UNITED STATES DEPARTMENT OF DEFENSE

JUDICIAL PROCEEDINGS PANEL

JUDICIAL PROCEEDINGS SUBCOMMITTEE

MEETING

THURSDAY
APRIL 9, 2015

The Subcommittee met in the Judicial Proceedings Panel Office, 875 North Randolph Street, Suite 150, Arlington, Virginia, at 9:30 a.m., Hon. Elizabeth Holtzman, Acting Chair, presiding.

PRESENT

Hon. Elizabeth Holtzman
Dean Michelle J. Anderson
Lisa M. Friel
Laurie R. Kepros
COL(R) Lisa M. Schenck
COL(R) Lee D. Schinasi
Prof. Stephen J. Schulhofer
BGen(R) James R. Schwenk
Jill Wine-Banks
Maj Gen(R) Margaret H. Woodward
WITNESSES

Dwight Sullivan
COL(R) Tim Grammel
Col(R) William Orr
LtCol(R) Quincy Ward
CDR(R) John Maksym

STAFF:

Lieutenant Colonel Kyle W. Green, U.S. Air Force - Staff Director
Lieutenant Colonel Kelly L. McGovern, U.S. Army - Deputy Staff Director
Maria Fried - Designated Federal Official
Lieutenant Colonel Glen R. Hines, Jr., U.S. Marine Corps - Staff Attorney
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Adjourn
P-R-O-C-E-E-D-I-N-G-S

9:30 a.m.

LT. COL. GREEN: Well now we can get
to the more meaty part of what we get to do.
Again, I'm Kyle Green. I think I got a chance to
meet almost everybody here.

And I'll introduce some of the members
of the Staff so that you know who is here to
support you. But on behalf of Kelly and I and
Dale and everybody on the Staff, thank you very
much for agreeing to do this and being part of
it.

It's been a long process, we know.
But definitely I appreciate you sticking with it
and helping us as we learn all the different
things that we have to get from you to get
started. And now that we're here, we can finally
get going.

I thought maybe before we turn it over
to Ms. Holtzman and talk about the work of the
Subcommittee, it might be helpful if we just go
around the room and everybody introduce
themselves so that you know each other and kind
of know each other's backgrounds.

Because we've gotten to know you a
little bit through the process. But you probably
don't necessarily know each other as well.

So, if we wouldn't mind, maybe Ms.
Holtzman, if you'll start and just introduce.
And we'll go from there and meet everybody.

ACTING CHAIR HOLTZMAN: Okay. Well
I'm -- my name is Liz Holtzman. I'm temporarily
sitting in as the Chair because the very esteemed
and distinguished Barbara Jones has decided to be
in London at this time.

(Laughter)

ACTING CHAIR HOLTZMAN: So I apologize
for the replacement. But you can be assured, or
at least we hope, that at the very next meeting,
you'll have the properly designated Chair.

In any case, I -- the reason I'm here
today is I'm on the -- I'm chairing the JPP
Panel, the Judicial Proceedings Panel, which
called for the creation of this Subcommittee.
I was a member of Congress for eight years. I served as District Attorney of Brooklyn, New York. I was Comptroller of New York City. And then for the past more than 20 years, I've been in private practice in New York. That's my background. Are you next?

BRIG. GENERAL SCHWENK: Go this way?

ACTING CHAIR HOLTZMAN: Sure.

BRIG. GENERAL SCHWENK: Okay. Jim Schwenk. I was a Marine for 30 years. Infantry Officer and then a Judge Advocate. And then for -- I couldn't get a real job, so for 15 years after that I worked in the DoD General Counsel's Office.

And I ran several advisory committees.

When Jim Freeman said that there weren't that many run by OGC, we took that as a good thing because we didn't want to have to run any.

But, I retired at the end of last year. And so now, I do what my wife tells me to do at home most days.

(Laughter)
PROFESSOR SCHULHOFER: Stephen Schulhofer. I teach at NYU Law School. Before that -- I've been teaching at NYU since 2001. Previously I taught at the University of Chicago and at the University of Pennsylvania.

I taught generally in the areas of criminal -- substantive criminal law and criminal procedure, Fourth Amendment. More recently, national security issues as they impact on domestic intelligence gathering in law enforcement.

I started working on sexual assault issues in the early 1990s, both in terms of trying to introduce it into the teaching curriculum, where it had not been ever considered before. And also in the substantive concern about reform.

And so since the 1990s it's been one of the principal focuses on my work.

MS. KEPROS: Good morning. My name is Laurie Rose Kepros. I am the Director of Sexual Litigation for the Colorado Office of the State
Public Defender.

That job didn't exist before I had it the last five years. I train and advise over 700 public defenders and staff for my agency across the state in their representation of clients who are accused or convicted of sex offenses.

So, I touch thousands of cases every year. Prior to that I worked as a trial lawyer for the Public Defender's Office for more than ten years in four different regional offices across my State.

So, I guess I have the kind of life experience piece and less the academic piece. Although I do also teach a seminar at the University of Denver Law School.

I serve on more than 25 committees of the Colorado Sex Offender Management Board. I'm also a professional member of the Association for the Treatment of Sexual Abusers, which is an international treatment organization.

So, I'm a civilian. I'm learning a lot. I read a lot to be here today.
(Laughter)

MS. WINE-BANKS: Good morning. I'm Jill Wine-Banks. And I started my career as a prosecutor. And then became General Counsel of the Army, which was one of my greatest jobs of all.

I was in private practice for a long time. And then I became a corporate executive doing international deals for Motorola and Maytag.

And then was head of Career and Technical Education for the Chicago Public Schools. And am a consultant now and writing a book.

LT. COL. GREEN: Ms. Woodward?

MAJ. GENERAL WOODWARD: Oh, I'm Maggie Woodward. I served in the Air Force for 32 years. Of that, about ten years were as a -- in a command position. So, I guess that's the little bit I have to bring to this.

I don't know what's more confusing for you is understanding the military side of this?
Or for me not being a lawyer and understanding all that.

(Laughter)

MAJ. GENERAL WOODWARD: I'm a dog watching TV.

(Laughter)

MAJ. GENERAL WOODWARD: But -- so, I will be all ears as we go through this. And hopefully I won't embarrass myself amongst you asking silly questions.

But -- and I was the Director of the Sexual Assault Prevention and Response Office for the Air Force for the last eight months of my career. And learned a great deal obviously about this issue and all the challenges associated with it.

As well as prior to that, I served as the Commander Directed Investigator for the Lackland incidents. And wrote that report.

That's my background.

COLONEL SCHENCK: I'm Associate Dean Lisa Schenck from GW Law School. I'm the Co-
Director of the National Security Law Program. I teach military justice.

I was the coauthor of a book, "Cases and Materials on Military Justice." Prior to arriving at GW, I was an active Army JAG. And was a prosecutor for many years.

Was on the Army Court of Criminal Appeals for six years. I was the Senior Judge on there. And finally decided to retire when the GTMO thing, my additional duties started to heat up.

And went to GW and I'm here. Happy to be here.

COLONEL SCHINASI: My name is Lee Schinasi. I'm a retired JAG Colonel. I entered the JAG Corps during Vietnam.

I served for 23 years. And as most people who were in the JAG Corps during that time, I prosecuted and defended every conceivable crime you could imagine, including sexual assaults.

So I sat in a little cell with an
accused who was charged with some form of sexual assault or not. I heard the story from their side. Certainly from the Government's side.

I represented the Government in criminal appeals for several years. And worked the intelligence business in the Pentagon for several years.

It's hard to imagine, but I've been retired from active duty for 20 years. And during that time I've been a full-time Law Professor at the University of Miami and Barry University.

And my scholarship is pretty much exclusively in evidence. And so the issues that concern this Panel have been issues for me since I was 25 years old. Which was forever ago.

(Laughter)

DEAN ANDERSON: So my name is Michelle Anderson and I want to begin by saying that I'm an Air Force brat. And so all of these acronyms feel like home to me.

(Laughter)
DEAN ANDERSON: Currently I'm Dean at the City University of New York School of Law. And my scholarly area of expertise and focus is rape law and sexual assault. I'm also on the American Law Institute with Stephen Schulhofer, focusing on trying to figure out what the Model Penal Code should say about these very important issues. And so that's part of the dialog that we've had over an extended period of time.

Although I think our dialog spans earlier -- earlier discourse. Let's see, I'm sure there are other things. I was for many years the Policy Chair of the National Alliance to End Sexual Violence. But I've also worked as a defense attorney around sexual assault issues. So I have sympathies on all sides.

And am very pleased to be here. Thank you.

MS. FRIEL: My name is Lisa Friel. I'm a former prosecutor from the Manhattan DA's
Office in New York. I went there right out of law school and I had a three-year commitment there that I thought would be forever. And I stayed 28 years.

(Laughter)

MS. FRIEL: And I spent 25 of them in the Sex Crimes Unit. 11 as the Deputy Chief. And my last decade as the Chief. I succeeded Linda Fairstein, who I'm sure Ms. Holtzman knows well, and learned much from her.

I left there in the fall of 2011. And I went to a security and consulting company and I opened a division for them to do sexual misconduct consulting and investigations.

And built a business there over the last three and a half years doing proactive, rewriting policies. Doing education and training for schools and businesses and teams and athletic leagues.

And then we did private investigations as well, using the expertise. I've gathered a group of former prosecutors that I had trained
and from other offices. And we do this kind of work.

I left there on Friday and I started at the National Football League on Monday. They have been a client of mine for the last seven months.

I was doing some work post Ray Rice, I'm sure you all recognize that name, as an outside consultant. And they decided they really needed more inside, full-time help with these issues. And so I just started working there.

I would say the other thing I bring to this is, and I think it's equally important, I have three children who are in their 20s now. Boys and girls.

And I think when you look at laws, you really have to understand the practical effect and how things really work in real life. And to see it from both sides.

And to have three kids that have gone through American colleges here with this issue, I think has really helped me think about what
should the laws say? What's fair to both sides
of this kind of thing?

So that's who I am.

LT. COL. GREEN: Well, I hope you can
see why we've been so excited to pull this
together, going around the room and the different
perspectives and expertise. And amazing
experiences that all of you bring to this.

And I know Ms. Holtzman will talk more
about the JPP's focus on this issue. And kind of
how we got to here and the plan.

I want to just explain a little bit
about the Staff just so that you understand. Let
me -- I'll pass these around. Take one and go.

The Judicial Proceedings Panel is
supported by statute by the Office of the General
Counsel for the DoD. So they are responsible for
providing staff support to the JPP and as part of
that to the Subcommittee.

The Services -- the military Services
have detailed personnel to support OGC. I was
detailed by the Air Force Judge Advocate General
over to DoD to support initially the Response Systems Panel. And then was asked to move over to the JPP afterwards.

Kelly McGovern was the same way. She was detailed by the Army. And then was asked to stay over and work as well for the JPP.

Glen Hines is detailed by the Marine Corps. He's an activated reservist. And so, we are the three military people who have been detailed by the Services to DoD OGC.

The rest of our Staff are civilians that we've hired. And so they work directly for OGC in support of the JPP and its work.

So we have a 15-person staff to support JPP activities. That includes some people who help us with publications and reports. But primarily, it's the legal expertise and the investigatory expertise you can see and the different issues that the Staff is primarily responsible for.

In addition to that, I know you've all worked with Roger Capretta on getting orders and
your travel and those types of things. And so
Roger and Dale -- Dale is our Chief of Staff and
Roger is our Chief Administrator, who are going
to be our primary points of contact to help you
with those travel details and vouchers and orders
and all those kinds of headaches to get you to
wherever we need to make sure you have the
opportunity to go.

Your primary points of contact

obviously as you're going through the process are
going to be Lieutenant Colonel Hines and then
Sharon Zahn. And they're really the team that we
designated within our Staff to focus on
Subcommittee support.

So, they'll continue to work on Panel
activities. But they will primarily be
overseeing things for the Subcommittee. And so
as we kind of get this up to speed.

We did three subcommittees with the
Response Systems Panel. So we've kind of done
this process before in terms of supporting it.
And so most of us are fairly familiar with the
needs of the Subcommittee and supporting it.

   But again, we're here to serve you.

And so we will try to help you. And it's our
goal to get you materials and to try to help put
all the materials and prepare you as much as
possible.

   But again, we are at your service. So
if what we give you is not right, if what -- if
you want something else, if you think we need to
go in a different direction, then obviously
please let us know. And through Judge Jones and
her direction and through what we hear from you,
we're here to serve.

   So, it's an exciting opportunity for
us. And we look forward to getting to work with
all of you throughout this process.

   Any questions about the staff or any
support? Please, any time you have questions or
anything, obviously Glen and Sharon are always
here. And Kelly and I and Dale as well anytime
you need to talk to us.

   Ms. Holtzman, do you have any topics?
ACTING CHAIR HOLTZMAN: Sure. First of all let me welcome you all here. Some of you I recognize from prior service. So you really are gluttons for punishment. But, I just want to say thank you so much for being willing to help out again.

Let me just -- for those of you who are not that familiar with it, and some of you appeared as witnesses also, so, thank you, very much.

Let me just give you a little bit of background. I'm sorry, I'm not going to remember the dates exactly. But Congress in its wisdom created something called the Response Systems Panel, response to sexual assault in the military adult -- committed by adults.

And that was created and that Panel was charged with over -- an overview of the problem of sexual assault in the military. It was a huge assignment and we had about a year and a half to complete it.

And some of the Members who are here
today served on that Panel. And -- or served on subcommittees as part of that Panel. We produced a report.

Many of the recommendations if not almost all of them are being adopted or reviewed seriously by the Defense Department. And many of them will be accepted and implemented.

After that Response Systems Panel went out of business, a succeeding panel was created. Judge Jones by the way was the Chair of the Response Systems Panel.

A succeeding panel was created called the Judicial Proceedings Panel, which had a much narrower focus. The Response Systems Panel looked at the body of victim services. Looked at the issue of how statistics were being kept with the issue of the role of the commander and so forth. But there were more policy oriented issues.

The Judicial Proceedings Panel is really charged with looking at a lot of technical issues in the process. The legal process of
handling sexual assault cases.

And I wouldn't say early, but relatively early in the work of the Judicial Proceedings Panel, we confronted Article 120, which is the statute under which sexual assault is prosecuted. And that brought a number of Members of the JPP up short because it's a quite astonishing statute.

And we thought that it would be having -- Judge Jones and I having been on the Response Systems Panel felt that working through a subcommittee would be a much more effective way of dealing with the issues in this statute.

And I hope you have received the materials that we received as Members of the JPP. The copies of the testimony we received and so forth.

But, broadly speaking, there are two issues. One is you have, let's just call it an imperfect statute. Very few are perfect. This isn't.

I'm not going to tell you where I
think it belongs on the spectrum of imperfect.

But it's not perfect.

And on the other hand, we've been told repeatedly that it's not a good idea to mess with this statute because it's been messed with three times already in the last, I guess, seven or eight years. And so that will create its own burdens trying to make this better.

And so that's a big conundrum that this Subcommittee has to review. What is more important? Stability, security or improving a statute?

And then if the committee decides to improve the statute, how are we going to recommend changes? Are we going to sit around and try to rewrite it ourselves?

How's that going to work? But we can make those decisions as we proceed.

The timeframe here, we don't really have a definitive timeframe except that the JPP goes out of existence February 2016?

LT. COL. GREEN: It's September of
'17.

ACTING CHAIR HOLTZMAN: Oh, okay. I was wrong. Okay.

(Laughter)

ACTING CHAIR HOLTZMAN: Okay. But we didn't -- so there's really a long time horizon. But we're hoping not to have to wait that long.

And our first -- we've issued one report to the Department of Defense. We are required to issue another report in February, we being the JPP, in February 2016.

And there's some hope, I don't know how realistic that hope is, that this Subcommittee will finish its work in time for that report. And so that can be presented to the Department of Defense for its deliberations.

I just want you to know that the work of this committee -- the work of the Response Systems Panel was carefully followed in the military. The work of the JPP has been carefully followed.

There's a lot of respect for the
Members of the Panel and the seriousness with which these issues have been approached. And so I tell you this because a lot of people are going to be paying a lot of attention to what we're doing.

And that's why you're on this panel because everybody felt that you brought expertise and perspective that would be vital to determining what the statute's going to be that's going to govern the prosecution of sexual assault in the military.

We have discretion about how we're going to proceed in the sense of the witnesses we want. Obviously there's input from everybody. The materials we need to consider, the direction we need to go.

But basically -- preliminarily the Staff has suggested splitting the issue of 120 into two parts. One, the substantive nature and the substantive questions about 120.

And then the issue of how to deal with abusive and coercive relationships within the
military. Which is of very special concern. Two pieces of legislation were introduced by members of Congress. They testified before the JPP.

So there's a lot of particular interest in the Congress about the abuse of the relationships in the -- the command relationships within the military. And how to address that.

But we -- the staff suggested, and I think it's probably a good idea, to save that -- those issues for later and focus first on the just basic statute itself.

Our preliminary staff, preliminary thoughts is that in April we will hear from presenters on a variety of issues on the statute. And in May we'll hear additional presenters.

And in June maybe there will be breakout groups. Sort of subcommittees of the Subcommittee. August -- July and August we'll hear presenters on the coercive relationships.

I mean this is -- these are preliminary. If we don't get finished by July, we'll still be -- we'll finish our work and --
we'll do our work until we finish.

Of course, I'm not chairing this, so

I -- maybe Barbara Jones will crack a very

serious whip.

(Laughter)

ACTING CHAIR HOLTZMAN: But, I'm

suggesting that I just think it's probably likely

if you don't get finished then, you know, pretty

intractable and if we have serious questions,

then we'll take the time that's necessary to come

to the right conclusions.

But, the anticipation is or the hope

is, I should say, realistic or not, that February

2016 we will report on this subject to the

Secretary of Defense.

I mean, the Subcommittee will have

finished so that it can submit its report. The

report doesn't have to be in writing, but it can

be in writing, to the JPP. Which then can amend

it. Change it. And then the JPP submits what it

wishes to the Secretary of Defense.

And by the way, I know all of you will
be pleased, particularly those of you who dealt
with the Response Panel, we have a writer, a
staff writer. A technical writer to help us
produce our reports.

That's great. Yes. That's on the
record.

(Laughter)

ACTING CHAIR HOLTZMAN: Okay. So
that's all I have to say at the moment. Does
anybody have any questions?

So, Lieutenant Colonel Hines, should
we -- are we going to hear our first presenter?

LT. COLONEL HINES: Yes, ma'am. I was
going to throw out for the Subcommittee's
benefit, it's -- Mr. Sullivan is here and ready
to begin in five minutes.

But if anyone would like to take a
break.

ACTING CHAIR HOLTZMAN: Well, should
we take a five-minute break? Yes, okay. We'll
take a five-minute break and then we'll come back
and start it then.
(Whereupon, the above-entitled matter went off the record at 9:55 a.m. and resumed at 10:12 a.m.)

ACTING CHAIR HOLTZMAN: Can we all come to order? I think we're ready. I think we're ready to begin.

By the way, I just want -- for everybody's information, this meeting is being transcribed.

Now we'll hear from Mr. Dwight Sullivan from DoD, the Office of General Counsel, who is going to give us the probably not X-rated history -- the evolution of Article 120.

MR. SULLIVAN: Thank you very much, Madam Chair. Gosh, I look around this room and I see such titans in the field that I feel like a finger painter who has been asked to come and discuss portraiture with Rembrandt and Van Gogh.

So I'll be --

(Laughter)

MR. SULLIVAN: Let me give you a road map of what we're going to do this morning. So
we're going to start with an overview of the military justice system, and then from there I'm going to go into a legislative update to brief you about some of the legislative developments over the last two years. And then I'm going to stop -- no matter where I am, I'm going to stop at 10:45. That's because I am fascinated by military justice. I could talk about military justice all day. As General Schwenk knows, some days I do. And so if left to my own devices, I'll just hog all the time.

So I'm going to stop that discussion at 10:45, and then we're going to switch over to a discussion about Article 120's development, current language, and judicial interpretation. And then we'll discuss that until 11:30, and then you'll get to hear from one of the actual Rembrandts, Professor Schulhofer.

Okay. So let me start with an overview of the military justice system. So the military justice system governs the active duty military justice members, you know, more than 1.4
million active duty military members, which is a larger population than in 11 states and the District of Columbia. So it governs quite a large population, and it governs them 24 hours a day, seven days a week, 365 days a year.

So if a military member is on block leave, or when they come back from deployment, and so they are at home in Atlanta, Georgia, and they smoke marijuana, they have just committed an offense under the Uniform Code of Military Justice that could be tried by the military.

