and so
I am very glad she -- she presented this. Maybe
at some point, maybe we won't have the chance,
undoubtedly won't have the chance to -- to
comment on that, but I hope at some point that
some people start looking seriously at the whole
Statute and saying maybe this needs to be
completely reworked.

But I do think that the changes that
the Subcommittee has recommended are very
carefully thought through, without doing -- doing
minimum damage to the -- to the Statute, creating
some clarity and some really positive results, so
I just want to say thank you very much.
And so we'll -- we can conclude now?

COL GREEN: Ma'am, we have one public comment --

CHAIR HOLTZMAN: Okay.

COL GREEN: -- request, and so maybe if we took a few minutes --

CHAIR HOLTZMAN: Okay, so we'll take a --

COL GREEN: -- just for a quick break, and come back for that.

CHAIR HOLTZMAN: -- ten-minute break, and then public comment.

(whereupon, the meeting went off the record at 2:28 p.m. and resumed at 2:45 p.m.)

CHAIR HOLTZMAN: Before we hear from the person during the public comment session, I just want to point out that it is the intention of JPP to circulate the report of the Subcommittee for widespread public comment given the fact that we're going to be suggesting changes in the Statute, and so that's to be expected.
How, where, and when -- when this will happen, we'll leave it to the Staff and further deliberations, but we certainly expect that to happen, and I would hope also that we could manage to provide briefings for the most interested members of the military and Congress on the proposals that will be coming out of the JPP and the Subcommittee.

Okay, thank you very much. Our next -- next on our Agenda is Public Comment. Our -- we're going to be hearing from Christopher Perry, is that correct?

MR. BARTLETT: My name is E. Edward Bartlett.

CHAIR HOLTZMAN: Okay, E. Edward Bartlett, I am sorry.

MR. BARTLETT: With Center for Prosecutor Integrity.

CHAIR HOLTZMAN: Yes, Center for Prosecutor Integrity.

Mr. Bartlett, we have five minutes allocated for your testimony, presentation here.
Welcome, and you may begin.

MR. BARTLETT: Thank you so much.

Thank you for welcoming the public comments, and thanks in particular to the Staff of your Committee.

So the American system of legal justice is characterized by fundamental precepts that distinguish our system from approaches utilized in totalitarian societies. These principles include rule of law, separation of powers, and the presumption of innocence.

The presumption of innocence is implicit in the 5th, 6th, and 14th Amendments to the Constitution and has been explicitly affirmed by the U.S. Supreme Court in two different cases.

Unfortunately, the presumption of innocence has come under siege in recent decades in our country. Countless laws have been passed, have been enacted, that have enabled a growing number of prosecutions, convictions, and incarcerations. Now, sadly, the United States leads the rest of the world in terms of the
number and the percentage of our population
currently behind bars.

In counteraction to that -- that
decades-old trend, in the past 10 years, there
has been a new social movement often termed the
Innocence Movement. This movement has emerged to
counter the pernicious effects of over-
criminalization and overly aggressive
prosecutorial activities.

For example, earlier this fall, the
bipartisan Smarter Sentencing Act was introduced
in both the Senate and the House. We heard
testimony earlier this afternoon about the
revival of congressional interest and concern
about mens rea issues.

This is all part of this growing
trend, not only in Congress, but in our -- in our
society at large. So it's no surprise that our
concerns about the loss, or at least the erosion,
of the presumption of innocence has met with
largely a sympathetic response from staff members
of both the SASC and the HASC.
So in the military context, there is no doubt that some of the initiatives that have been instituted designed to address military sexual assault have been beneficial. That said, there is growing concern that essential due process protections have been eroded, and far too often, the presumption of innocence lost.

From 2012 to 2015, the NDAA included 85 new provisions designed to address sexual assault in the military. These provisions have had the general effect of increasing the number of prosecutions, and, yes, convictions.

For some of these examples of these new provisions, complainants are afforded a series of quote "victims' rights" throughout the adjudication process.

Number two, the focus of Article 32 assessments has been narrowed from an investigation now to a preliminary hearing to find probable cause.

Third, interviews of the complainant must take place in the presence of trial counsel
of the victim advocate.

Fourth, command officers are expected
to refer sexual assault allegations to court-
martial at the risk of losing their command
position.

And five, complainants are represented
by Special Victims' Counsel who advocate on
behalf of the complainant and are permitted to
appeal decisions by the trial judge regarding the
admissibility of certain evidence.

Yet, it is important, and it is
remarkable, to point out that not a single one of
these 85 new provisions has served to expand,
protect, or reaffirm the cardinal principle of
the presumption of innocence.

There are some who have actually
asserted that the focus of the Judicial
Proceedings Panel should be to actually increase
the number of convictions. They've actually said
it in those words.

Having undertaken extensive research
on the extent and devastating consequences of
wrongful convictions, the Center for Prosecutor Integrity believes that logic is fundamentally flawed. Instead, the focus of the JPP should be to enhance the accuracy and efficiency of the judicial proceedings.

To this end, the Center for Prosecutor Integrity has developed a number of recommendations to enhance the presumption of innocence.

Number one, to assure the proper use of the term "victim" and "perpetrator." Number two is clear delineation of the role of the SVC. Number three, repercussions for false reports. Number four, same standards of admissibility of evidence. Number five, expertise of investigating officers. Number six, the importance of a unanimous verdict.

The JPP now stands at a legal crossroads. Will the military justice system seek to respect hundreds of years of legal precedent and work to restore the presumption of innocence, or will it go down the dangerous path
that totalitarian societies have pursued in presuming guilt of the defendant and removing fundamental due process protections?

Thank you very much for your interest and your concern to these issues.

CHAIR HOLTZMAN: Thank you very much for your testimony. Are there any Members of the Panel who wish to ask any questions?

(No audible response.)

CHAIR HOLTZMAN: Okay. Okay, hearing no requests, we again want to thank you so much for coming and appearing before us and providing us with your opinions and your expertise.

MR. BARTLETT: My pleasure.

CHAIR HOLTZMAN: And the -- Ms. Fried?

MS. FRIED: Yes, the meeting is closed.

CHAIR HOLTZMAN: Thank you very much.

Thank you, Panel Members.

(Whereupon, the meeting went off the record at 2:53 p.m.)
CERTIFICATE

This is to certify that the foregoing transcript

In the matter of: Judicial Proceedings Panel

Before: DOD

Date: 12-11-15

Place: Arlington, VA

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