So the military, in addition to applying to those more than 1.4 million active duty members, the military justice system sometimes also governs the conduct of 850,000 reservists. So reservists, when they are performing military duties, and members of the National Guard and Air National Guard, when they are performing federal duties as opposed to state duties, are also subject to the Uniform Code of Military Justice.

And there are some rare instances in
which the UCMJ also applies to civilians. So, for example, when we're on a combat deployment, Congress has authorized the military to try Service members that are accompanying -- I'm sorry, by civilians that are accompanying the military in the field.

There was a court decision from the Vietnam era that said that applies only in times of declared wars. Congress later changed that to apply to contingency operations. That power has been used a grand total of once since the Vietnam War. So very rarely used.

We can also try active duty retirees.

So, Professor Schinasi, we can try you for whatever it is that you engage in.

(Laughter)

MR. SULLIVAN: We also try persons in custody of the Armed Forces serving a sentence imposed by court-martial. So after Professor Schinasi is prosecuted and confined at the USDB at Fort Leavenworth, we can also prosecute him for his misdeeds there. Okay.
Like I said, so there is Van Gogh. I mean, again, I'm in a room with titans, and the bigger painters --

(Laughter)

MR. SULLIVAN: Okay. So I always like to go back and say, well, what is the constitutional basis for anything that the United States Government does? Where do we trace the constitutional basis?

And here it's explicit, so Article I, Section 8, Clause 14 of the Constitution gives Congress the power to make rules and regulations for the government and the land and naval Forces. I actually recently went back and looked at the records of the Constitutional Convention. This basically elicited no discussion.

The Articles of Confederation had also assigned a similar power to Congress, and that just pulled through at the Constitutional Convention.

MAJ GEN(R) WOODWARD: So the Air Forces aren't subject to --
MR. SULLIVAN: I have heard that argument, but --

MR. SULLIVAN: So before the UCMJ was adopted in 1950, there were separate statutes that governed the discipline of the Army and the Navy. And then so the Army was under the Articles of War, which were amended by the Elston Act right after World War II, and the Air Force was brought under that system. And the Navy was governed by the Articles for the Government of the Navy, which were colloquially and colorfully referred to as Rocks and Shoals.

And the reason it was called Rocks and Shoals is because Article 4 of the Articles for the Government of the Navy included the provision, "The punishment of death, or such other punishment as a court-martial may adjudge, may be inflicted on any person in the naval service who intentionally or willfully suffers any vessel of the Navy to be stranded or run upon
rocks or shoals," hence giving that code its nickname.

But once Congress decided to unify our military to some extent with the Department of Defense after World War II, a decision was also made by DoD that it would urge Congress to adopt a Uniform Code of Military Justice that would apply to all of the services, including the brand-new Air Force.

And so Congress passed the UCMJ on April 26, 1950. President Truman signed it into law, and it became effective on May 31st of 1951.

And so the UCMJ does a number of things, but we are going to look at three specific things that the UCMJ does, subject to Maria taking out the shepherd's crook and hauling me off at 10:45.

Okay. So the UCMJ establishes the military justice system's structure. It enacts punitive articles. It sets up the crimes, including Article 120, which criminalizes four forms of sexual assault that we will talk about
after 10:45. And the code also delegates a great deal of authority to the President within the military justice system.

Okay. So let's start by examining the military justice system's structure, and one of the most important things to understand about the military justice system's structure, it is a command-driven system. So commanders, not warriors, make the decision whether to exercise prosecutorial discretion. Where a commander sends a case to be tried, the commander picks the members of the court-martial panel, the equivalent of the jury.

If there is a pretrial agreement, a plea bargain, that plea bargain isn't cut between the defense counsel and the prosecutor. It requires the approval of the commander. And then after the trial is over, the commander on the back end can also exercise some clemency authority, although that clemency authority was greatly reduced by the National Defense Authorization Act for fiscal year 2014.
Okay. So the UCMJ establishes four fora at which criminal charges within the military can be resolved. And these go in order from least severe to most severe -- non-judicial punishment, which -- and we will talk very briefly about each of these levels -- summary courts-martial, special courts-martial, and general courts-martial.

Now, of course, commanders can resolve cases in any number of other ways. They could bring a kid in for counseling. In the Marine Corps, you know, you could give them a Page 11 entry in the service record book that establishes that, you know, you drank under age and you were counseled on that. Don't do it again.

It ranges up through the possibility of administrative discharge. So there are any number of other things that a commander can do with charges, but the UCMJ establishes these four fora to deal with them.

So, as I said, the least severe is non-judicial punishment. It could be -- any
Service member has -- so NJP is done by the commander, and the Services vary a great deal in how they carry out NJP, with the Air Force giving a great deal of procedural protection at NJP, the Navy probably giving the least amount of procedural protection at NJP.

But a Service member can generally say, "I opt out of NJP. I don't want to give the captain -- I don't want to give the colonel the sole authority to decide whether I did this and to impose punishment. I'm opting out. Court-martial me if you want." Except for Service members that are attached to our embarked-upon vessels. They are not allowed to opt out of NJP.

As I said, there are substantial differences among the Services in how they carry it out, and it is not a criminal conviction. So the next -- and so NJPs can carry out a number of punishments, including correctional custody, which is almost never used anymore. Really, the maximum punishment that is used in practice is restriction for up to 60 days. There can also be
a forfeiture of pay, a reduction in rank, and in cases of Service members attached to or embarked upon a vessel, they can be sentenced to three days' confinement on bread and water.

When Congress reauthorized that punishment in 1950, because there was a great deal of discussion within the House Armed Services Committee, which held extensive hearings before the UCMJ was adopted in 1950, and there was a great deal of discussion about whether to continue with NJP -- I'm sorry, whether to continue with bread and water.

And the Navy made the argument, for a Service member -- for a sailor at sea, they are basically confined anyway. They are not going anywhere. So if we just put them in the brig, all that means is he doesn't have to perform his normal duties. So we needed a bigger hammer. So Congress ended up agreeing to continue allowing the Navy to impose NJP, including up to three days' confinement on bread and water.

Okay. So the next level
BGEN(R) SCHWENK: They get as much bread and water as they want, right?

MR. SULLIVAN: I'm not going to say anything.

So the next most severe level is the summary court-martial. Only enlisted members can be subjected to a summary court-martial. Any Service member can decline to be subjected to a summary court-martial, including those attached to or embarked on vessels. So no one can be forced to go to a summary. It's a warrant officer court-martial.

Once again, there are substantial differences among the Services in how they actually carry out summary courts-martial, but it is not -- once again, the Air Force giving the greatest degree of procedural protection. And, once again, the Supreme Court has actually held that an NJP -- I'm sorry, a summary court-martial conviction is not a criminal conviction.

So the next most serious forum is the summary court-martial. And once you get to a
summary, it's done pretty consistently across the
five Armed Forces, and it -- if you put a lawyer
that is used to practicing in U.S. District Court
and you drop them into a special court-martial or
general court-martial, they'd know what was going
on. You know, it would translate, very similar
to the way that federal trials are tried. There
are some unique military factors, but, again, a
lawyer would be able to navigate the system if
they were dropped in there.

Convictions by special courts-martial
are federal convictions and carry substantial
collateral consequences as federal convictions.
So, for example, a sex offender registration
could arise from either a special or general
court-martial conviction, loss of right to own
firearms could arise from a special or general
court-martial conviction. You know, felony
disenfranchisement could arise, depending upon
state law. So a number of factors arise from the
fact that this is considered a federal
conviction.
It appears that the right to elect to
be tried either by a military judge or by a panel
of members -- as we said, the commander will
choose those members if they elect to be tried by
a panel of members. And if the accused is
enlisted, the accused has a right to have that
panel consist of at least one-third enlisted
members from a unit other than the accused.

So the maximum punishments for this
kind of court-martial -- unlike a special court-
martial or NJP, you can get kicked out of the
military by special court-martial, which is what
is called a bad-conduct discharge. That's
considered to be a stigmatization. That
classification of discharge is intended to
stigmatize.

A special court-martial -- but
officers, by the way, can't be kicked out by a
special court-martial. They can only be kicked
out by a GCM. An enlisted member can be
sentenced to up to 12 months' confinement by a
special court-martial; officers can't be confined
by special courts-martial.

A special court-martial can impose up
to two-thirds forfeiture of pay per month for a
year. And for enlisted members only they can be
sentenced to reduction to the lowest enlisted
paygrade. Officers can't be reduced in rank at
either a special or general court-martial.

In the most serious forms, the general
court-martial, once again, it resembles a federal
criminal trial. Convictions are federal
offenses. Once again, the accused can be --
elect to be tried by either a judge alone or a
panel. In this instance, with the GCM, the panel
has to consist of at least five members as
opposed to a special where it has to be at least
three members.

The accused also generally can elect
to be tried by judge alone, except in a capital
case those can only be tried before members.
And, once again, the procedures for general
courts-martial are fairly constant across the
five Armed Forces.
Okay. So, and the maximum punishments include dishonorable discharge. They can give --
depending upon whether the offense, you know,
carries the possibility of -- they could adjudge
up to a dishonorable discharge, which seems to be
even more stigmatizing than a bad-conduct
discharge and will result in the forfeiture of
virtually all veteran's rights.

Confinement for up to the maximum for
the offense, total forfeiture of pay and
allowances, reduction to the lowest enlisted
grade -- again, enlisted only -- and death if
death is statutorily authorized for the offense.

There are 15 offenses under the UCMJ that carry
the death sentence, though all six Service
members on military death row at Fort Leavenworth
were convicted of felony murder or premeditated
murder, or both.

Okay. Both special and general
courts-martial you need two-thirds to convict.
And if you don't get two-thirds, it's an
acquittal. So if you have a 12-member court-
martial and you have seven that vote to convict,
five that vote to acquit, that's an acquittal.

Jeopardy attaches. Can't be tried again. So you
can't have a hung jury at the finding stage.

There is an exception for all of this
for spying in time of war. Can we all agree that
we will just ignore spying in time of war? So we
don't have to get into all of these weird
exceptions. Thank you.

Okay. So then there is -- a sentence
requires a vote of two-thirds of the members,
except for confinement for more than 10 years
requires the concurrence of three-fourths of the
members, and death requires the concurrence of
all of the members.

Okay. Let's just look at the
statistics. Since 9/11, we have seen an enormous
decrease in the number of capital -- in the
number of courts-martial trials. An enormous
decrease. So each year now we do about 1,000
general courts-martial, and that figure isn't a
lot different for FY13. FY13 to '14, we had a 20
percent drop in the number of special courts-martial, to about 1,000.

Summary courts-martial, we actually had a bit of an increase suggesting that some of the cases that used to be specials are probably now tried by summaries, about 1,000 in FY14, a little bit lower number than that in FY13. And non-judicial punishments, 50,951, and the Army -- the Army tries the majority, an absolute majority, of the GCMs and is responsible for about 60 percent of all those NJPs.

So the special courts-martial are spread pretty evenly among the Services, and summary courts-martial -- despite its small size, the Marine Corps actually had more summary courts-martial than any other Service. There are some reasons for that. If anybody cares, I can get into that.

All right. So let's look at how a case goes through the system. So let's say you have a sexual assault that is reported, and let's take an Air Force case. So the commander must,
by DoD regulation and by statute, must refer that case to a military criminal investigative organization. So in the Air Force instance, that would be Air Force OSI.

And Air Force OSI doesn't answer to anyone in uniform, so they are required to refer to this military criminal investigative organization. So they will come out with a report of investigation. So let's say after that charges are preferred. So in the Air Force example, the squadron commander would swear out charges. Preferring of charges means you swear out charges against the accused.

And then, the wing commander will decide should this case go to an Article 32 preliminary hearing. The Article 32 preliminary hearing was revised by statute in the NDAA for 2014. It is an adversarial hearing. Unlike a grand jury proceeding, the accused is there; the defense counsel is there. The defense counsel can present witnesses. The defense counsel can cross-examine the prosecution's witnesses.
So the wing commander will decide to send a case to the 32, and then --

MAJ GEN(R) WOODWARD: Can I add in squadron commander at the Air Force is either a major or a lieutenant colonel. The wing commander is either a colonel or a one-star. And the numbered Air Force commander is either a two- or three-star.

MR. SULLIVAN: Thanks so much.

And so then the wing commander will then -- if the wing commander thinks this case should go to a GCM, and in some cases even if the wing commander thinks it shouldn't go to a GCM, the wing commander will then forward the case to the numbered Air Force commander saying, "Hey, I think you ought to have -- you ought to send this case for trial by general court-martial."

Now, that numbered Air Force commander at that point is -- the commander cannot send the case to a GCM unless it has gone through a 32 and they received legal advice from their staff judge advocate. And so the staff judge advocate has to
make certain -- give certain advice. Do the charges state an offense? Is there probable cause? Is the -- are the charges warranted by the evidence presented at the 32? And what is the appropriate disposition?

If the SJA says there isn't probable cause, the numbered Air Force commander may not refer charges. So the SJA has a de facto veto over the referral of charges. If the SJA says that -- if the SJA says that the charges don't state an offense, the CA may not refer charges.

On the other hand, if the SJA says, "Yes, the charges state an offense; yes, there is sufficient evidence to warrant going forward, but I urge you to exercise your prosecutorial discretion not to go; yeah, there is probable cause but we are never going to get a conviction out of this case," then it is not -- that isn't a veto. That is just a recommendation. The numbered Air Force commander then decides whether to refer or not refer.

As a result of some changes that
Congress made in 2014 and 2015, or NDAA's for 2014 and 2015, there is review of a decision not to refer charges. So it's a one-way review. If the commander decides to refer charges in a sex assault case, there is no further review required. But if the commander decides not to, further review is required.

So if the SJA says to the commander, "I recommend that you don't refer charges," then that has to go one level up. So the numbered Air Force commander has to refer that case to his or her boss for a review of the non-referral decision.

If, on the other hand, the SJA says, "I think you should go, you should refer this sexual assault case to trial," and the numbered Air Force commander decides not to, that decision has to be reviewed by the Secretary of the Air Force. And then Congress enacted one additional trigger.

There was -- Congress had a concern that it might be the case that the SJA isn't
adequately representing the interest or
advocating the interest or expressing the
interest of the prosecutor. So Congress changed
the -- had put an additional trigger. Say, if
the Service's chief prosecutor thinks the case
should go, and the numbered Air Force commander
doesn't refer the case, then the Secretary of the
Air Force has to review it.

The same rules apply in the Army and
the Department of the Navy. We are just using
the Air Force as an example. Same rules would
apply.

So, again, there is review of non-
referral -- of every non-referral decision for
sexual assault cases. That's a sexual assault-
specific provision.

So if the numbered Air Force commander
sends the case to trial, then the case really
goes within the control of the military
judiciary, which is independent of command. So
the Chief Trial Judge of the Air Force will
assign a trial judge to preside over the case,
and then it is within the trial judge's control.

And, again, the resulting process would look a lot like what you are used to in the civilian system.

If there is a conviction, then the case goes back to the numbered Air Force commander to take action on the case. Now, traditionally, that Air Force commander had unconstrained discretion what to do. He could set aside findings of guilty for any reason or no reason, could reduce the punishment for any reason or no reason. Largely due to dissatisfaction with Lieutenant General Franklin's handling of the Lieutenant Colonel Wilkerson case out of Aviano Air Force Base, Congress took -- severely limited that power. So in a sexual assault case, the commander has almost no discretion to take any action on a case post-trial. There are a couple of minor scenarios that would allow him to do so.

Except there is one major exception, and that is if there is a plea bargain, if the
parties struck a pretrial agreement -- let's say it limits the amount of confinement for the case, then that empowers a convening authority on the back end to grant that clemency. But pretty much the clemency on the back end now is limited by what is agreed to at the front end. We've got a couple of exceptions, but they are just so narrow they are probably not even worth discussing.

And so once the convening authority takes action in the case, then because this -- because the case in our scenario involves a punitive discharge and/or a year or more of confinement, and for sex assault cases now for penetrative sexual assault cases, a punitive discharge is required. The Congress requires that a DD -- a dishonorable discharge or a dismissal be adjudged for any penetrative sexual assault case, or an attempt to commit a penetrative sexual assault case.

So once the commanding authority approves it, the case will automatically go on appeal to the Air Force Court of Criminal
Appeals, which sits at Andrews Air Force Base or Joint Base Andrews in Maryland. That court will review the case. After that, the accused can ask the Court of Appeals for the Armed Forces to review the case. That would be discretionary review.

On the other hand, if the government loses, the government can ask the Judge Advocate General of the Air Force to certify the case to the Court of Appeals, in which case they have to hear it. Now, the defense can also hypothetically ask the JAG to certify the case, but --

BGEN(R) SCHWENK: What's the difference in the kind of judges in the Air Force Court of Criminal Appeals and Court of Appeals for the Armed Forces?

MR. SULLIVAN: What an excellent question. So in the case of all of the Services except for the Coast Guard, all of these judges are military members. And so they are assigned by the Judge Advocate General of their Service to
sit on that court. All of the judges on the
Court of Appeals for the Armed Forces are
civilians appointed by the President, confirmed
by the Senate, for 15-year terms.

So this court operates much like a
geographic circuit court. Actually, it doesn't,
because this court -- the military court has
discretionary review. It operates more like a
state Supreme Court reviewing convictions. Where
this is an appeal as of right, this is, for the
most part, discretionary appeal.

The Coast Guard -- the Chief Judge of
the Coast Guard court is a civilian. Some, but
not all, of the judges of the Coast Guard court
are civilian. The Coast Guard is different.

Okay. Not as different as spying in
time of war, but the Coast Guard is different.
Okay.

PROF. SCHULHOFER: Could I take you
back to --

MR. SULLIVAN: Please.

PROF. SCHULHOFER: -- focusing on this
question of discretion. You were very clear
about how the numbered Air Force commander's
discretion not to prefer charges is constrained.
But I was wondering down below, once the assault
is reported, working up from the bottom, there is
-- you said that it -- the report must be
referred to the OSI --

MR. SULLIVAN: Correct.

PROF. SCHULHOFER: -- investigation.

If they find sufficient reason to believe an
offense might have been committed, is there
discretion at that point at the next level where
it says charges preferred by squadron commander?

MR. SULLIVAN: Yes.

PROF. SCHULHOFER: Is there discretion
to kick it out of the system?

MR. SULLIVAN: Yes.

PROF. SCHULHOFER: And, likewise, for
-- at the Article 32 level, the preliminary
hearing, is that before a judge?

MR. SULLIVAN: It is not. So it is
before an officer. The Congress recently -- when
Congress recently changed it, they provided that
that officer should, unless there is a compelling
reason not to be, should be a lawyer. Before
that, it didn't even have to be a lawyer. But
the Secretary of Defense requires that in all
sexual assault cases the 32 preliminary hearing
officer must be a lawyer. So they have to be a
judge advocate in some Services.

   In serious cases, it might be a judge,
but there is no requirement that person be a
judge.

   PROF. SCHULHOFER: So if that hearing
officer decides that the case is not provable, is
there any review of that decision?

   MR. SULLIVAN: Yes. So that decision
isn't binding on anyone. So the 32 preliminary
hearing officer -- we call them PHOs, preliminary
hearing officer. So the 32 PHO makes a
recommendation to the officer that convened it,
so they'll make a recommendation to the line wing
commander.

   You know, and, again, not -- they are
not recommending to a lawyer, although an SJA will -- you know, in reality, an SJA will review it. But they are making a recommendation to that line commander, and then that line commander then makes the decision, do I dismiss charges at this point, or do I send them up to the GCM convening authority?

And it's only at the GCM convening authority that that further review requirement kicks in. That's the first time that that review by its immediate superior in command, if the SJA and GCM convening authority agree not to go forward, or a review by the Service Secretary if there is a disagreement there. That kicks in only at this level.

Before that it is -- so, again, is it mandatory to send it to the MCIO? Discretionary, discretionary, and then review required.

DEAN ANDERSON: Just to clarify, on the discretionary moments that you identified with the squadron commander, and then in Article 32, at both of those moments this could be kicked
to a special court-martial or a summary court-martial or a non-judicial punishment. Or at what kind of discretion to do different forms of -- in other words, you know, when is it mandatory that it becomes a general court-martial? When the others?

MR. SULLIVAN: Great question. So Congress, by the -- before the NDAA for 2014, it was almost unconstrained.

DEAN ANDERSON: Right.

MR. SULLIVAN: There were certain limitations on when -- there were limitations on sending a capital charge to a special court-martial, but with certain exceptions it was pretty much unconstrained. Congress imposed a restraint in 2014 and said the jurisdiction to hear a penetrative sexual assault or an attempt to commit a penetrative sexual assault is limited to -- cannot be exercised by summary courts, cannot be exercised by special courts.

So if you're going to send it to a court, you can only send it to a GCM. And then
that is also tied into that mandatory discharge, because, as we discussed, only a GCM can dismiss an officer, which is the punitive discharge for an officer -- dismissal. Only a GCM can adjudge a DD, a dishonorable discharge, to an enlisted member, and that's a mandatory punishment if someone is found guilty of one of those offenses.

So Congress constrained the discretion here about which level of court to send it to.

So if it's a penetrative sexual assault, and that court -- and that commander wants to send it to a court-martial, it must be sent to a GCM.

DEAN ANDERSON: Can it go to non-judicial punishment?

MR. SULLIVAN: It could. There is --

DEAN ANDERSON: So a squadron commander could say it's an allegation of a penetrative sexual offense, but the squadron commander could say non-judicial punishment.

MR. SULLIVAN: A squadron commander could, but, interestingly, that would not bind superior commanders. So --
DEAN ANDERSON: Indeed.

MR. SULLIVAN: -- jeopardy doesn't attach from an NJP. The role that Congress gave us -- and this is in the Manual for Courts-Martial -- is that if it's a minor offense, and NJP is imposed, that prohibits a court-martial. You can't impose NJP for a minor offense and then court-martial someone. But that board does not sit in for a major offense, which this obviously would be.

So after that blew up and The Military Times wrote about it, and after waiting for the SJA for the numbered Air Force commander to hear about, that commander cannot direct the lower commander what to do. That is unlawful command influence. But what that person would say at that point is, "Send me the case, and I will send it to a general court-martial." And that's what would happen in real life.

Now, they couldn't send it to a GCM unless it had already gone to a 32. But this individual -- I mean, you can always -- a case
can always go up the chain, so this individual
could also direct a 32 and then make the review
of the 32 himself or herself. So it doesn't
always proceed this route, but this is the norm.

It's the rare case where the superior commander
says, "No, I'm going to handle that," but those
cases do exist, and in some cases, say national
security cases, in the Department of the Navy,
the Secretary of the Navy has said only three-
stars can resolve those cases.

Yes, ma'am.

MS. FRIED: But the sexual assault
case's initial disposition authority would be --

MR. SULLIVAN: At an O-6 or above.

That's a great point. So a sexual assault case, 
under -- by the direction of the Secretary of 
Defense, the initial disposition authority, so 
the first person to make the decision does this 
case go or not go, it has to be a special court-
martial convening authority who is at least a 
colonel or a Navy captain. That's a great point.

So that -- a constraint on just that
COL(R) SCHENCK: And if they choose not to refer, doesn't it have to go to the Secretaries of the Services?

MR. SULLIVAN: Well, again, it has to go to the Service Secretary at -- if the general court-martial convening authority doesn't refer, if the SJA said don't refer, then it doesn't go to the Service Secretary. It goes to the general court-martial convening authority's immediate superior in command.

If, on the other hand, the SJA said refer it, and the general court-martial convening authority didn't, then it has to go to the Service Secretary. My understanding is that since that requirement went into existence, there has been no case, zero, in which an SJA said refer it, and the general court-martial convening authority said no. No Service Secretary has had to review any of those cases. It just doesn't happen.

Okay. So we're going to stop there,
because otherwise I will talk about --

MAJ GEN(R) WOODWARD: You know, there is just -- there is also a requirement, because we talked about it earlier, about preferring the charges or not at the squadron commander level. If an investigation goes through on a sexual assault, and the charges are not preferred, that has to be briefed up to the one-star level, doesn't it? Do they put that in the NDAA?

MR. SULLIVAN: That's not statutory.

MAJ GEN(R) WOODWARD: It's not statutory?

MR. SULLIVAN: That may be a Service policy, but that's not a statutory service.

MAJ GEN(R) WOODWARD: I thought they put that in.

MR. SULLIVAN: That would not apply.

Okay. So we're going to switch over to the other slideshow, the Article 120 slideshow. Yes. We're going to go to the Article 120 slideshow next.

Okay. So now we're going to dive down
and explore the statute that prohibits rape and other forms of sexual assault within the Department of Defense.

So when Congress initially passed the UCMJ in 1950, Article 120, which covered rape and carnal knowledge, which was the military's version of statutory rape. It's a 110-word statute, and it defined "rape" as an act of sexual intercourse with a female not the person's wife, by force, and without her consent, and death was the maximum authorized punishment.

So it only covered rape. So if you wanted to cover some other form of sexual offense, say forcible sodomy, that would be covered under Article 125, because, again, it was only forcible vaginal intercourse that was covered by 120. So 125 would cover forcible sodomy, and sodomy was construed by the military courts broadly to include oral sex in addition to anal sex, or it could be charged as an assault under Article 128, or it could be charged as an attempt under Article 80.
Now, there is something in the military called the General Article. There is -- Article 134 prohibits any act that is of a nature to discredit the Armed Forces. It prohibits any act that is prejudicial to good order and discipline within the military. It prohibits any -- it prohibits a Service member from violating any non-capital federal criminal offense, including -- if you are on base, including state law for similar crimes.

So Article 134 has this broad coverage, is very broad, and what the President has done, in Part IV of the Manual for Courts-Martial, which the President promulgates to implement the UCMJ, in Part IV of the MCM the President has specified about 65 different specific ways that Article 134 could be violated, so -- possessing child pornography.

Of all things, for some reason Congress never prohibited negligent homicide for Service members. So the President did -- what the Manual for Courts-Martial did, if you commit
negligent homicide and it prejudices good order and discipline, or is service discrediting, we can get you.

So the President specified certain 134 offenses that are of a sexual assault nature, so assault with intent to commit rape or sodomy. In 1951, when President Truman issued the first of the post-UCMJ Manual for Courts-Martial, that was included as a 134 offense. Indecent assault, indecent acts with a minor.

Now, Congress has amended the Article 120 six times since it was enacted. The first amendment was in 1956 when Congress codified the UCMJ into -- you know, they codified Title 10 and brought the UCMJ into Title 10 in a codification project. They made some non-substantive changes in wording.

So you'll recall that when Congress passed -- when Congress passed the rape statute in 1950, it could only be committed by a man against a woman. So it was made gender-neutral, and the marital exception was eliminated in 1992.
You'll recall when Congress passed it it was defined as committing that act on a woman not his wife. And so Congress took out that exception for marital acts in 1992.

In 1996, they changed the carnal knowledge -- again, the statutory rape -- provision, made it gender-neutral, and to prescribe certain mistake of fact defenses that kick in depending upon the age of the individual.

In 2006, as we will see, Congress substantially rewrote Article 120 leading to much consternation, wailing, and gnashing of teeth. Due to that wailing and gnashing of teeth, in 2011, Congress again rewrote Article 120. And then, in 2013, they amended the Article 120 once again to take out an extraneous period. And I'm serious. So that was the final edit; it removed a period from Article 120.

Okay. Now, exactly as Representative Holtzman said before, because there is no statute of limitations for rape in the military, right now you could have a court-martial trying someone
today at Fort Bragg under the 2011 version, even
though it had the extra period. Or, more
seriously, you could have somebody there being
prosecuted under the 2006 version.

If an offense occurred between 2007
and 2012, it is covered by this statute and still
is, despite the change in statute. And you can --
again, because there is no limitation, you
could even conceivably have something tried under
the pre-1992 version, you know, but unlikely
given who would fall within the military's
jurisdiction, but it is certainly possible. You
have multiple versions of this that could be --
that could apply.

And then one particular problem that
might arise -- let's say you have a scenario
where the victim says, "Yeah. I was sexually
assaulted sometime in 2012, but I can't remember
exactly when." Well, then the government is
going to have to prove beyond a reasonable doubt
that it was either under this regime or this
regime.
They'll have to prove that date beyond
a reasonable doubt, which leads to one of the
problems with constant revisions of the statute,
and that is the obligation of the government, the
prosecution, to prove beyond a reasonable doubt
that the act occurred while one particular
version of this was in effect. I don't think the
period would matter.

Okay. So how did that 2006 amendment
that proved to be so problematic come about?
Well, the fiscal year 2005 NDAA told the
Secretary of Defense to review the UCMJ and say
whether any provisions should be changed. So
within the Department of Defense, there is
something called the Joint Service Committee. So
each of the Judge Advocates General sends a
representative to this Joint Service Committee
that makes recommendations about changes to the
Manual for Courts-Martial and then also
recommends changes to the Uniform Code of
Military Justice.

So this issue got referred to the
Joint Service Committee, which issued an 800-page report that said, "Hey, here are six different ways you could change the UCMJ. Please don't do any of them. But if you're going to do one, do what ended up being enacted as the 2006 change that took effect in 2007." And so, again, when you look at the NDAA, it is almost exactly what Congress had -- what the JSC had recommended.

And so now you'll recall the origin of Article 120 as a 110-word statute. It now becomes a 2,830-word statute as a result of that 2006 change. And so it now includes not only rape and carnal knowledge, but 14 separate offenses, only one of which contains a lack of consent element. So before 2006 we always thought of rape in the military as being intercourse committed by force and without consent. That's the way we thought about it.

But the key change in 2006 was to remove that consent aspect from it. And so here is a list of all of the various 14 offenses that were included within that provision.
Okay. And so these changes applied to acts that occurred on or after October 1, 2007. But very soon after it came into effect, you had trial judges starting to rule that points of it were unconstitutional. And largely they said that it was unconstitutional because taking away that consent meant the government no longer had to prove beyond a reasonable doubt something that they -- that the judges viewed as an intrinsic aspect of this particular offense.

And so some of you may recognize Don Christensen, who is now the President of Protect Our Defenders. Well, he was an Air Force trial judge in 2009. And so in the case of United States v. Payton, he wrote, "Article 120, on its face, is almost incomprehensible and is probably the most poorly drafted and poorly enacted article in the UCMJ probably in the history of the UCMJ." And so you had a number of judicial rulings very critical of 2006.

So finally one of these cases goes up to the Court of Appeals for the Armed Forces.
was a case, United States v. Neal, where the trial judge had said taking away the government's obligation to prove consent in a forcible context was unconstitutional and CAAF disagreed.

So CAAF said that taking away the consent and the burden shifts, forcing the defense to initially prove consent by a preponderance of the evidence, and then have the burden shift to the government to disprove it beyond a reasonable doubt. The trial judge said that was unconstitutional; CAAF said no, that's okay.

But then, in 2011, CAAF invalidated the part of Article 120 that dealt with an incapacity case, so a case where someone is typically too drunk to consent. CAAF said in that instance, you are forcing the government -- you are forcing the defense to disprove an element when you have the preponderance standard.

And they said that was unconstitutional.

Moreover, they said that that burden shift, where it forced -- the defense has the
burden of showing by a preponderance of the
evidence that there isn't consent, and then the
burden shifts to the government to prove beyond a
reasonable doubt that there is consent, they say
that's a factual impossibility. They said that's
a legal impossibility, and so they were critical
of that aspect as well.

And so that led to changes, but let me
note something that happened even after the
change. So in the case of United States v.
Valentin, you know, the Navy-Marine Corps Court
of Criminal Appeals -- again, one of these
intermediate level appeals courts that consists
of appellate military judges, uniformed officers.
The court held that the 2006 amendment abrogated
the theory of parental compulsion for rape.

And so they set aside a rape
conviction of a parent against the parent's
child, because the conviction was obtained under
parental compulsion theory.

Now, again, this is an important
object lesson I believe. Obviously, no one in
Congress meant to abrogate the parental compulsion --

ACTING CHAIR HOLTZMAN: Could you explain what the parental compulsion rule is?

MR. SULLIVAN: Sure. So instead of using actual force, instead of forcing the victim to do it, the parent does things due to their parental relationship that de facto compels the kid. But you're not using actual force; you're just using your authority as a parent.

And so the court set aside a conviction because before 2006 that parental compulsion theory had been recognized through common law. So, again, we had a 110-word statute and a tremendous amount of case law that implemented that statute, a tremendous amount of case law, and, you know, quite frankly, from the perspective of someone that litigated cases before 2006, it worked pretty well.

You know, if you looked at the statute, you might -- it might not cover laws that you might think it covered, but there are
other parts of the Manual that covered those things, and we had this substantial case law overlay. So, for example, force -- force was generally thought of -- the force required to commit the act was sufficient force to satisfy the elements. So that was by case law.

So you have a lot of case law. But then when Congress codified it, they didn't catch all of the case law. And so then the court said, "Well, wait a second. That was my case law. There is a codification. That case law doesn't survive that codification, and Congress didn't bring that codification through. They didn't bring that case law through."

So, again, I think it's a very important object lesson that would then stretch out to when you enact a statute such as this, there is a particular danger of missing some theory that is recognized by case law, and then enacting a statute that accidentally doesn't carry through. I'm sure that there is not a single member of Congress that either intended to
or would have wanted to eliminate that theory of liability, and yet the courts held that the 2011 change -- I'm sorry, the 2006 change -- even though it was a 2012 case, it was a case that was litigated in the 2006 version of the statute -- had done so.

Okay. So now -- so now we've explored the problems and we've explored CAAF in Prather saying there are unconstitutional aspects of this statute. So Congress decided to change the statute. So, in 2011, they changed the statute again, with the new statute being effective on June 28, 2012. And so now instead of these 14 offenses under Article 120, now there are four offenses under Article 120 and another six that are spread out throughout Article 120, Article 120b, and Article 120c.

So let's take a look at those. Okay. So the four offenses under Article 120 are rape, sexual assault, aggravated sexual contact, and abusive sexual contact. So basically we have two variables. We have the degree of invasion of
bodily integrity, and then we have the theory of liability. How does one commit that violation of bodily integrity?

And so we have penetration offenses. So the penetration offenses refer to penetration of the vulva, mouth, or anus. And so if it's a penetration offense, that is the most serious. And then, again, it's -- we have two different variables. So we have penetration or contact, penetration or non-penetration, penetration or contact.

And then we have another variable which is the manner in which the sexual offense occurs. So if it's done by force and it's penetration, that's the most serious. So force, rape, death, or grievous bodily harm, rendering the victim unconscious. So it's not merely the victim is unconscious, but I do something to make the victim unconscious. That's the most serious.

So if we have -- so if we marry up the most serious way of committing the offense with penetration, that is the most serious offense,
rape. Congress took away the death penalty in
2011, so this is punishable by up to confinement
or life without eligibility for parole.

And then we have penetration offenses
committed by a less serious means. So no longer
a threat of death or grievous bodily harm, but a
threat other than of death or grievous bodily
harm. Bodily harm or the victim is unconscious.

Here again, remember, you caused the victim to be
unconscious. Here the victim is unconscious and
the person basically exploits that situation. So
then -- so when we have these theories of
liability with penetration, then we get sexual
assault, which is the second most serious offense
punishable by up to 30 years' confinement.

Okay. So then we have the non-
penetration offenses, so, you know, the contact
offenses. And so, once again, we have -- if they
are committed by certain means, those are
considered the most serious offenses --
aggravated sexual contact. And then if they are
committed by the means that would distinguish
sexual assault for rape, that is the least serious of these, abusive sexual contact.

Okay. So does it make sense that we apply those two different dichotomies, and then we can mix and match them and we can end up with these four offenses. And, again, in terms of seriousness, one, two, three, four.

So Congress considered the violation -- the kind of violation of bodily integrity to be more important than the means. Okay? Does all that make sense?

LTCOL HINES: As we go forward today, ladies and gentlemen, I just want to remind you the present statute that he is going through right now is at Tab 2 in your read-ahead materials. And we also made sure and gave you loose copies. They should be in your folders there.

Sorry.

MR. SULLIVAN: No, no. Thank you very much. That's very helpful.

Okay. So, again, so maximum punishment
for the most serious offense, rape, life, no eligibility for parole; sexual assault is 30 years' confinement; aggravated sexual assault, 20 years; and then abusive sexual conduct, seven years.

And so there is a separate statute for child offenses now. Now it's Article 120b. So you could try -- you could charge a juvenile -- you know, it's not an element that the person not be a juvenile for 120, but basically you charge a child offense victim under 120b and this would generally be used for adults.

Yes?

DEAN ANDERSON: I apologize if it is somewhere in the materials, but is there a minimum sentence that is required for a conviction for rape?

MR. SULLIVAN: Excellent question. So before the NDAA for 2014, there was no minimum punishment. So you could have -- and in fact, there was one case in which you actually had -- someone -- there has probably been more than one
case, but one case I can think of, where you actually had a Service member convicted of rape and the sentence was no punishment. Literally, no punishment.

So Congress changed that in 2014, and they said for penetrative offenses -- so for either rape or sexual assault, or an attempt -- you would charge an attempt under Article 80, but an attempt to commit either of these offenses, if the individual is found guilty, they must receive a punitive discharge.

And so in the case of an officer, they must receive a dismissal, which is the officer equivalent of a dishonorable discharge, and in the case of an enlisted they must receive a dishonorable discharge, the more stigmatizing of the two.

And then there are certain rules -- an enlisted member could enter into a plea bargain under which that dishonorable discharge gets knocked down to a bad conduct discharge, so the less stigmatizing of the two. But they must be
thrown out with what we would call bad people.

DEAN ANDERSON: So that essentially

for penetrative offenses, if there is a
conviction, you are going to be thrown out.

MR. SULLIVAN: Correct.

DEAN ANDERSON: Okay.

MR. SULLIVAN: That's exactly right.

And then --

DEAN ANDERSON: And then that doesn't
require incarceration, totally independent of.

MR. SULLIVAN: Correct. So

incarceration is still entirely within the

discretion of the sentencer, and in the military

if -- remember when we talked about how generally

the Service members elect whether to be tried by

members, which is the equivalent of a jury, or by

a judge alone. If the accused elects to be tried

by members, then the members also sentence.

So the judge doesn't sentence where

the person is tried by members; the members

sentence. So it's the members that would decide

how much confinement, but the judge would tell
them you must sentence them to a dishonorable
discharge.

Okay. So let's look at how the 2011
statute defined these various terms and look at
one particular issue that has arisen regarding
the definition of sexual contact that has been
the subject of litigation we are looking at.

So rape is defined, as we said,
penetration of vulva, anus, or mouth. Okay. So
now -- so there are two ways you can commit rape.
So penetration of those body parts by the penis
just -- that's it. You know, no specific intent
required, right? So as long as you do it by one
of those prohibited means, regardless of intent,
that is rape.

Okay. Or penetration by something
other than the penis, by an object or a person's
body part, with an intent to abuse, humiliate,
harass, or degrade any person, or arouse or
gratify the sexual desire of any person. So it
doesn't even have to be, you are trying to, you
know, arouse the sexual desire of either the
victim or the accused. It can be of a third
party. That is still the prohibited intent.

Okay. So note especially where it
says "another person's body or by an object."
Okay. That is going to become important. And
then, again, accomplished through one of the five
theories of liability.

So there are five theories of
liability. We briefly discussed them when we
talked about our chart. Unlawful force; using
force causing egregious bodily harm, so basically
an aggravated assault; threatening or placing the
victim in fear of death, grievous bodily harm, or
kidnapping. So only those three kinds of threats
here. If there is another kind of threat, then
it will drop down to sexual assault instead of
rape.

Rendering the victim unconscious.
Again, not that the victim is unconscious -- that
is sexual assault -- but the person is
responsible for making the victim unconscious.
Or for administering basically a date rape drug
to the individual. Those are the five theories of liability that will kick it up from sexual assault, 30-year maximum, to rape, life without eligibility for parole maximum.

So sexual assault, which is the next most serious offense, again, defined as the same kind of penetrative offense, but accomplished through one of seven theories of liability. Threatening or placing the victim in fear, and no longer fear of death or grievous bodily harm, but placing them in fear.

Causing bodily harm, it no longer has to be, you know, aggravated assault type of harm, but harm. Fraudulent representation, that the sexual act serves a professional purpose. We will look at a case that demonstrates that momentarily.

Inducing the belief that the perpetrator is another person. So now the victim is asleep or unaware, no longer that the person made them asleep or unaware, but they are asleep or unaware. They are incapable of consenting due
to impairment by drug, intoxicant, or similar substance. This is the case we see most often. This is the theory of liability that we see most often. It is number 6 right there.

And then the victim is incapable of consenting because they suffer from a mental disease or defect or some similar condition.

Okay. So those are the penetrative offenses, and now there are two kinds of non-penetrative offense or contact offenses -- aggravated sexual contact and abusive sexual contact.

Now, "sexual contact" is defined as touching, either directly or through the clothing, certain body parts -- genitalia, anus, groin, breast, inner thigh -- of any person without intent -- or, I'm sorry, with the intent to abuse, humiliate, or degrade; or touching, either directly or through the clothing, any body part of any person if done with the intent to arouse or gratify sexual desire.

Okay. So the definition of "sexual
act" says by any part of the body or by any
object, whereas the definition of "contact" only
refers to a part of the body. It doesn't have
that language "or by any object." Okay. So you
can see where the problem is going to arise now,
right?

Okay. So let's look at the case of
United States v. Schloff. Schloff is an Army
lieutenant. He is a physician's assistant. A
soldier comes into his clinic and says, "I have a
foot problem." He gives her -- he says, "I need
to hear your heart." And so he has her lift up
her T-shirt and he uses a stethoscope on her
heart.

And then he puts it not on her sternum
but on the fleshy part of her breast to listen to
her heart and he says, "I am having a hard time
hearing." So he keeps it there for some amount
of time. She said that he is looking at her in a
leering way when this is going on. He never
looks at her foot. Never.

So she goes in complaining of foot --
all he does is put the stethoscope there and then
he says, "How long do you want your profile?" So
apparently in the Army the profile is what we
would call in the Marine Corps a chit that lets
you get out of doing your duty and your physical
fitness, and so forth. Is that --

DEAN SCHENCK: Yes.

MR. SULLIVAN: Okay. So he says, "How
long do you want your profile for?" She says,
"Seven days." He writes it up and it says she
doesn't have to perform duties for seven days and
gives it to her. Never looks at her foot.

Okay. So she goes, "That was weird."
And so she ends up reporting it. And so his case
goes on trial, and the defense moves -- and so
it's alleged that he commits the sexual assault
by placing a stethoscope on her breast. And so
the defense at trial moves to dismiss for failure
to state an offense, because you can't commit a
sexual contact offense, because the sexual
assault can be committed by a body part or an
object, but sexual contact -- the statute only
says by a body part.

And so they stated that doesn't meet
the statutory definition, and the judge said,
"Let's let the members decide." It might not
matter, you know, depending on what they talk --
so the members come back and they convict him of
a contact offense. They convict him of a contact
offense.

And so then the defense says, "Uh,
Judge, we are renewing our motion to dismiss for
failure to state an offense." And the judge
says, "I agree." And the judge contrasts the one
statute that says "by an object or" -- I'm sorry,
"by a body part or an object," with the other
statute that just says "body part," and basically
adopts the expression unius est exclusio alterius
type of rationale and kicks the charge.

The government doesn't like that, so
they appealed the case to the Army Court of
Criminal Appeals, which Dean Schenck used to sit
as a judge on. And so the Army Court of Criminal
Appeals reverses the trial judge and says, "No.
A sexual contact offense can be committed with an object."

So the judge's ruling -- we already talked about that. So we find the touching of a person's breast with a stethoscope can constitute abusive sexual contact. The statute does not require direct contact. To the contrary. It contemplates various levels of separation.

So, for example, you can have a perpetrator take another person's hand and force that person's hand and make them make that other person's hand sexually grope the individual, and that would constitute the offense. So it doesn't require direct body-to-body contact.

One can easily imagine countless more examples, including indirect contact by items such as gloves, condoms, sex toys, and sadomasochistic devices, that would easily fit within the umbrella of sexual contact, if the other mens rea factors, you know, the specific intent factors, were also satisfied. So they say the stethoscope satisfies that.
So we had CAAF say, no, the statute does reach that instance. And then they go on to say -- they go on to parse the language, then, and they say touching may be accomplished by any part of the body, is unambiguously permissive and not exclusive. I don't think the judge knows what "unambiguously" means. I think there is some ambiguity there.

Okay. We read that provision not as limiting prescribed behavior, but as clarifying that these particular crimes can be committed even when contact is made by or with certain body parts that are not typically considered to be of a sexual nature -- in other words, any body part.

We interpret the statute in such a manner as to focus on whether the alleged victim was touched and whether the accused caused the touching, rather than focusing on body part, as the statute says.

Okay. So we talked about how the Court of Appeals for the Armed Forces can exercise discretionary review over the service
court's decisions. So on the 23rd of March, the Court of Appeals for the Armed Forces decided that it would review the Army court's decision in that case. So they granted the petition in Schloff.

Here is the language of the issue they granted. Don't read -- the language of the granted issue would seem like it is pointing in a particular direction. This is just the way that the appellant's defense counsel wrote it. So this isn't the court -- you know, this is the court granting a review of this issue, so don't read anything into the language.

The issue that the court is considering is whether the Army court erred in expanding the definition of "sexual contact" to a touch accomplished by an object, contrary to the plain language of Article 120(g)(2). Again, it is not the court saying it is contrary to the plain language. It is not the court saying it's -- okay. You get it. Okay.

So the court is going to hold oral
argument on that issue on August 28th. The court's term ends on August 31st and will almost certainly issue its opinion by then. The current term of the Chief Judge of the court ends on July 31st. So in all likelihood, its decision will be issued by July 31st.

So we will have CAAF come out and definitively tell us what that contact offense means and can you commit it with an object, or does it require direct body-to-body contact.

Now, so we will have that CAAF ruling this summer. But there is one other factor, and that is the Supreme Court can exercise discretionary jurisdiction over CAAF opinions. That discretionary jurisdiction has existed only since 1984. In that time, the Supreme Court has exercised plenary review over a CAAF decision only nine times. It doesn't happen very much.

But if, for example, the accused loses -- let's say CAAF comes out and affirms the Army court opinion, it would be an almost certainty that the Service member will then ask the Supreme
Court to review the case. Extremely unlikely that that will happen, but it's possible.

On the other hand, if the government loses the case, it is theoretically possible that the Solicitor General will ask the Supreme Court to review the case. The Solicitor General asking -- you know, the Solicitor General has like a 70-percent grant rate as opposed to everyone else on the planet who has like a 1.5-percent grant rate.

So if the Solicitor General asks the Supreme Court to review that, the Supreme Court probably would. There is almost no likelihood the Solicitor General would agree to a DoD request to ask the Supreme Court to review that decision.

So if the government loses the case at CAAF, that is likely to be the final word, and then the way to fix that would be by -- if Congress decides that it should be changed, the way to do that would be through statutory amendment. If the defenses loses, they will seek Supreme Court review. Again, very little
likelihood that Supreme Court review will be

granted.  

Okay. Yes? 

PROF. SCHULHOFER: This is really a 

side point, but there are a couple of Justices 

who love this kind of issue. You probably know 

they recently granted cert on the issue of 

whether throwing fish overboard was a violation 

of Sarbanes-Oxley. 

So who knows, but it is possible that 

if the defense loses that Justice Scalia and 

several others would love to sink their teeth 

into this issue. 

MR. SULLIVAN: And following up on 

Professor Schulhofer's comment about the fish 

case, one of the dissents actually cited Dr. 

Seuss' One Fish, Two Fish, Red Fish, Blue Fish, 

actually cited that in the dissent to the famous 

fish obstruction of justice. 

So we have looked at one way in which 

this issue has gone up on appeal within the 

military system.
So you'll recall that in Prather the Court of Appeals for the Armed Forces held that the 2006 version had an unconstitutional aspect and another legal impossibility aspect regarding the way it dealt with consent. So you had defense challenging the new Article 120 on vagueness grounds.

So in a case called Torres, the Navy-Marine Corps court rejected a vagueness challenge to the language. Remember we said that the statute is most often used in the context of someone who is inebriated, and the argument is whether they are too drunk to be capable of consenting? That was -- in Torres, that was challenged as being unconstitutionally vague, but that was an as-applied challenge.

The Navy-Marine Corps court rejected that, and then the Court of Appeals for the Armed Forces denied the petition in that case. The Court of Appeals for the Armed Forces declined to review the Navy-Marine Corps court, just like the de novo certiorari denial of a petition by CAAF
has no precedential effect. This isn't necessarily saying CAAF agrees with NMCCA's, you know, rationale in Torres, but they declined to review that.

Now, since Torres, there has been another Navy-Marine Corps case called Corcoran, and this was a facial challenge to that language. And so, once again, the Navy-Marine Corps court rejected a facial challenge to the language "incapable of consenting." So they said the statute does not prohibit committing a sexual offense upon a person who was impaired by alcohol, but of a person who is incapable of consenting to the sexual act due to impairment, a more discernible standard.

And then they also point out that it is further limited by the statutory language that the condition has to be known, or reasonably should be known, by the appellant. So the Navy-Marine Corps court pointed to this language to reject a facial challenge to the new version of Article 120.
Now, the accused in that case of course has sought the Court of Appeals for the Armed Forces' review of that decision. The court extended the deadline for submitting the supplement, which functions like a cert petition, it's the argument to the court why they should exercise their discretionary jurisdiction.

They extended that deadline to March 30th, so that supplement was only very recently filed. It will probably be another couple months before we know whether the Court of Appeals for the Armed Forces will take on the Corcoran case and give us its thoughts about whether there is a vagueness problem with the language about "incapable of consent." Okay?

Okay. Finally, the -- normally what happens when Congress passes a criminal statute is the Manual for Courts-Martial will be changed, and Part IV of the Manual includes the President's guidance in terms of what the elements of the offense are. Now, those are not binding on the courts. You know, the elements of
the offense of course are done by statute. And
as Marbury v. Madison said, it is inherently the
province of the judicial department to say what
the law is.

But the President will set out what he
thinks the elements are. In reality, the Joint
Service Committee will tell the President what
they think the elements are, and then the General
Counsel, Department of Defense, will decide
whether he or she agrees with the General -- with
the Joint Service Committee. That will be sent
to the -- that will be sent to the Office of
Management and Budget, who will then shoot it out
so DOJ LOC can say whether it agrees with what
the General Counsel thought of what the JSC said
about what the elements should be.

And then ultimately, you know, if they
opted, the Department of Homeland Security said
the Coast Guard can weigh in, even though they
already had the vote of the Joint Service
Committee. And then ultimately it will be
presented to the President for the President to
sign. But that is how these -- that is how these should -- the system should work. Sometimes they come back.

General Schwenk is smiling.

Okay. So the President will set out what the President thinks the outlook should be. The President will send out definitions where there aren't definitions within the statute. The President will set out the maximum punishment.

Now, unlike the elements, which, again, are a judicial construct where the courts will consider the President's views but they are not binding, the President, under Article 56, has been delegated the authority to set maximum punishments for non-capital offenses. So what the President says the maximum offenses are goes. So after Congress adopted the statute, the President did promulgate the maximum sentences for these offenses. In fact, we saw those before. It was the President that said, "Confinement for life for rape." It was the President that said, "Thirty years' confinement
for sexual assault." That came from the
President.

That has been -- it's not -- the most
recent time this was published was in 2012. That
happened after this was published. It isn't
actually in here, but it's in an Executive Order
that is available through the Federal Register.

However, the normal supplemental
materials have not yet been signed by the
President, so the elements have not yet been
signed by the President. The definitions have
not yet been signed by the President, and so they
have been -- the Joint Service Committee
published them for notice and public comment in
2012, but they have not yet been promulgated by
Executive Order.

Okay. Please.

DEAN ANDERSON: So I'm interested in
this fascinating thing that happens when there is
judicial decisions -- when there are judicial
decisions interpreting language, and then there
is a revision which undermines the decision--
making that has already interpreted the language
of the statute.

MR. SULLIVAN: Yes.

DEAN ANDERSON: I'm particularly
interested in the 2011 amendments on the theory
of liability for sexual assault. The second
theory of liability for sexual assault is causing
bodily harm to the victim. And I believe in the
materials we read last night, late, I read that
the courts have concluded -- military courts have
concluded that bodily harm includes simply non-
consensual penetration.

MR. SULLIVAN: Right.

DEAN ANDERSON: And I'm interested in
the -- among other things, the majority of sexual
offenses happen as non-consensual and don't
involve physical force of the kind that the
heightened statutes or the aggravated statutes,
like rape, require -- would require.

So I'm wondering if the interpretation
of bodily harm under the second theory of
liability in the 2011 amendments survives those
amendments.

MR. SULLIVAN: That's a good -- I know
of no opinion that has yet taken a position on
that. That doesn't mean there hasn't been one,
but I am not aware of any. Again, that is not
where the fight tends to be. But exactly as you
say, traditionally, the definition of "bodily
harm" there would include any offensive touching.
It would be likely an assault consummated by a
battery.

DEAN ANDERSON: But for sexual assault
it would have to be -- would have to have a
penetrative offense.

MR. SULLIVAN: Exactly. That's
exactly right.

DEAN ANDERSON: So it would have to be
non-consensual penetration itself.

MR. SULLIVAN: Exactly. And so
traditionally --

DEAN ANDERSON: In addition to the
sexual offense.

MR. SULLIVAN: Traditionally, yes.
And, again, I -- there may be a case -- I'll look that up. You know, there may be a case that has delved into that under the 2011 appellate decision, but, if so, it doesn't come to mind. I understand the question, but I just don't -- I don't think the courts have --

DEAN ANDERSON: Thanks.

MR. SULLIVAN: But I'll let you know if they have.

All right. Any other questions? Yes, please.

MS. KEPROS: The very first version of rape -- you know what I'm talking about?

MR. SULLIVAN: The 1950 version?

MS. KEPROS: No. The current statute.

MR. SULLIVAN: Oh, okay.

MS. KEPROS: The first means of --

MR. SULLIVAN: Yes.

MS. KEPROS: -- committing it?

MR. SULLIVAN: Yes.

MS. KEPROS: Why wouldn't that be chargeable any time any of the other sections are
also chargeable?

MR. SULLIVAN: Because it would be -- because the force would be the force required to commit the act?

MS. KEPROS: Yes. I'm just trying to understand, does that serve some function separate from -- or could you file it in conjunction with the other mechanisms to commit the other versions of rape?

MR. SULLIVAN: Certainly, it gets back to exactly that discussion. You know, again, traditionally, military law, the force required to commit the offense is sufficient. But of course the difference is that was under a regime where the government had to prove lack of consent beyond a reasonable doubt.

MS. KEPROS: Right.

MR. SULLIVAN: And so now if -- if merely the force necessary to commit the offense was sufficient, then any act of sexual intercourse would be rape. I mean, literally, you know, so -- which obviously Congress didn't
intend. So I think that that theory would
probably no longer survive because it would --
you know, no one would think that Congress meant
to make any act of sexual intercourse by a
military member, you know --

(Simultaneous speaking.)

MR. SULLIVAN: But that may very well be, so that may very well signify another
instance like Valentin where the codification of
the rules in a particular way undercuts the case
law that had been relied upon before. Because,
again, it doesn't fit within a regime where that
kind of force is used as a proxy for lack of
consent. You know, I mean, it must mean
something else.

Yes, please.

DEAN ANDERSON: But that's rape, not
sexual assault.

MR. SULLIVAN: Correct. Correct. And
that's what we were just --

DEAN ANDERSON: Right.

MR. SULLIVAN: So force means of
committing --

DEAN ANDERSON: My question was

about --

MR. SULLIVAN: No. I understand that,

but I just think that the same sort of analysis

is implicated where we used to have -- we used to
define "force" in a certain way. In a certain

regime, that included --

DEAN ANDERSON: Yes.

MR. SULLIVAN: -- it included a

separate obligation to prove lack of consent.

But if we are just going to use force as a proxy

for it, we can't --

DEAN ANDERSON: Right.

MR. SULLIVAN: -- that definition.

DEAN ANDERSON: That's different. So

I have an interesting question about the 2011

amendments on rape. The first theory of

liability is the use of unlawful force against

the victim. And I know what historically the

word "unlawful" is doing floating around in rape

statutes. It is a function of the marital rape
exemption, but that is not what is going on here.

So what is the word "unlawful" doing there?

MR. SULLIVAN: It is modifying it to
-- because if it were just force, then, you know,
we could all -- we can all imagine scenarios
where some level of force might be used that
would be consensual. And so when it -- so, for
example, aggravated -- under military law, you
can't consent to an aggravated assault.

DEAN ANDERSON: Right.

MR. SULLIVAN: So if I use -- if I
commit that by means of -- if I commit a sexual
act by a means likely to produce death or
grievous bodily harm --

DEAN ANDERSON: Then that makes it --
the force unlawful.

MR. SULLIVAN: Then that would make it
unlawful force.

DEAN ANDERSON: Right. But that's not
true.

MR. SULLIVAN: So Congress may have
intended that. Again, I don't -- I will check
this, but I don't believe there has been case law construing that -- the use of unlawful conjoined
with force there. But I will check that as well.

DEAN ANDERSON: Thanks.

MR. SULLIVAN: I don't believe -- I
don't believe that there has been case law on
that.

Interestingly, there has been a very
recent CAAF case dealing with the HIV scenario.
So before this year, there was a case where the
courts under a case called Joseph construed
committing -- someone who engages in unprotected
sex who is HIV-positive, they considered that to
be aggravated assault. They considered that to
be a means likely to produce death or grievous
bodily harm.

CAAF, last month, reversed the Joseph
decision in a case called Rodriguez and said
that, in fact, there is only about a one in 500
chance that that would actually transmit a
disease, and whatever means -- "likely" means,
one in 500 isn't "likely."
And so -- but that aggravated assault concept that -- in fact, in the Joseph case, it was the wife of the individual who consented, knowing the person was HIV-positive, consented to having unprotected sex with the individual. And the court, in addition to saying that was aggravated assault, said you can't consent to an aggravated assault under military law. Therefore, it is prohibited.

So, again, I suspect that that is in their thinking of aggravated assault, but, unfortunately, there isn't any legislative history to speak of. You know, there is no committee report that elucidates that point. So we are involved in sort of a post hoc analysis much like the Army court was engaged in in the Schloff case. And I will see if there is post hoc analysis of that issue.

BGEN(R) SCHWENK: If I ever read the 2012 draft MCM language, I have long since forgotten. But how much depth does the MCM provision go into on 120 and implementing 120?
MR. SULLIVAN: It does --

BGEN(R) SCHWENK: Is it --

MR. SULLIVAN: It's not a treatise.

You know, it goes into --

BGEN(R) SCHWENK: Does it address the
issue of unlawful? Does it -- or does it just do
a more cursory review of the statute?

MR. SULLIVAN: My recollection is it's
more cursory. But, again, I'll check that and
I'll let the Subcommittee know if there is
anything -- if there is anything helpful in that.
Well, in fact, I'll provide the Subcommittee with
the -- with that language, and then I will
highlight anything that may get into one of these
questions.

ACTING CHAIR HOLTZMAN: Mr. Sullivan,
I'm going to bodily -- the question about bodily
harm. When it says it means a sense of touching
of another, is that a subjective standard, or is
that an objective standard?

MR. SULLIVAN: I believe the case law
states that it has both a subjective and
objective component. And it has an objective --

ACTING CHAIR HOLTZMAN: What does that mean?

MR. SULLIVAN: So --

ACTING CHAIR HOLTZMAN: You have to prove both?

MR. SULLIVAN: Well, so, for example, if someone is -- if some individual is hypersensitive and considers something to be offensive that in the normal course of human interaction would not be considered offensive, the person would probably be -- if the person has a reasonable and honest belief that their conduct would not be offensive, that is a defense.

So if they -- if the defense produces some evidence that a reasonable and honest -- that the accused reasonably and honestly believed that that form of touching would not be offensive to a normal human being, then that would be -- that would -- then if the defense produces some evidence of that, the burden would shift to the government to disprove that defense beyond a
reasonable doubt.

So there is both a subjective aspect
of that, but there is also an objective aspect of
that. So if someone subjectively has heightened
sensitivities that society is not prepared to
recognize, the individual could not be convicted
in that scenario.

And, similarly, someone could
subjectively consent to a kind of touching that
society would generally consider to be unwelcome
touching, and that would also -- well, that
wouldn't merely be a defense; that would preclude
the defense -- the government from establishing
an element. Unless the touching was likely to
cause death or grievous bodily harm, in which
case the consent wouldn't matter because it would
be an aggravated assault.

Is that helpful, or is that -- I fear
I've confused the issue more.

ACTING CHAIR HOLTZMAN: No. It just

PROF. SCHULHOFER: I know there was a
lot of discussion of defense -- the defense in the commentary, but I can't keep it all straight right now. Is the defense that you refer to, is that within the four corners of Article 120, or is that coming from a separate provision?

MR. SULLIVAN: Great question. That comes externally. So the President, in the Manual for Court -- so in Article 36 of the Uniform Code of Military Justice, Congress said that the President can identify rules of evidence for courts-martial, and rules of procedure for courts-martial shall generally follow the rules of procedure that apply in federal district court in criminal cases, unless they aren't practicable.

Okay. So Congress has delegated rulemaking authority to the President, and so the President has carried out that rulemaking authority in part to recognize certain defenses. So the defense of reasonable and honest mistake of fact is specified in the Rules for Courts-Martial.
So any general intent offense, so any offense that doesn't require the government to prove the accused was thinking a certain thing when they committed the offense, any general intent offense, it is a defense that the person reasonably honestly had a mistake of fact, with certain extremely limited exceptions.

And I'll give you one example. Sex with someone under 12 is a crime, doesn't matter that the accused reasonably honestly believed the person was above the age of consent, which in the military is 16. Doesn't matter. If the person is less than 12, it's a crime, you know, without regard.

So we have three kinds of offenses in the military. We have strict liability offenses, like carnal knowledge with a person under 12, and then we have general intent offenses, and then we specific intent offenses.

So general intent offense has the reasonable and honest mistake of fact. If the government has to prove a specific intent, that I
had some specific thought, there's an honest belief, even if not reasonable, that is inconsistent with that requirement for the government to prove that particular thought would be a defense.

So, for example, if you're accusing me of premeditated murder, I have to specifically intend to kill an individual. So if I do something that any normal human being would recognize is likely to kill an individual, but for some reason, you know, I honestly, but quite mistakenly, believed that that act would not cause death or -- or would not cause death, I can't be found guilty of premeditated murder.

I can be found guilty of any other -- of some other form of homicide. But because I didn't have that specific intent, even though I was unreasonable in not having that intent, I can't be found guilty of that particular offense, unless --

PROF. SCHULHOFER: I assume the government -- the military is not challenging the
Commander-in-Chief's determination that a culpability defense is a rule of procedure and evidence. We wouldn't normally think so.

MR. SULLIVAN: Right. But it's not only evidence. Yeah. It's also procedures, and does that term -- is modes of proof -- okay. The courts have expressly said that it does not include evidence, which is a judicial function.

But let me read you the actual language in 36. Okay. So the President may prescribe rules, pretrial, trial, and post-trial procedures, including modes of proof. So it's likely that that would be thought of as satisfying -- as falling within the modes of proof authority of the President there.

But exactly as you said, you know, certainly the United States is not going to go into court and say, "No, the President didn't have authority to promulgate that Rule for Courts-Martial." But, again, yeah, I think it would be a good argument that that does satisfy.

And let me just refer -- Article 36
had a moment in the sun fairly recently. You'll recall the Hamdan v. Rumsfeld case where the Supreme Court invalidated the military commissions that were in effect before the Military Commissions Act of 2006. Some reporting incorrectly said that they held it was unconstitutional. They did not. They held that it violated Article 36. That was the basis for which those commissions were invalidated in Hamdan.

PROF. SCHULHOFER: Those were procedures that were disadvantageous to the defense.

MR. SULLIVAN: Exactly. That's right.

ACTING CHAIR HOLTZMAN: I'm still trying to understand the -- this bodily harm issue. Isn't it on some level redundant, on, for example, sexual assault? Because what is the bodily harm that is being caused here? It says, "commits a sexual act," which is a penetration act, b) causing bodily harm -- by causing bodily harm, but the bodily harm definition is an
offensive touching.

So you are committing the crime by committing the crime.

MR. SULLIVAN: I guess the -- the way I would think of that is when the offensiveness of the touching serves as a proxy for the lack of consent, because, again, it is only -- it is only bodily harm --

ACTING CHAIR HOLTZMAN: But then do you have to prove that it's offensive?

MR. SULLIVAN: Yes. It --

ACTING CHAIR HOLTZMAN: The government has to prove that that act of penetration is offensive if it's relying on point B?

MR. SULLIVAN: Exactly. So if that is the theory of liability, then the government would have to prove beyond a reasonable doubt that it was -- that it was bodily harm. And if the theory of bodily harm is offensive touching, then the government would have to prove beyond a reasonable doubt that the touching was offensive.

ACTING CHAIR HOLTZMAN: To that person
or in general?

MR. SULLIVAN: Well, again, they would have to prove that it was offensive to that person, and then --

ACTING CHAIR HOLTZMAN: And that that was reasonable.

MR. SULLIVAN: And then the defense would have the opportunity to try to rely upon the defense of reasonable and honest mistake of fact where they would say, "Well, no, you know, I reasonably and honestly believed that kind of touching would not be offensive."

ACTING CHAIR HOLTZMAN: And what is it -- what is meant by the non-consensual sexual act, which also is part of the definition of bodily harm? Does that pull in the whole question of whether the victim consented? Because bodily harm means any offensive touching of another, however slight, including any non-consensual sexual act or non-consensual sexual conduct.

So then the question of whether the
victim consented or not becomes an element of the prosecution's case?

MR. SULLIVAN: It can, depending on the theory of liability.

ACTING CHAIR HOLTZMAN: So if the theory of liability is causing bodily harm, which means -- to me it seems quite redundant, but -- or circular. So you have to prove that there is non-consent. The government has to prove that.

MR. SULLIVAN: That would be one way in which that could be proved. But presumably you could prove --

ACTING CHAIR HOLTZMAN: Well, let's just say you have a sexual assault where they have no threat and you have no fraudulent representation, and you have no artifice. You don't have A, C, or D. So the only way you could have sexual assault is B. I guess -- I'm just trying to figure this out. I'm sorry. I don't mean to be taking --

MR. SULLIVAN: I mean, just -- you know, so if I -- if I brandished a lethal weapon
and said -- you know, I brandished a lethal
weapon and --

    ACTING CHAIR HOLTZMAN: Well, that's
    A.

    MR. SULLIVAN: Yeah. That would be --
    that would be --

    ACTING CHAIR HOLTZMAN: A.

    MR. SULLIVAN: Right.

    ACTING CHAIR HOLTZMAN: Sexual
    assault. B --

    MR. SULLIVAN: That would also be an
    aggravated assault, so that would also -- that
    would actually bump it up into rape.

    MS. FRIEL: It's almost like --
    because the next one for the grievous bodily harm
    is that it almost looks like it should have been
    physical injury and serious physical injury. And
    physical injury -- different, you know, injury,
    not the force, and that is New York law. That is
    why this looks so unfamiliar to me, that under
    New York law the force of the act of penetration
    is not -- it doesn't count for the force if you
are looking at a forcible sexual assault. There
has to be force apart from the act of the
penetration.

MR. SULLIVAN: In New York law, is the
prosecution under the separate obligation to
prove lack of consent?

MS. FRIEL: Yes.

MR. SULLIVAN: And, again, that's --

MS. FRIEL: By case law. By case law,
even though most of the statutes don't say "and
lack of consent." But lack of consent -- force
is considered lack of consent. Being
unconscious, doing it to someone, that is
considered lack of consent. It is kind of that
statutory scheme; all of those things are lack of
consent, which is why this is odd to read the way
this reads.

MR. SULLIVAN: Right. And that gets
into the central change that was made in 2006
when Congress took out "consent." Then, again,
you could no longer have the mere force required
to commit the act be the force required by the
statute, as was the case before 2006.

COL(R) SCHENCK: Dwight, I just want
to point out one thing. This thing -- first of
all, this handout was fabulous. This is
absolutely the best read-ahead I have ever
gotten, especially with the focused issues we are
supposed to be looking at.

But there is -- under Tab 4 -- the
trial judges received this bench book, Military
Benchbook. All of the Services use it. The Army
is basically the source. And it provides
instructions that the judge -- how the judge is
supposed to do the analysis and what they are
supposed to tell the panel members.

I think that is a little bit helpful
for everybody. I mean, clearly, me, but it lays
out some of those issues and what the judge is
supposed to think about and what -- how they do
that analysis regarding elements. I just wanted
to point that out to you.

PROF. SCHULHOFER: I wanted to go back
to the question that Liz Holtzman was raising
because I think the concrete context for that would be the one that you said is the very most common one you see, which is two Service members, both pretty intoxicated, and the guy makes sexual advances, which is the -- in some sense the norm, and the woman perhaps pushes his hand away -- perhaps her head is spinning, we don't know -- and he penetrates her.

Some people might think of that as a non-consensual penetration. So could you walk us -- if that were charged, could you walk us through how that would be charged and proved under the statute?

MR. SULLIVAN: Right. So that would typically be charged as a sexual assault, not as rape.

PROF. SCHULHOFER: Right.

MR. SULLIVAN: So that would technically be charged as sexual assault, and it would be charged under the theory the victim is incapable of consenting to --

PROF. SCHULHOFER: No. I'm sorry. I
didn't want to get into the case where the victim
is incapable, whatever that means, but just the
case where the victim is intoxicated, not
incompetent, but just, you know, drunk, loud,
boisterous, kidding around, but she is standing
on her feet, she is conversing or laughing or
whatever.

MR. SULLIVAN: That tends to be --
that scenario that you just described tends to be
charged under that scenario -- under that theory,
under six.

PROF. SCHULHOFER: But what if the
court-martial members say, and one way or another
they communicate to the judge, "Judge, we don't
think she was incompetent, but we think maybe
this act was committed by causing bodily harm,
because it was a non-consensual touching."

MR. SULLIVAN: Right. There isn't an
opportunity for that sort of dialogue between the
members and the judge. So the judge will
instruct on any theory of liability that the
judge thinks there has been some evidence to
support. But the scenario that you described tends to be charged under the -- and tends to be -- the government tends to try to prove that as six and saying that the victim -- the victim in that case is incapable of consenting and --

MS. FRIEL: And it sounds like you're saying and if the government in the investigation and looking at it doesn't think it rose to the level of incapable, they don't charge it.

MR. SULLIVAN: Or they charge a different offense. It probably would not be charged as a sexual assault. So you might have that scenario charged where there is some other touching that is incident to that event that is charged as a sexual contact offense. But, you know, in reality, in the military, that tends to be charged as a six, and then we have -- what do we have, about a 40-percent acquittal rate in those cases? And so --

PROF. SCHULHOFER: I'm sorry. It tends to be charged as a six, you said?

MR. SULLIVAN: Yes. Under the number
theory of liability, the victim was incapable
of consenting. That's how it tends to be
charged.

DEAN ANDERSON: It's b(3)(A) on the
statute.

PROF. SCHULHOFER: b(3)(A). Right.

Okay.

MR. SULLIVAN: Yes. But of the seven
theories of liability for sexual assault, it
tends to be charged under that sixth theory of
liability, the victim is incapable of consenting,
due to impairment by any drug, intoxicant, or
similar substance, and that condition is known or
reasonably should have been known by the --

MS. FRIEL: I mean, that would be
similar to New York law and similar to a lot of
college policies. Mere intoxication doesn't make
you violate the policy. It's intoxication that
rises to a certain level, and then people
defining "capacity" different ways in different
policies or in different laws. But generally
they try to draw a line between just getting a
little drunk and what level, should that be considered a criminal or violative of college policy.

PROF. SCHULHOFER: So what I'm inferring from that is that in cases where the prosecution can't prove b(3)(A), can't prove it either because the person is not incapable, whatever that means, or they can't prove that the condition reasonably should have been known, in those situations, which sounds to me like is the most common situation you see, they can't be charged under this theory, they can't be charged under 120.

MR. SULLIVAN: Well, they are often charged under 120, and then it becomes a jury issue.

(Simultaneous speaking.)

PROF. SCHULHOFER: Yeah, and from what Liz Holtzman was saying, it's not clear why -- it's not clear how that fits with the definition of bodily harm as any non-consensual touching.

MR. SULLIVAN: Right. And, again, I'm
just saying that, as an empirical matter, is the way that these cases tend to play out. That isn't to say that there -- you know, there are any number of cases where they are charged as rape, where the theory is that there was -- you know, that it would have been -- in pre-2007 it would have been by force and without consent.

So we certainly have those cases as well, but I think that the bulk of the cases we see are where the argument is simply, was this person capable of consenting or not? And did this person -- and then you will often have the defense making the reasonable and honest mistake of fact, which is regardless of whether -- which also of course goes to the element of whether the person knew, but you'll have the defense making the argument that this person manifested their consent in some manner such that it was not a criminal offense.

ACTING CHAIR HOLTZMAN: Just going back to the point again about bodily harm, and pulling up on the point that Ms. Friel mentioned,
because if you look at rape, the first one is using unlawful force. We're not into that here.

But using force likely to cause death or grievous bodily harm, and here we have causing bodily harm, which is a very infinitesimally small or minor harm that is caused. Why did Congress write this without -- make it this way as opposed to saying, using force that was less than likely to cause death or grievous bodily harm to a person?

MR. SULLIVAN: Although any form of force, any form of unlawful force is sufficient to bump it up to --

ACTING CHAIR HOLTZMAN: Well, any form of unlawful force, then why do you have two? If any form of unlawful force counts, then you don't need (a)(2).

MAJ GEN(R) WOODWARD: Yeah, it seems like one is an umbrella for the ones that follow to some extent, doesn't it?

ACTING CHAIR HOLTZMAN: What I'm trying to say is, if two is lesser, you don't
really have a lesser. You've gone down to bodily
harm, which is like, where did that come from?
Just my take on the draft --

MR. SULLIVAN: And, again, my
perception is that that is a proxy for bringing
in consent, because, again -- because of the
definition of bodily harm, which is any offensive
touching, that serves to bring in the lack of
consent concept.

ACTING CHAIR HOLTZMAN: Right. But if
you use force, other than force that was likely
to cause death, or other force that was likely to
cause bodily harm, you can't -- I mean, then
consent -- in other words, if you use that force,
you don't have an issue of consent. But if you
use lesser force, then you are raising the issue
of consent.

BGEN(R) SCHWENK: I think that's right.
That's what they've done.

ACTING CHAIR HOLTZMAN: That's what
they've done. So, in other words, right, so it's
--
BGEN(R) SCHWENK: You can't consent to grievous bodily harm, you could consent to lesser forms. So it's going to be offensive, meaning --

MR. SULLIVAN: And so their definition of "force" is the use of weapons, which is easy, use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person, or inflicting physical harm sufficient to coerce or compel submission by the victim.

ACTING CHAIR HOLTZMAN: Yeah, but I have a question to that, too, "because sufficient to overcome, restrain, or injure a person," is that an objective standard, or is that requiring the victim to respond?

MS. FRIEL: It's supposed to be an objective standard, at least from what I read, because by saying "a person," they meant it to be an objective standard as opposed to other places they refer to "the person" or "the victim." And then that's supposed to be subjective.

BGEN(R) SCHWENK: So no obligation on the individual to try to be not overcome or
restrained or whatever. I think it is supposed
to be objective.

ACTING CHAIR HOLTZMAN: But if you

look at the C, it had --

MS. KEPROS: It just -- it defies any

meaning. What is an objective person for

purposes of being overcome?

MS. FRIEL: Does it mean someone 5'2"

and my size or somebody else that is much bigger

and stronger? And so which is the reasonable --

MS. KEPROS: Right, looking at the two

of you, I'm trying to conceive of who is that

objective person?

MS. FRIEL: Yeah.

ACTING CHAIR HOLTZMAN: Are we being

unfair to you, Mr. Sullivan?

MR. SULLIVAN: No. No. Again, I'm

not here to defend what Congress did, so --

ACTING CHAIR HOLTZMAN: We're just

trying to understand what they did.

MS. KEPROS: I have another practical

question about what is being done around the
"bodily harm" definition. Because if I understood the instructions section in Tab 4 correctly, in the charging sometimes the allegation will be non-consent, and sometimes the allegation will be an offensive touch.

And I am trying to think if there is ever a situation where there is consent and it would still be offensive, because I can't think of what that would be. It seems like consent necessarily makes the touch okay. So that's one question I had. Is there any practical scenario I'm just not thinking of?

MR. SULLIVAN: I don't think so, because, again, the only scenario where the consent is obviated is in an aggravated assault context. So, but that's a different concept than the one you articulated.

MS. KEPROS: Sure. And then related to the honest and reasonable mistake of fact defense, there is reference in these instructions to having mistake of fact as to consent under some circumstances, although it is not even like
a real affirmative defense. It's kind of a
"here's stuff you should think about." It
doesn't say, therefore, you acquit the person; it
is just kind of, these might bear on your
analysis of whether the government has met their
burden.

And it has made me very confused about
something you've said today and I read in some of
the other materials, that you can't consent to
grievous bodily harm. Well, if you can't consent
to grievous bodily harm, can there be an honest
mistake of fact as to consent to grievous bodily
harm? Because this instruction book says that
you could be so instructed.

MR. SULLIVAN: Presumably, there could
be an honest and reasonable mistake about whether
some particular act is likely to cause death or
grievous bodily harm.

MS. KEPROS: Okay. But then so to
refer to it as this instruction does, as a
mistake of fact as to consent, is kind of
misleading.
MR. SULLIVAN: Right. So, again, there's a general defense that, you know, apart from what is in any benchbook instruction as to 120, there is a general defense to any specific — I'm sorry, to any general intent offense, that there is a reasonable and honest mistake of fact.

So there is a standard instruction that judges give in that scenario, and then, again, the test is if there is some evidence of reasonable and honest mistake of fact, then the burden shifts to the government to disprove that reasonable and honest mistake of fact beyond a reasonable doubt.

So, again, we have this just general honest and reasonable mistake of fact overlay that would apply regardless of the offense that a judge would then tailor to the specifics of the offense in the particular context of what the evidence has shown.

MS. KEPROS: And there was discussion, obviously, in the cases about this burden shift, double shift, that kind of issue.
MR. SULLIVAN: Which is gone.

MS. KEPROS: Right. Which is gone.

Is there -- you just said "some evidence." Is there a burden of production or persuasion in terms of what the defense has to show to trigger that affirmative defense?

MR. SULLIVAN: That is the standard.

The standard under the law is some evidence.

MS. KEPROS: Some evidence?

MR. SULLIVAN: Some evidence.

MS. KEPROS: And so that could come from cross-examination, for example --

MR. SULLIVAN: Oh, yes.

MS. KEPROS: -- there's a little bit in there somewhere.

MR. SULLIVAN: Correct.

MS. KEPROS: Is that true of most affirmative defenses in military practice, like self-defense? Is that how it functions?

MR. SULLIVAN: Yes.

MS. KEPROS: Okay.

MR. SULLIVAN: Yes. That is fairly
standard. Again, the distinctions there, again, tend to be strict liability offense, general intent offense, specific intent offense, but once you are within there then the defenses function fairly similarly, you know, in their relevant category.

MS. KEPROS: Okay. Thank you.

MR. SULLIVAN: All right. With that, I will yield the floor to Rembrandt.

(Laughter)

PROF. SCHULHOFER: I don't see him.

Okay. Well, that's a very hard act to follow. That was very clear and very, very comprehensive. And it's a good thing -- I think it's a good thing that we used more time with you, because I haven't thought about taking the full hour anyway, and I think I can give an overview of the Model Penal Code fairly quickly. And maybe a little bit of time can be spent on issues and questions from --

LTCOL HINES: Professor, would you like to take -- we've got until 12:30, I think,
is when we are going to have lunch brought in.
Does anyone need just a quick five- or 10-minute
break?

ACTING CHAIR HOLTZMAN: Yes. Let's
take a quick break.

(Whereupon, the above-entitled matter
went off the record at 11:51 a.m. and resumed at
12:06 p.m.)

ACTING CHAIR HOLTZMAN: I think we now
have Professor Schulhofer, who will further
enlighten us. Thank you very much, professor.

PROFESSOR SCHULHOFER: Thank you.

Well, we have 24 minutes before lunch, so I will
try to do this quickly. The idea is that I will
discuss the ALI project to revise the sexual
assault provisions of the Model Penal Code.

We don't have Maria, on our staff, to
warn us about not speaking for the organization,
but I'm not speaking for the organization.

Everything I say is just purely my personal
opinion. I think I'm likely to say "we think
this," or "we think that." It's not the royal
we, but it's not the ALI we either. It's just that this is an emerging view among many of us. But everything is still unofficial and probably will remain unofficial for at least another couple of years until we finish our work.

I think you all know that the Model Penal Code is not formally enacted anywhere in the U.S., but it's been a model for state legislation, and courts often refer to it, even when it's not enacted as statutory text, courts often refer to it for guidance. So it is a source of authority, although it won't have anywhere near the kind of teeth to it that this project will have if its recommendations are adopted.

I should also apologize. I don't have to tell you that I have a cold. I think it's obvious, but I apologize for my hoarse throat.

The ALI, the current version of the Model Penal Code was promulgated in 1962, but the sexual offense provision, Article 213, is actually even older than that because it was
drafted in the 1950s. And then it worked through
the ALI process until the entire MPC was
officially approved in 1962. So the text is
currently still -- the official MPC is
egregiously out of date, and, unlike the UCMJ,
the unrevised MPC still has gendered language, it
still has the Victorian vocabulary of the 1950s.
It still endorses a broad marital rape exemption.
It still approves very antiquated procedural
evidentiary provisions.

That said, the core problem, the most
fundamental problem in the current MPC is, I
think, a problem that continues to persist in the
UCMJ, and that is that the whole structure of the
statute is premised on the traditional idea that
rape is a crime that involves physical force or
threats of violence. So this force-based
conception is inherent in the MPC. I think it
permeates the UCMJ, with some qualifications that
we've been trying to tease out. And it also
continues to be the law in roughly half of
American states.
The concern is that this approach is much too narrow. And so there's an emerging view, I think, certainly in academic commentary, in the civilian case law, in the FBI definition of rape, which is used only for statistical purposes, but it's important, and it's an emerging view also in many state statutes that sexual offenses should include all forms of sexual penetration without genuine consent irrespective of the concept of force.

So the main impetus for the revision that we're working on now is to move Article 213 away from the emphasis on purely physical threats and instead ground it in protection against any interference with genuine sexual, free sexual choice. And this problem—shifting the concept from force to consent opens up a wide range of very difficult challenges. And not only for drafting and not only for clarity, but also for setting the right substantive boundaries and not over-extending the criminal sanction.

So where we are. The ALI approved --
you'll see our timeline is quite a bit more
leisurely than the last committee.

(Laughter)

PROFESSOR SCHULHOFER: The ALI
approved the revision project in the spring of
2012. They appointed me as the reporter, which
means only that I'm leading the research effort
and the consultation effort and the drafting.
We've consulted with a variety of ALI committees.

Ultimate decisions are not for me. I report and
the ALI decides. And that will ultimately be
decided by the ALI membership.

For the time being, I think we're at
least a year, probably more likely two years,
away from having a document that would be ready
for formal ALI approval. So I can give you an
overview of our process and issues.

One of the first issues that we were
concerned about was formulating the different
advisory committees that we would work with.
That wasn't really my job. That's a job for the
ALI management, but I was involved. And we had
to try to bring in a diverse group of experts.

Dean Anderson was one of the first people,

obviously, that we thought about.

One of our concerns was to assure a

balance or a diversity, from a racial and ethnic
dimension, because, at least in the civilian

justice system, there are intense concerns -- in

the sexual offenses as well as in other offenses,

but in some ways especially in the sexual

offenses -- concerns about discriminatory

likelihood to charge when the defendant is

African-American, likelihood of greater severity

of the treatment of those cases, concern about

discriminatory unlikelihood of charging when the

victim is African-American. So it was very

important for us, at least within the purview of

the civilian criminal justice system, to make

sure that we had minority representation on our

advisory groups.

So those types of concerns may not be

right within the four corners of the charge of

this committee, might or might not be. Certainly
the Response Systems Panel, I don't know even there, but certainly more directly concerned there with charging issues.

The largest and most basic set of issues that we're confronting is directly within the purview of this committee, and that's with the substantive definition of the offense and how to shift from a force-based to a consent-based offense.

Roughly speaking, we've had three different kind of challenges: One is the obvious one of drawing the right substantive boundaries and deciding which impediments to fully free and genuine consent should trigger criminal liability and which departures from an ideal world of complete freedom should not trigger criminal liability.

The second challenge is to organize those judgments in a way that lawyers, and not only lawyers, but also ordinary people, can understand. And I was thinking a lot about this during Dwight Sullivan's presentation because, as
he mentioned, many of these earlier iterations of UCMJ had a case law overlay which clarified some of the ambiguities, where the courts said that there wasn't ambiguity, where I think he indicated, in an aside, a stage whisper, that it looked pretty ambiguous to him, but the court said it wasn't ambiguous, or they cleared it up.

So you have within the military justice system a dense layer of legal sources that may not suffice, but even if they do suffice, to present a coherent picture, even if they do, it's a coherent picture that emerges only after highly immersed lawyers work their way through Article 120 and the Manual for Courts-Martial and the Judges' Benchbook and all of the case law from the court of appeals for the Army and the other Services, and then the Court of Appeals for the Armed Forces. You put all that together and maybe a very proficient JAG lawyer can tell you, oh, this is what it means. And that might mean that within our mission we might say, we might say, it can work as a judicial
proceeding.

But it still leaves a concern that's very prominent for us, which is whether the statute by its own terms communicates to ordinary people what is expected and what's out of bounds. And particularly in an area where you're trying to change social norms, and many of us think that it is an appropriate function of our exercise, our ALI exercise, and this one, to communicate social norms that may be different from the ones that people grew up with, or, depending on the region of the country and the type of family they came from and what they heard in the locker room at the gym about how guys -- what girls want and things like that. If you want to communicate a clear message, our feeling is that the statute, by its own terms, has to be as self-explanatory as possible.

So, that's maybe a judgment for this committee to make, whether we want to take on that concern or just limit ourselves to whether technically all the materials put together can
solve the problem.

One of the proposals in our book, someone said, "Don't amend Article 120, there are too many things in play already, let the President fix it by amending the Manual for Courts-Martial." And that would solve one set of problems within the courtroom, but it might not, in my judgment, it wouldn't solve the problem for the 1.8 million people out there who haven't gone to law school and many of them haven't gone to college. Many of them are still in their teens.

So I think that was our second concern, which is to organize the judgments in a way that ordinary people can understand, right on the face of it, this is how you're expected to behave.

The third concern we have is that as we start extending the criminal law into less violent types of abuse, we want to make sure that the grading and the authorized punishments don't exceed the gravity of the offenses that we're talking about.
Again, that's something that's outside the purview of Article 120. For military purposes, the grading judgments apparently are imbedded in the Manual for Courts-Martial. And, personally, I don't see how we can separate those, but this committee has to decide whether our mandate extends beyond 120 into the grading judgments that are attached to those offenses in the MCM, I guess it is.

So, as we work through these issues, we're basically headed toward having 5 different kinds of offenses. Actually, 10, if you want to separate penetration and sexual contact. But in the interest of getting to lunch I'm just going to talk about them all together.

Penetration or contact by physical force; penetration or contact with a person who's impaired or vulnerable; penetration or contact by coercion, non-physical coercion, which would include non-violent threats as well as abusive positions of superior authority. That's how we're approaching it. For this purpose, I know
there's an interest in separating abusive
authority from offenses that would fall within
120.

The fourth category is penetration or
contact by exploitation of trust, which, again, I
think that certainly could arise within the
military since people, typically Service members,
get their medical care and their psychological
support and so on within the Service.

And lastly, the last category is
simply penetration or contact without actual
consent. In other words, without the first four
points, without physical force, without special
vulnerability, without coercion or superior
authority, without exploitation of trust, there
still can be penetration or contact in the
absence of actual consent. So those are the 5
areas, or 10 if you prefer, that we are focusing
on.

I don't like the complexity of this
structure. Dean Anderson referred to it as being
aesthetically unappealing.
DEAN ANDERSON: Aesthetically displeasing.

PROFESSOR SCHULHOFER: Displeasing.

(Laughter)

PROFESSOR SCHULHOFER: Actually, many of our advisors kind of raised an eyebrow and said, well, that's what statutory drafting is. She was referring to my work product.

(Laughter)

PROFESSOR SCHULHOFER: So people leaped to my defense. But I thought she was right. I thought that it was aesthetically displeasing. And it actually resonated with something that had been a source of discomfort of my own that I hadn't really articulated to myself. And that was the impetus for reshaping, in the new draft that the Staff sent you, a new draft dated April 1st, which reconfigures, in a way that's still complicated, but I think hopefully communicates a more explicit message.

And one of the problems is that, as we see that there are many different ways that
genuine consent can be tainted, you get into many
different kinds of abuse that are behaviorally
distinct. They're distinct in terms of their
culpability, their seriousness, their
dangerousness to others in the community, they're
distinct in many, many ways.

You can lump them all together by
saying penetration without consent is this crime,
period. But if you do that, you're lumping
together many, many importantly different kinds
of misconduct. And doing that, you don't really
simplify anything. You can get the statute down
to ten words instead of 8,000, but you're not
really simplifying anything. You're likely to
create more confusion because everything turns on
the one or two place holders that aren't really
defined, like "freely-given consent." And also
it aggravates the danger that you're going to
have punishments that are running way out of
proportion to the seriousness of the offenses.

So, one point I think may be worth
repeating in what I've said, the first four
categories that I mentioned: force, coercion, abuse of trust; those apply even when the victim didn't expressly say no. Those kinds of offenses apply even when the victim said, "Yes, I am willing." A commanding officer says come back to my quarters. She says yes and she comes back. Those kind of offenses apply even when the victims says yes because the concern is about whether the consent is freely given.

The last category might be the most controversial because it addresses situations where there's no exploitation, there's no coercion, there's no physical force, but there's also no consent. This was really the focus of that last problem that we were kicking around right before we took a break. The victim might have said no, explicitly, but there's no other force or overbearing. And also the victim may simply have been passive, neither cooperating nor resisting. And that could be because of willingness or it could be because of unwillingness together combined in some way with
fright or intoxication or something of that sort.

So I think it's fair to say that in
the situation where the victim verbally expresses
the unwillingness and communicate that, there's
virtually universal support, a least within the
ALI, for treating that conduct as criminal. And
again, treating it as criminal even in the
absence of any of the coercive methods that are
enumerated in the UCMJ.

It's the last situation where the
victim has expressed neither willingness nor
unwillingness. That's the one that's the most
controversial. And I noticed in the comments
here that there was a great deal of discussion
about whether the absence of consent is a
necessary precondition for liability. Some of
these provisions seem to read in such a way that
there could be liability without showing an
absence of consent. So is absence of consent
necessary? A lot of material on that.

But there seemed to be much less, or
maybe no commentary that I noticed, about whether
the absence of consent all by itself is sufficient for liability. And that's the area that I think is one of the most important judgments that has to be made. It's probably one of the most controversial within our deliberations.

The current draft, both versions of the draft that I gave you, treat that as a criminal offense at the misdemeanor level. In other words, simply penetration without affirmative expression of willingness, so that passivity, silence, any kind of ambiguity, mixed signals, any of those things, it becomes a criminal offense to proceed, becomes a criminal offense at the misdemeanor level.

So among our advisors -- and our advisors, by the way, have simply an advisory role. They don't vote on anything. The vote is at the level of the entire ALI membership. But we did take a straw vote among our advisors to see how people lined up, and about half of our advisors felt very strongly that the grading
judgment, about these silence/passivity cases, strongly felt that the grading judgment was insufficient and that the offense should be treated as a felony in the absence of affirmative consent. That was the view of about half of our advisors. And the other half of our advisors also felt very, very strongly and passionately that the conduct should not be treated as a criminal offense at all.

And some people thought that the reporters were just choosing a middle ground. I'm not sure if that's exactly -- I mean, I don't normally like to do that. I normally like to think that what I'm trying to do is just defensible on its merits rather than simply splitting the difference. I think this call is defensible on its merits, but to convey a sense of what we're doing, there're very, very passionate views that this conduct should be a felony and very, very passionate views that it should not be a crime at all.

And the latter view is not that this
is fine and that this is decent behavior, but primarily I think motivated by the overreach of the criminal justice system, and by the way that jurisdictions typically respond in an unduly harsh and indiscriminate manner to anything that carries a criminal offense, that it's overreach. And unfortunately, maybe if we had more freedom to grade things and not worry about overreaction, maybe we would criminalize it. But that second view, the non-criminalization view, is mainly that there are a lot of things that are bad behavior that we don't make crimes.

Yes?

MAJ. GEN. WOODWARD: Can I just add for -- an important part of that, as it relates to 120 and the changes that went through the NDAA in 2014 -- or, as we might say, something falls at that lower level that you would call a misdemeanor, though we don't have that differentiation, really -- but by them putting in the NDAA if you are convicted of any sexual assault conviction, it mandates an administrative
discharge action. That has a serious impact on
some that I would put is above probably the
misdemeanor level. I don't know if you want to
weigh in on that. But I think that's something
for us to think about, because that's separate
from the 120 piece that we're looking at. That's
in the statutes, right?

LT. COL. GREEN: Certainly the
ancillary consequences of conviction within the
military system, number one, the quality of a
conviction in a court-martial is different
because of, like what General Woodward was
saying, in terms of how it's defined. And then
what the consequences are within the military
community and outside the military community are
just -- it's a different factor than -- and
obviously you're probably talking to people from
different jurisdictions within the advisory group
that are factoring in some of those same
concerns.

PROFESSOR SCHULHOFER: Yes.

MAJ. GEN. WOODWARD: I just thought
it's something that's different in our
environment that we need to be aware of.

PROFESSOR SCHULHOFER: No, you're
absolutely right. The categories and the
consequences are different. The underlying
dilemma is somewhat similar in the sense that we
might think, as a matter of the way we want our
children to behave, the way we want them to be
brought up, the way we think young people should
be educated and sensitized, we might want to
communicate a very clear message that this is bad
behavior.

On the other hand, we are stuck in a
-- not everybody would think it's bad, but we are
working within a system that's once you make that
judgment that it's a crime, or if it's a general
court-martial offense, if it's a 120 offense or
if it's a felony, and in some cases if it's a
misdemeanor, that's where it's -- some people
think we can't escape this dilemma just by
calling it a misdemeanor. And if I understand
your point, I think it is that you can't escape
this misdemeanor. Whenever you put it within Article 120, the collateral consequences are --

    MAJ. GEN. WOODWARD: Are significant, right, yeah. So you can't --

    PROFESSOR SCHULHOFER: Now, I just may be repeating what I said, but that presents a dilemma for us, ALI, and a dilemma for what this committee might recommend, that I could imagine that everybody would agree around the table that this is bad behavior. On the other hand, some people might say this is not behavior that we want to automatically trigger lifetime sex offender registration for a 17-year-old Marine partying with another 17-year-old Marine and engages in some unwanted touching and then is categorized as a sex offender for the rest of his life. And the way it works in many states is that the offense would be reported.

        And by the way, actually, I assume that if soldiers go on leave -- not leave, but when they're off-base at a bar, they may encounter 16-year-old girls or 15-year-old girls.
That's going to be a court-martial-able offense. He may have a record that he had un-consensual
sex with a 15-year-old girl. And that, you know, when you look it up when he's 40, it's going to
say this is a man who had un-consensual sex with a 15-year-old girl. It's going to read very
different on that sex offender registry from what actually happened. And without condoning what
discovered, we worry a lot about working within a system that doesn't make discriminating
judgments.

We go more specifically into sex offender registration because it's part of our mission. And it's not part of the mission here, but I think your point, General Woodward, is that we have to know that the decisions we made, we make, tie into that.

MAJ. GEN. WOODWARD: But it would help us -- that's one of the things that I was -- when I was working on this -- if there was a way to not have such severe consequences, it actually helps you educate and actually helps you with
convictions. Because right now what happens is you don't get a conviction, so the implication is it wasn't wrong, or that person was falsely accused. So if you got more minor convictions for things, I actually think that it would be more effective in portraying that this is wrong.

PROFESSOR SCHULHOFER: Yeah.

MAJ. GEN. WOODWARD: And that's the challenge for us is, how do you create something where you address those, but we can make it minor enough that a jury, a military jury, is going to say, okay, we're going to do that? Because right now they're saying, I'm not going to put somebody on a sexual assault or a sexual registry for this crime.

PROFESSOR SCHULHOFER: Yes.

MAJ. GEN. WOODWARD: And it's really impeding our ability to get convictions.

PROFESSOR SCHULHOFER: Yes. During the break, I think I overheard that you were talking about education and communicating these messages. And the ability to limit that effect
really would be very helpful there. And then it
also would mitigate some of the pressure not to
charge these cases. I don't know how that plays
out within the military, but I would imagine in
borderline cases, or in cases that it just looks
like young people who are not very well-
socialized, who are misbehaving, there must be
resistance on the part of the military
prosecutors to trigger those kind of
consequences.

So, there is a concern that being a
little bit more modest about what's criminalized
could actually further the ultimate objective and
make the law more effectively enforced. You
know, if we said everything under Article 20 had
the death penalty, that wouldn't help.

DEAN ANDERSON: Just as a matter of
process to try to understand -- and I think I
might have asked the same question before, but
I'm not sure if I did, so I want to clarify
because this keeps kicking around in my head. If
there's an allegation of a penetrative offense by
force or non-consent, that doesn't have to go to a courts-martial. In other words, the wing commander could say, oh, let's do non-judicial punishment and then we never move then to the mandatory problems of sex offender registration. Is that correct?

MAJ. GEN. WOODWARD: Well, no, if somebody has a substantiated sexual assault, even if it's non-judicial punishment that they get for it, you have to go to administrative discharge proceedings. It may not necessarily get administratively discharged, but you have to, you know -- so even if it's not a conviction, even if it's non-judicial punishment, it activates that piece of it at least.

DEAN ANDERSON: I'm sorry, what does it activate?

MAJ. GEN. WOODWARD: It activates the requirement for that individual to go through administrative discharge proceedings.

DEAN ANDERSON: To be separated from the military?
COL. SCHENCK: Through an administrative process. And many of these junior enlisted folks that engage in this kind of ongoing misconduct don't have enough years of service to get an administrative hearing. So it's just a paperwork -- they'll get non-judicial punishment and then they're processed out.

DEAN ANDERSON: Right, but that doesn't lead to a sex offender registration.

COL. SCHENCK: That's correct. That's exactly right.

DEAN ANDERSON: So I'm just trying to separate out that there are not inexorable consequences to 120, as I understand it.

COL. SCHENCK: That's right.

DEAN ANDERSON: There's discretionary moments. Once you get a courts-martial and a conviction, there are mandatory consequences, but there is discretion built into the system at the reviewing stages early on that could kick this to non-judicial --

ACTING CHAIR HOLTZMAN: Isn't there a
problem, though, if the staff lawyer disagrees with the decision?

DEAN ANDERSON: Right.

ACTING CHAIR HOLTZMAN: Then that automatically kicks it up. Am I wrong?

MAJ. GEN. WOODWARD: Well, yeah, and another problem is non-judicial punishment is not a given. For instance, if I want to kick it down to an Article 15 non-judicial punishment and give you that, you can refuse the Article 15 and then it has to go to court.

DEAN ANDERSON: Right. Right. I'm just trying to understand the analogy or dis-analogy between a criminal conviction, which is what the ALI -- whether misdemeanor or felony, and the consequences of a criminal conviction, versus opportunities for lesser discretion within the military. Just trying to understand whether or not that's analogous or dis-analogous.

COL. SCHENCK: Right, but also we have to remember that sex offenses are withheld to the O-6 level. The decision-making authority is a
brigade commander. That's really high up. He can send it back. He can send it back down to the captain or the company commander and say, okay, you can dispose of it however you want. But so the visibility is really high.

PROFESSOR SCHULHOFER: Even at the very initial stage when a complaint is --

(Simultaneous speaking.)

COL. SCHENCK: At least in the Army.

I can't really speak to --

PROFESSOR SCHULHOFER: When a complaint is filed and then it's investigated --

COL. SCHENCK: It's investigated, right, by the --

PROFESSOR SCHULHOFER: -- and if the investigation says there is, you know, probable cause, then only a two-star, a three-star general can --

(Simultaneous speaking.)

COL. SCHENCK: No, or a colonel.

BRIG. GEN. SCHWENK: So, Glen and Kyle are nice guys and all that, but they're not sharp
enough to handle one of those.

(Laughter)

MAJ. GEN. WOODWARD: Well, but that's a result of the problem that there were a lot of younger officers that were burying cases --

PROFESSOR SCHULHOFER: And also I would assume that a full colonel or a Navy captain is not going to want to be out there on the line saying, fine, don't prosecute this. So the easier course is to say, bring it forward.

And the other concern I would have about the point that Michelle is bringing up is that even though there's a way out within the military, it's a little bit of an -- it's not completely all or nothing, but separation from service might not be such a big deal for an 18-year-old kid who's been in the Marine Corps for a year and then he's separated from service.

We might want to have a world where there's more severe punishment and training and you're saying to the Marines, look, it's not just that you'll get separated from service if you do
this kind of thing. You could get a sanction
within the military. You could get 30 days in
the brig. The present structure doesn't seem to
leave an intermediate -- if I'm right in saying
that separate from service isn't always such a
big deal --

MAJ. GEN. WOODWARD: No, no, it's the
other way around. I would say, or at least -- I
don't know, in our service, I'm not sure, but my
sense is across the -- it's the being separated
that's the significant issue.

PROFESSOR SCHULHOFER: This is for
enlisted?

MAJ. GEN. WOODWARD: They'll take 30
days in the brig over being kicked out.

PROFESSOR SCHULHOFER: But it doesn't
go on their record as a dishonorable discharge,
right?

COL. SCHENCK: The characterization of
service depends on the due process you're given.
So in order to give a character of service that's
unfavorable and other than honorable, a Service
member would have to have an administrative
hearing to get there. So, at least in the Army,
in order to expeditiously and use the least
amount of resources we'd allow him an
uncharacterized discharge. So you would get a
general discharge, something that -- not
honorable, but not other than honorable.

One thing I do want to point out, just
for everyone to understand, one of the changes
that has occurred is with that Article 32
hearing. So if I'm the brigade commander and I
get the report of a substantiated sexual assault
from investigative authorities; in the past a
commander could order investigations. Now
they're going to the cops, the investigators. It
comes to me and I can say, oh, okay, you
commanders lower than I am, go ahead and take
your discretionary authority on this case.
That's my option.

Or I can say I'm going to appoint a 32
officer to investigate. One of the changes that
occurred was making this investigative hearing no
longer an investigative hearing. It is now a preliminary hearing. There are a lot of changes with that. In the past, commanders would use those hearings to kind of flush out the evidence. You know, it's a he said, she said, everybody in the unit was drinking. I don't know. I have no idea. The cops say it's substantiated. I don't know. Let me have someone who knows what they're doing investigating call witnesses.

That has changed. That ability to do that has changed. And in the preliminary hearing, I think that the accused will still be represented by counsel. I think there will be witnesses called. But the standard in order to get that to a general court-martial is much lower. It's just probable cause.

And the victims are not required to testify. They have the option now not to testify. Many of the victims in the Services are within the units, right? So you have the accused, you have the victim. In the past, the commander would say, okay, hearing officer, the
accused doesn't have to testify, but can speak
through counsel and can testify. The victim in
the past would have to testify. If they're in
the military, they could be ordered to testify.
And so those -- there's no longer that --

MAJ. GEN. WOODWARD: The rape shield
laws --

COL. SCHENCK: Yeah. Well, the rape
shield law wouldn't really be applied in the
Army. I mean, the DA Pam required Article 32
hearing officers to impose -- and here's the
expert for Military Rules of Evidence right here.
Wrote the book. Seriously, wrote the book.

But anyway, so now all I'm saying is
it's a different scenario. So there's the admin
separations, no reason to be required to report
as a sex offender, which I think is really
important. And then there's this --

PROFESSOR SCHULHOFER: If I were to --
just one follow-up question to make sure --

ACTING CHAIR HOLTZMAN: Then we have
to go to lunch.
PROFESSOR SCHULHOFER: -- this
dichotomy. If I were to put that in civilian
terms, would you say that it used to be that a 32
hearing was a kind of provable case or
preponderance standard and that now it's been
reduced to something more like probable cause?

COL. SCHENCK: I would, I guess.

PROFESSOR SCHULHOFER: Is that --

COL. SCHENCK: I mean, I was a
prosecutor for a really long time and you -- it's
good for the defense because you get the
discovery, and it's good for the government
because you put your witness on the stand, and
the unit, the soldiers that are in the unit are
testifying. They know the importance of this.
This means this person's going to go to jail.

And, I mean, I saw cases when I was on
the Defense Task Force for Sexual Assault in the
Military Services. I was a senior advisor. We
visited units. And there was an actual 32
investigation where the victim testified she'd
never had sex with anybody else, never had sex
with anybody else. Everyone testified. And then
the DNA came after the 32 went to trial and there
was an acquittal.

But all those -- usually, you would
flesh those issues out at the trial. Huge impact
of the 32. And, I mean, as a prosecutor, I
really liked the 32. And if the accused felt
that they were going to go to jail, you would use
that as a -- to deal it out to a guilty plea. If
you waive your 32, we'll cap your sentence, you
register as a sex offender. You know what I
mean? You push them.

ACTING CHAIR HOLTZMAN: I think we
have to break for lunch. When's our next
witness, 1:00?

LT. COL. HINES: 1:30.


We'll take 45 minutes for lunch.

(Whereupon, the above-entitled matter
went off the record at 12:44 p.m. and resumed at
1:40 p.m.)
A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

(1:40 p.m.)

ACTING CHAIR HOLTZMAN: Good afternoon. We're very pleased to welcome this very, very distinguished panel of retired jurists, who we hope will be able to enlighten us a little bit about Section 120. We very much appreciate your coming before the Subcommittee. And which way shall we go? Commander Maksym, can we start with you? You can go first and then -- should we withhold questions until everybody finishes, or how do you want -- or should we --

LTCOL HINES: Ma'am, I believe some of the judges may have prepared remarks. I know Colonel Grammel, his written product is provided. So maybe whoever's got prepared remarks and wants to speak upfront can do that, and then we'll just go ahead with the panel.

ACTING CHAIR HOLTZMAN: I don't know. I think everybody should have something to say. I hope you have something to say to us, whether
you have prepared remarks or not.

(Laughter)

MAJ GEN(R) WOODWARD: They're lawyers.

I mean, come on.

(Laughter)

(Simultaneous speaking.)

ACTING CHAIR HOLTZMAN: I'm just joking. Sometimes I don't have a smile on my face when I'm joking.

CDR MAKSYM: I found this incredibly amusing, and I'm ready to go.

All right. Madam Chairman, thank you for having us today. I just want to, on a personal point of privilege, I just wanted to say hello on the record to General Schwenk, who I haven't seen in a very long time. It's always a privilege to see an old boss. And it's been a lot of years.

Madam Chairman and members of the Panel, it's a real privilege to be here today.

By way of remarks, I don't want to take a lot of time. I just wanted to enjoin you to the fact
that I've, you know, been a judge for about going
on 13 years when I retired in August from the
circuit in Japan for the second time, and I've
sat on the appellate court and I've sat as a
trial judge.

And I have to tell you that I don't
think, in my legal career, as a litigator of
about 30 years now, I ever saw a more failed
statute than the machinations of Article 120, and
what has happened to it since we had a perfectly
good statute which functioned wonderfully. And
then we decided to go to the dental office and
get a root canal without anesthetic.

And since then, we've had a triage
process where jurists on the military bench have
been required to fix some statute problems ad
hoc. And I did this both on the appellate bench
and on the trial bench.

I can think of Crotchett, I can think
of a couple of other cases where -- which led to
Prather, where slowly but surely we undid in 120
Mod 2 that which was fixed by Prather and then
finally eradicated by what I'll call Mod 3, the newest 120.

What I want to contain my remarks to, though, is the context of all of this. It's all rather easy to say, okay, we can fix the statute. We can, you know, make the root canal better. We can kill the infection. But we can't forget the context of where we're coming from.

The majority of these cases are tried by incredibly inexperienced counsel. They're tried before incredibly inexperienced jurists. They're tried in an atmosphere which has become highly potent and political, and they're tried with a new creature coming onto the stage, Victims' Legal Counsel, all of this happening simultaneously.

It would be one thing if in this environ we had a professional judiciary. But I was the exception rather than the rule. I only can speak to the sea Services. I was a professional jurist. I sat with the closest thing you had to that in the Navy and Marine
Corps. I sat longer than anybody did. But I had to grind and machinate and beg and grovel to stay on the bench. And I had to take a vacation to Iraq in between, as part of the negotiated process, to do a little work there, and then come back to the bench.

We have to change that. And I don't know if that falls under this Subcommittee or under this Subcommittee's owning committee or under Judge Effron's process that he's going through. But somebody needs to fix that. Or all of this, and no matter what kind of microscopic vision we give to this statute and fixing the statute, will be meaningless.

The second thing, you know, the longer you stay on the bench in the military, the more dead your career is right now. You know what you call a guy who's been on the bench for 13 years when he retires? Commander. So that should tell us something. And there's no jibe there. That's just the reality. So in the sea Services it's a reality. I won't speak to the other Services.
That's the first thing.

I think the second thing is someone needs to, at least in the sea Services, take a look at where we're going with Victims' Legal Counsel and how it's going to affect the application of the statute. I won't get into that, because that wasn't my mandate. But someone needs to look at that.

I did the first members trial with Victim Legal Counsel, and it was -- I fashioned a way that it worked. But there was no funding for these people. There was no application of a federal statute. There was no -- I mean, there was nothing.

So it was a mess. And that was as of August, and I don't know if Admiral DeRenzi's gotten the Navy's act together on this yet. I have no idea.

And then finally the statute itself. I think, right now, and what I'll talk about later as you're addressing the questions, will be, you know, they fixed things in the statute,
but then they got rid of some of the defenses.

So I'll tell my little story of just how juries would come back to me. Members would come to me, ask me questions after the trial was over, and they'd say -- you know, and I work with all three statutes. They'd say, well, why couldn't this guy say something about, you know, consent. Why couldn't -- and they want to know.

It's the gigantic elephant in the jury room wearing a tutu, and no one wants to talk about it.

And so we can hear as many special interest groups as we want. We can hear as many victims' advocates as we want. But I think we all have to remind ourselves, at the end of the day there are two creatures in the courtroom that count the most. The government of the United States who believes that a crime has been committed, and the accused who is exercising his constitutional duties, rights, in order to compel the government to meet their duty of proving his guilt, by legal and competent evidence, beyond
any reasonable doubt.

If we take our eye off that golf ball and start hacking the ball around the rough places, we end up with the kind of appellate root canals we had with Article 120. So we need more training for counsel. In the Navy and Marine Corps, we only have 300 general courts-martial. Most of them, 80 percent of them or so, are Article 120 cases.

So you literally have kids in the courtroom trying cases, with very little training. There's a case that I can't chat about right now, but watch out for United States v. Edmonds. It's a midshipman Article 120 conviction. I was the DuBay judge in that case.

There are serious issues about -- and it's a matter of public record. Counsel comes forward afterwards and says, "I wasn't competent." And guess what? He wasn't. So this is the kind of stuff that I think that both your senior Panel and you need to keep in the forest, as we discuss the trees that make up a statute,
that I think we can take medicinal action on.
But not without forgetting about -- not without
contemplating, in an omnipresent way, the context
in which a usually inexperienced jurist has to
reign over a three-ring circus -- and I mean that
with no deprecation involved -- with Victims'
Legal Counsel, inexperienced trial counsel,
inexperienced defense counsel. Thanks for your
time today.

ACTING CHAIR HOLTZMAN: Thank you,
Commander.

Lieutenant Colonel Ward, if you have
a prepared statement, you can summarize it. I'm
sure we have it.

LTCOL(R) WARD: I don't have any
prepared remarks. My name is Quincy Ward. Just
briefly, I was in the trial branch from the
summer of 2008 until the summer of 2011. So
right when I was trial judge, we were just
starting to see cases under what we now we would
call the new-old 120 of 2007.

So there was old-old, new-old and new-
new, up until just a few months ago. Even on the Appellate Court, that's how we would refer to them. I can remember seeing those first cases on the docket, and everyone was dreading getting that first case, because the statute, we all know, is far more complex. There were a lot of issues we were uncertain about.

Fortunately, the guidance that we got from the Army and the Benchbook and how to handle some of these issues was very helpful. I left in 2011, and then on the Appellate Court, saw a lot of those cases that we dealt with. A lot of the issues that we saw there primarily dealt with instructions, the affirmative defense, the dual use, the burden-shifting, all those things that are well known in cases such as Prather.

And then right in the last year, year and a half before I left a few months ago, we were seeing 120 cases under the current statute. And so my perspective is probably most germane in the Appellate Court from new-old to new-new. I would say that it was a positive trend, because
it was less complicated, for one. Some of the instructional error issues that we saw in the new-old were gone.

I would echo what John said about a couple of things. There were some things that I thought were good about the new-old, and we'll get some of those in these issues, that were left out in the current statute. So that's my timeframe, and I hope to answer any questions you may have, and thank you very much for your invitation to be here.

ACTING CHAIR HOLTZMAN: Well thank you very much. Colonel Orr.

COL(R) ORR: Hi. I'm Colonel Bill Orr, retired, and I want to thank members of the committee for the opportunity to address you this afternoon. Now let me begin by saying that I've reviewed all the materials provided by the staff, and I must say they've done a phenomenal job in one of the most difficult areas of the criminal law.

As you well know, the issues of rape
and sexual assault are two of the most difficult challenges facing not only our military, but our society as well. Now I've been a military judge at the trial and appellate level. I've done the old, new-old and all the categories he named, and if that wasn't enough, they ended up calling me back to do some work on new-old even after I retired. After 30 years, I still got recalled to come back to do some work.

But within that context, I understand that military judges perform an important and essential role, especially in those trials where the accused elects to be tried by a panel.

However, I firmly believe that the law and the facts in each case should determine the outcome rather than the military judge.

In short, the case results should be the same, irrespective of what judge presides over the trial. That's why the law and these instructions are so important. I love judicial discretion, I love it, but there's too much. The old and the old-new, first with the old-new, put
us in a position and a difficult position where
we either follow the law, the letter of the law,
or we were forced to protect the rights of the
accused.

Either he had an opportunity to
present a defense or he didn't, but the law
prevented us from doing that. We also had --
were placed in a position where we had to decide
whether there was enough evidence for the case to
go to trial, for the defense to be raised.

So I was pleased to see most of the
new articles regarding sexual misconduct in the
Year 2012. For me, they clarified and prohibited
many sexual activities, such as exposing one's
genitalia by any means to a child, intentionally
communicating indecent language to a child via
communications technology, when in the past the
UCMJ implied that such activity had to occur in
the child's presence.

Now I also agree with the decision to
place most of the crimes involving sexual
misconduct under Article 120 rather than General Article 134, because that eliminates the prejudicial to good order or discipline or conduct of a nature that would be bring discredit upon the armed Services.

Although my personal preferences should not determine your ultimate decision, by the wording of the statute and the underlying definition, I strongly urge that you clearly delineate any applicable affirmative defenses that focus on the accused's conduct, not conduct of the victim.

Specifically, in the case of rape, the current instruction seems to disallow a mistake of fact defense because it's considered not an element of the defense. But then it defines consent in like -- lack of consent may be inferred based on the circumstances.

Well, what that does is, in the context of -- first of all, I recommend against a requirement of an affirmative act of consent by the victim. That's not what I'm advocating. But
what I'm -- the point I'm trying to make is in many cases, especially when drugs or alcohol are involved, one or both folks involved in the incident are not beholden to the facts.

   Usually when an accused presents evidence of consent, it is often difficult to separate that evidence from the assertion that the accused honestly and reasonably believed the victim consented. Concurrently -- currently in those cases, the judge must carefully evaluate the evidence. The suggested instruction seems to give the judge discretion to give an instruction that permits a finding of not guilty without calling it a defense.

   When you give a judge such discretion, you have inherently added unpredictability into the process. In sum, I recommend that the language of the statute clearly state whether or not a mistake of fact is an affirmative defense. Additionally if used, it should clearly either permit or not permit internally inconsistent decisions such as denial, a lack of memory of the
event, coupled with it is not in my character to
force someone else; therefore, the victim caused
me to believe that he or she consented.

The other issue I find challenging is
the area of threatening or placing a person in
fear. Is the word reasonable necessary? If the
focus is on protecting the victim, the panel
should not be permitted to superimpose their own
judgment upon the victim, as long as they believe
the victim believed he or she was in fear. In
such cases, the accused should be responsible for
the victim as they find it.

Now as previously stated, judicial
discretion is vital and a necessary component of
a trial, but too much discretion results in
unpredictability and causes needless appellate
litigation. I believe shoring up these areas
will go a long way to ensuring fairness and
predictability in these court proceedings.

As a further aside, I was actually
called back to the court, the Air Force court,
just at the time the Judge Advocate General had
instituted the victims' counsel, and I understand there's a lot of work that needs to be done on that.

But there are instances, from my experience as a trial judge, where you do the private hearings under RCM 912 or what was it, 504 or 503, where it's just you, the accused, the victim and their counsel. A lot of times victims feel like they cannot -- they're just tongue-tied. They can't exactly articulate what they are.

And personally I have no problem with having a victim assistance counsel, and I would recommend that they limit it to those hearings per se, but not expand their capacity any further than that. I'm willing to take any questions to further explain that.

ACTING CHAIR HOLTZMAN: Thank you very much, Colonel Orr. I appreciate your testimony very much and your statement. Colonel Grammel?

COL(R) GRAMMEL: Grammel.

ACTING CHAIR HOLTZMAN: Grammel.
We're very pleased to hear from you next.

COL(R) GRAMMEL: Thank you. Good afternoon. I'm Colonel Tim Grammel. I retired from the Army last fall, and I appreciate the opportunity to be here. I understand the Subcommittee's going to look at the language in Article 120, and I've looked at the issues, the first 11 issues. I've got specific comments on all those, but that's detailed. I don't want to talk about that now.

Just by way of introduction, I was on the trial bench my last ten years in the Army. So from 2004 through 2014. So I was a trial judge for all three iterations of Article 120, and also before that, under the oldest version of the statute, I taught Criminal Law at the JAG School, and I taught substantive Criminal Law.

So I focused on sexual offenses. So I got to understand the way in which the old statute was able to cover all the different ways through constructive force and other means. But there's a lot of important issues in Article 120,
and obviously we've got to balance the rights of
the accused, and understanding the rights of the
victim too and the goals of the government.

With all the definitions at stake,
everyone in the room would probably come up with
a different way if everyone changed 120, because
there's so many different variables involved.

But I see this as an opportunity to share ideas,
create a marketplace of ideas where you all can
go shopping and together come up with hopefully
the best end result for Article 120.

But also while I was on the trial
bench, the whole time I was on the trial bench I
was also on the Benchbook committee. So what
that is, is we have some of the judges work at
modifying the Benchbook when changes come out.

So I went through the painful process of trying
to create instructions when the new section came
out in 2007, and also when it came out in 2012.

That was painful. I've done a lot of
difficult things in the Army, and that was one of
the hardest things ever, was to try to take that
statute and then put it into a product that the judges and the court members could use during an actual trial. To try to put that into practice was extremely difficult.

And was I pleased with what we ended up with? No. Did we do the best we could with it? Yes. That gave me an opportunity to see some of the practical problems when we put things into the statute. Some of them simply just don't work, and some of them do.

So I think that background is going to help me when we discuss what Article 120 should say, especially with specific words, phrases, et cetera. Thank you.

ACTING CHAIR HOLTZMAN: Well thank you very much. I think we'll start questioning with the panel. Ms. Friel, do you want to -- are we going to go around to everybody, or do you want to take people out of order? Who's got a question? Do you have a question?

DEAN ANDERSON: I do. I very much appreciate all of you all coming to talk to us.
It sounds as if you've got an extraordinary amount of experience under the different versions of 120. It does seem like there's an initial question that we face as I understand, within our charge, and that is whether or not to change, notwithstanding the fact that it's wildly imperfect, and notwithstanding the rapidity and frequency of change, whether or not to change again, at this time, make a recommendation to change 120.

Sounds like every time there's a change, there is pain and exasperation on the part of judges trying to implement this law, on the part of folks trying to write and revise the benchbooks. I'm wondering -- and it also sounds as if there is a comfort level with imperfections in the statute, but things get worked out in the case law.

So one theory would be, well, just let the imperfect law that we have now work itself out over time, and don't change 120 again. A different theory would be 120 is so imperfect
that it must be changed again, and I would be
very interested to hear each of you, with your
substantial experience under the variations and
the pain of each variation, whether or not you
would make a recommendation to change 120 yet
again at this time.

CDR MAKSYM: You want to keep our
order?

ACTING CHAIR HOLTZMAN: Yes.

CDR MAKSYM: Well, not to return to my
boring soliloquy to start this game off. I would
simply point out that it depends what the
attitude of DoD's going to be. If the attitude
of DoD is that they're going to back up statutory
change with beefing up the training and the
judicial expertise and everything else that goes
with a properly functioning justice system, then
I say you don't need to change it because these
appellate judges and trial judges will do exactly
what we did to the old-new 120, Version 2.

But you know, there's a certain
absurdity to all that. You know with that
version, the Benchbook instructions, to eradicate the burden-shifting, actually had a Benchbook instruction defining federal statute. Now that's crazy in anyone's book, you know. So you have to decide if that's what you want to do.

I'm not a great believer that DoD's going to suddenly change or the various Services, and again, I don't speak to the Army or the Air Force; I only speak to the sea Services, are going to suddenly wake up tomorrow morning and say wow, military justice is our top priority, and we're going to make, you know, judges are going to have a real tenured status and --

DEAN ANDERSON: Let's assume we don't control that. Do you want to change 120 now?

CDR MAKSYM: Well that's my point.

DEAN ANDERSON: Right. I think the answer's no.

CDR MAKSYM: Exactly. At this time, I think you have to change it. I think you have to be very particular about setting forth, for instance, on the issue of victim's consent to the
accused, mistake of fact, you know, who's going
to be lined up under that? Are we going to --
are we going to make it back kind of like it was
in Version 2, the last version, without the
burden-shifting problem? Are we going to put it
back in the statute or are we not? That's
probably the biggest area, I think.

The other area that's going to have to
be addressed is a definition for someone who's
substantially incapacitated. Right now, we're
going to Article 111 and stealing from Article
111 a definition for a major felony statute. I
mean that's -- I think that's ridiculous. So I
think that's a big anemia in the statute, and I
think we have to go in and we have to fill it.

LTCOL(R) WARD: Well to answer your
question, ma'am, I would say there's probably a
few what I would consider small changes that can
be made to address specific things that are
needed, without making a huge shift to the
statute as it is. An example would be, and
that's one of the things on the list, but just to
use an example, should we bring indecent acts back in? Absolutely.

The breadth and amount of things that are -- younger generations will do today, that are completely incompatible with what the public believes the military culture is, needs to be back in there.

I'm not a fan of 134. I think the fiction of having to have someone offer testimony that they think this is discrediting or, you know, that these are things that traditionally the public as a whole would look upon as criminal conduct. And you know, indecent act, I think, is just one example of a change that can be made.

It's not going to result in a big shift. It's not going to create a lot of problems with instructions or anything like that. I think there are a few of those things in the current statute that we've done.

PROF SCHULHOFER: I'm sorry, Colonel. Are you talking about consensual conduct, that the public would regard as indecent?
LTCOL(R) WARD: Yes, yes.

PROF SCHULHOFER: Could you give an example?

LTCOL(R) WARD: Well, a lot of things were addressed. I think it's 120c with the recording, reproduction, things like that.

COL(R) GRAMMEL: The most common one is open and notorious sex. I don't -- it's beyond -- that's beyond that, because I think that there's some would say, and you could poll and it looks to me that under some circumstances, they wouldn't find that indecent.

But there's just some -- and you don't know it, and so it pops up in a record, and you see it charged under 134 as a general article offense. And I'm surprised.

(Simultaneous speaking.)

ACTING CHAIR HOLTZMAN: I think we should go in order.

(Simultaneous speaking.)

LTCOL(R) WARD: --some slight, what I would consider slight changes that could be made,
without making wholesale changes.

DEAN ANDERSON: So as I understand, the answer is no, given the constraints of the way the military justice system operates, and in minor form only.

LTCOL(R) WARD: Yes.

DEAN ANDERSON: What about you, sir?

COL(R) ORR: I would say minor form, but focus on, is this a workable statute? Not, you know, not that it's perfect; is it workable, because that's -- given our frustration is it appeared to the judges that well, this is as good as it got, so now we have to figure this out, and it's always dangerous when you're looking at a statute, knowing that this is not what -- this is an unintended consequence.

So there are modifications, but I don't think it needs a wholesale change. But there are things that can improved in it.

DEAN ANDERSON: Thank you.

COL(R) GRAMMEL: Dean Anderson, I'd be open to changing everything, but if you look
at how many changes are required in it, I think
the number of changes that are required to the
current statute are low enough where I wouldn't
promote overhauling it totally. I would just go
in and make specific changes.

DEAN ANDERSON: That's fascinating.
I very much appreciate your responses.

ACTING CHAIR HOLTZMAN: We'll probably
go around the room, despite some discussion. I
think there are a lot of people. I want to give
everyone a chance. Ms. Friel, do you want to ask
any questions?

MS. FRIEL: Not right now.

ACTING CHAIR HOLTZMAN: I'm sorry. Do
you have any questions?

COL(R) SCHINASI: Colonel Ward opened
this box, and it's an interesting issue to me.
When we think about 120, it's a different kind of
criminal offense. It has a different culture,
and I'm wondering if there's a cause and effect
here. Is there any way we could write 120 that
would work on the cause, that would make an
impression on primarily the young soldiers, as to what the appropriate conduct would be?

Is there a connection, or is that too remote to work?

CDR MAKSYM: I have to tell you I think that -- I have to make sure not to apply my newly-found profession in the seminary to my former profession. You know, it's a very loaded question, and it's a question that talks about what's happened, you know, with the social fabric of our society, which I'll not touch here.

I would simply say that I think the -- it gets back to the Dean's question a little bit. I think any rewrite of 120 or any approach to 120, whether it even goes to something as comprehensive, sir, as you're referencing, has to be laser-like.

It has to be very limited, and it has to make it as easy for the trial judge as possible, you know, so that the law is crystalline, and so that we're no longer in the position where, you know, judges are literally
making law as we go along.

I think what you're asking for, Colonel, would be -- I know what you're asking, but I think it gets -- I think the statute already is bigger than it should be. I mean I think we're trying to -- we're trying to cover everything with 120, and I think that's been a criticism of the way 120 was rewritten.

I don't know if there's a way that that can be done. I'm not -- I don't think I'm smart enough for that.

MAJ GEN(R) WOODWARD: Am I the only one stupid enough to know what you are getting at, I mean to not know? I apologize, but I have to jump in so that I understand it.

COL(R) SCHINASI: Okay. Let me make it a little more meatier.

(Simultaneous speaking.)

COL(R) SCHINASI: There's a fascinating connection in the military justice system between commanders and all kind of disciplinary problems. It's unique to the
military. The commander has all kinds of responsibilities with respect to the soldiers that he or she is responsible for.

A lot of that is educational. A lot of that is cultural. A lot of that is value, helping them develop, helping them become better soldiers, sailors, airmen and marines. It's a very complex mix. You could only understand it when you see it done. I could talk to you about it for hours; it wouldn't work. You actually have to see it being done, and what I'm wondering is because Article 120 deals with a special kind of criminal behavior, if there was a way to write the statute in such a way that commanders could use it as an educational vehicle, because it was laser-like, because it was clear, because it was understandable, to help young soldiers and sailors and airmen understand what's expected of them.

I think a lot of times we kid ourselves that when there's a decision from the court, everybody knows what happened and so
everybody adjusts their behavior. That doesn't work. That's not what the law is about. But in our system, where you have commanders interested in the evolution and development of their soldiers, could we write a statute that would be more effective in getting their attention, as to what they can't do?

Because if you have 18-, 19 year-old Service members, their judgment, their values, their experiences really haven't developed yet. Yet this is the primary issue. Could we write it that way?

CDR MAKSYM: I just would quickly point out, I want to give it to my colleagues, but I'd just quickly point out we're already doing that.

COL(R) SCHINASI: Does that help?

MAJ GEN(R) WOODWARD: Yeah, except the demographics of the perpetrators don't fall into that 19 year-old age group. You know, I think we've got to be careful so that we understand. I think we too often believe that this is between
the 19 year-olds on a date that, you know, have
ssexual relations and there's a misunderstanding.

If you look at the statistics, it's
more often a mid-level NCO that is responsible
for the -- as the perpetrator, and they very
clearly know what's right or wrong, and generally
they have more than one victim.

COL(R) SCHINASI: There's an
interesting issue with a training assignment and
with the trainers, that's true. But if you look
at the responsibilities of the victims and
perpetrators, and help educate them as to what
their responsibilities are, the law is one way to
do that. I don't think the current Article 120
has a prayer of doing that.

CDR MAKSYM: I don't know if that's
ever going to happen with the confines of a
statutory education. It's already happening
right now out there with a lot of the sexual
assault prevention training that's going on
across the Fleet. I can tell you in Japan that
was very comprehensive training.
Sometimes, though, it actually would make it almost impossible to find a fair group of members, because they would be so convinced that their duty was to convict, based upon accusation alone, that that became a two-day jury selection process.

So I think we're, you know, that it's already an active aspect. General, I would simply point out that, you know, we have a lot of cases where, you know, it's chief petty officers, senior chief petty officers, master chief petty officers that are the accused in these cases. So sadly, your point's well taken.

LTCOL(R) WARD: To answer your question, I don't think there's a way. I mean I've heard the expression, you can't legislate responsible behavior. You can criminalize reprehensible behavior or whatever the other word was. But what you're describing is everything above that line, and that has to come through education.

That has to come through a culture
that's built around the positives, training.

This is the goal, this is -- this is the way to
treat one another. This is respectful behavior.

This is what we expect, and when you drop below
that, guess what, you know. You go to jail.

So I don't think there's a way to
accomplish that through writing a statute.

COL(R) ORR: I think there may be, but
it probably won't be in our lifetime. You know,
set out your standards, and eventually over time
people will figure out that if I do this, bad
things happen to me.

You're never, never going to eliminate
this 100 percent. I mean if there was an easy
answer, we wouldn't be here. I mean -- but
that's no reason not to try. Make it as clear as
possible; make it workable so people understand
that there are very clear consequences to
behavior that we believe is prohibited and not
acceptable, and generally what happens is they
have to choose another profession when this is
over with.
But if you're going to wear this uniform, if you're going to wear the nation's cloth, this is how you will act. And that's about as good as it's going to get.

COL(R) GRAMMEL: Colonel Schinasi, I think I understand your question. When I was a young captain and trial counsel, I thought what I was doing would have an influence on the way the young soldiers acted, because they would learn from it.

I think the answer's no though, and I base that on reality now, and what the soldier learns now is not what happens, it's not what's in the UCMJ, it's not what happens in the courtroom. It's what they learn at these training sessions.

Unfortunately, they learn the wrong things at the training sessions. The training session I went to on sexual assault, the instructor said that if someone has drunk any alcohol at all, they cannot consent, and dead serious. Then someone asked, a young soldier
seriously asked what if they were both drinking?

Well, the first one to go to CID was raped. Dead serious.

And someone said to a bunch of lawyers in the audience, someone said well, that's not the way it is. He said yes. At Fort Belvoir, that is the way it is. So it's like, you know, unfortunately what's in the UCMJ, what happens in the courtroom doesn't get down to the soldiers and it doesn't have that effect.

I think when this issue started to get light, and people were trying to fix the problem, there was different areas we could focus our efforts and fix the problem. One is down at the ground level with the culture. Fix the culture, and then another area is responders. Fix how people deal with it when it comes out.

Then the last area is in the courtroom. Fix what happens in the courtroom. I may be -- I know I'm biased, but that last piece does need to be fixed. But we tried to fix it where it didn't need to be. The end result was I
think we ended up with probably fewer convictions
than we would have had if we had kept the old
thing.

But that's water under the bridge.
We're dealing with what we have now, which is
totally different. So I don't suggest we go back
to the pre-2007, but I really do think what
happened was we focused some way that wasn't
broken, because people there were -- whether it
was an NCO or a young soldier that had sexual
activity with someone who wasn't consenting, by -
- and force or constructive force, they were
convicted.

Felons were convicted. What happened
in court was right. Soldiers that shouldn't have
been convicted weren't; the ones that should have
been convicted were, and it was handled. The
other areas, the culture probably did need to be
fixed. It's a male-dominated culture or was at
least, and that did need fixing. Are we getting
there? Yes, we are. Responding, connected. It
wasn't handled well when it first came up. So
those are fixes they have --

   Now some of those have perhaps
positive influences or consequences in the later
part of the trial, because the panel members come
from the culture. So if you fix the culture,
that does have an influence in the courtroom,
because the panel members are the ones making the
ultimate decision.

   But I don't think we needed to change.

Again, I know I'm biased in that area, but those
are my thoughts. Thank you.

   ACTING CHAIR HOLTZMAN: Colonel
Schwenk, do you have any questions? General

   MAJ GEN(R) WOODWARD: When I went
around the Air Force and talked to a huge number
of airmen in focus groups, one of the things I
found that was the biggest problem was the huge
bias out there that a large percentage of these
are false accusations.

   I think that was reinforced by going
to court and getting -- not getting a conviction.
In their mind, that didn't mean that the accused was not guilty; that meant the accused was innocent and the accuser was guilty, and that was a -- I believe was a very detrimental effect on our ability to deal with the real problem, which is get to the culture, take care of the victims when something happens, and to deal with things properly.

So I guess what I'm trying to get at it is, do you think there's a way that we can get to this, as we had talked about, where you can differentiate the different number of sexual assaults that are out there, and put them on the spectrum correctly, so that we are actually taking the right cases to court, so that we have a better level of conviction, but we catch some of the minor offenses at a more minor level? I mean is there a way that any of you see to do that more effectively? Did I articulate that correctly? I don't know.

COL(R) GRAMMEL: I think you put your finger on something, is, there's a push now to
just push everything to trial and let it be
decided at trial. There's two different goals
that I think are mutually exclusive.

One is pushing everything to trial and
let it be decided in a courtroom, and the other
is have a respectable percentage of convictions
of the ones that do go to court. Because if
you're pushing everything without screening it
eyearly on, logically you're going to have a lower
conviction rate of what does get into the
courtroom.

There is -- there is a fear by
commanders and prosecutors to not push things
forward that ten years ago they wanted to push
forward. That's just a fact, and I think it's
bad -- this goes broader than sexual assault in
the military. I think commanders are becoming
more hesitant in making hard decisions. I think
that might have a negative impact when they have
warfighting to do, because they're not -- they're
learning not to make the hard decision when it's
right, and they're just pushing things off when
they shouldn't be.

So I don't see how you can have both,
pushing more things into the court and then
getting a higher percentage --

MAJ GEN(R) WOODWARD: Can you do it by
giving them more options? I mean because
everybody just wants them to take action, I
think. So is there a way to give them the
ability to take action that --

COL(R) GRAMMEL: Sure, and that
happened in the past. And I think the Special
Victims' Counsel program goes to that. I felt
one way it might go early on was that might help,
because if it's an experienced Special Victims'
Counsel, who's been trial counsel, defense
counsel or both, you can usually give a good
estimate on what's the likelihood of success of
conviction with this case?

And you can give good, honest advice
in that victim's interest, which would mean
sometimes if there's not a good chance of
conviction, don't go forward, because you're
going to feel like you said. He's going to be found not guilty because it wasn't proven beyond a reasonable doubt. Well she's going to feel like he's innocent, she's wrong, and that's not it at all.

But if you have a good estimate, they can make correct decisions. If I have two daughters, and if one of them had experienced something that the chance of success of conviction was low, my advice to my daughter would be don't go forward. I know what you're going to go through, and you just don't have a chance. That doesn't mean I don't believe you.

So I think the Special Victims' Counsel could help in the screening process. I don't see that right now in the Army. But so the answer is could we have other alternatives? Sure. If something didn't have a burden of proof of beyond a reasonable doubt, then you could go that route.

In the past, people were given other disciplinary actions. But I mean when we have
all the offenses still have to be proven beyond a
reasonable doubt, that's something I don't think
we're willing to give up.

    CDR MAKSYM: General, I'd have to
start with the premise of your question, which
was, you know, are false allegations always --
you know, there is that myth out there that, you
know, there's a ton of false allegations. Sadly,
there are a decent number. I've seen them.

    I've been in mid-trial as recently as
last summer in Japan, where a young lady wanted
to get to San Diego, and the Navy has a policy
that if you make an allegation, you're going to
be shipped out. She didn't like Japan. She
perjured herself, and this young man's life was
thrown in utter disarray, only to have her
withdraw, admit finally to the prosecutor on the
eve of testimony that the whole thing was
nonsense and horse pucky, and the young man never
really gets his life back the way it was.

    Are there a tremendous number of
these? No, but there shouldn't be one. The
minute you have one that's substantiated and you
don't make an example out of the false
complainant at the time, and the decision at a
political level is made, oh boy, we can't touch
that person, let it go, that takes all the
credibility out of the system and knocks the
stuffing out of it.

MAJ GEN(R) WOODWARD: So they didn't
hold her accountable?

CDR MAKSYM: Certainly not, and that
would be the first thing. The second thing would
be and why not? That gets to your second tier of
your question, and I think what the Colonel very
strongly asserted, look at the fate of flag and
general officers who have exercised real
discretion. It's called retirement.

You know, this has become so
politically charged that the ability for a flag
or general officer to really get into the guts,
mud, blood and beer and dirt of one of these
things is near-impossible to do anymore, because
there's so much pressure, as the Colonel pointed
out, push this forward. Let this be resolved in
the courtroom.

I was in private practice for eight
years. I have broken service, and I have to tell
you, as someone who dealt with DAs all the time,
I would argue to you the majority of military 120
cases, your local major city DA would never take
to trial because they're tough he said/she said
cases, and it would kill their conviction rate.

So we have to bear that in mind. One
of the reasons our conviction rates are so lousy
is because we're taking stuff to trial, as you
know, Navy prosecutors, Marine Corps prosecutors,
Air Force prosecutors and Army prosecutors are
taking things to trial that in the civilian world
would not be brought to trial. That has to be
contemplated.

Finally, so I think the Colonel's
point is very well taken, and the premise of your
question is well taken. The need for real
screening, but I don't think the real need for,
the acute need for real screening of these cases
can happen in the environment we find ourselves in.

So I would just say frankly, as hesitant as I am to say this, I've kind of been won over by the school that having the officer exercising general court-martial jurisdiction involved in deliberative processes of these cases is a thing of the past.

That makes me feel sad to say that, because I think some of these flag and general officers are brilliant. I used to work for Admiral Tracey on the anthrax issues, and she's on the JPP. But I just think those days are gone.

LTCOL(R) WARD: Well, I'm afraid I lost track of the original question. Yeah, it's hard. The dangers of looking anecdotally, whether it be a case, you know, a few cases that I saw in the field, and there's so much that I didn't see.

The only thing I would say that I'm comfortable with is that in the change from being
a prosecutor before the first, you know, the old-old, and being a trial judge with the new-old, and then seeing both the new-old and the new-new at the appellate level, is that just in my little limited microcosm of the cases that I saw, I have no way of knowing if they're representative across the whole or not, was that there were cases that I was surprised to see go to trial and result in convictions.

It wasn't just he said/she said. It was he said, she said and what's happening more and more and, I saw this on the Court of Appeals, he said he said, she said she said. So we were seeing a lot more of those cases. But there were the typical things that caused problems, multiple prior statements, other -- sometimes some physical evidence that was inconsistent.

Other things that typically years ago a prosecutor would say there's just -- there's no way this case gets to a conviction, because of all these other factors. And at some point, there's an ethical obligation not to take a case
to trial. I did see cases, as recently as a year ago, that I was really surprised that this case resulted in a conviction.

Now what does that mean? I don't know. I mean there's plenty of other cases, you know. We obviously, we don't see them if they get an acquittal. So I didn't pay a whole lot of attention to what was going on outside my office, in the cases that we worked on, but I was surprised in more recent years, that the problematic cases with those tough issues that were going to trial is a good thing, because they stopped being cast off because they're problematic cases.

But they're resulting in conviction more and more, and these were cases that ten years before I would have expected juries to acquit. So I saw that as something that well, we'll be careless with the narrative that was outside my world, which was in the military, these cases don't get prosecuted, and if they do, they all result in acquittals. I just didn't see
that, and I don't know what that really means in
the bigger show. I hope that answers your
question.

COL(R) ORR: Yeah. From my bench, I
was heavily involved in the cases at the Academy
way back when, and as the Colonel said here, part
of the issue on that was those cases were turned
down by a local prosecutor, tried by the Air
Force. Some of them were convictions, but by the
time they got to the appellate process, they
couldn't withstand the judicial process of
actually finding any facts to substantiate them.

The unfortunate thing is the folks
that were relieved and moved and reassigned
ultimately ended up being right. I mean it
didn't help them, but it also really ended up
being right.

I didn't see a lot of false
accusations or anything like that, but some cases
are just tough to prove. Not that they didn't --
they're just tough to prove, and in this
environment, it's very hard for somebody in the
middle to turn the process off before it gets all the way up to an appellate court or to our appellate court, when they say there's nothing there.

MAJ GEN(R) WOODWARD: And you don't see a way to deconstruct 120, so you have more options that makes that more viable --

COL(R) ORR: No, it's not the law. It's, you know, what do you do with the law that's there. You know, the tools are there.

Can you have a senior officer or a mid-level staff judge advocate say, boss, this is just not going to make it? But what ends up happening is nope, we're going to an Article 32, and it just keeps going. How do, you know, how do we get control of turning that switch back on?

ACTING CHAIR HOLTZMAN: General Schwenk.

BGEN(R) SCHWENK: Thank you. Let me return to Dean Anderson's question, where we talked about whether we need to -- whether we should amend 120 or not, and all of you thought
that a laser-like approach that ended up with a
more workable statute was -- would be helpful and
doable.

Let's go the other way. I'm sure with
really smart people, with all the experience they
have here on the Subcommittee, we can make
recommendations for a laser-like approach that
would make the statute more workable and the
members of the JPP can come up with those
recommendations. Unfortunately, as you know, we
then lose control and who knows what happens at
the other end?

So assuming that, you know, having
seen what happened in the 2006-2007 situation,
we're a little reticent. I think that was one of
the reasons that the Dean asked the question. We
were a little reticent about whether we want to
open it up for laser-like small changes and risk
some other change.

Let's look at the statute as it is,
and is it workable? I mean we looked at it, and
I think our general consensus in the discussion
we had today is, boy, there's a lot of parts of
it you just shake your head at. But that doesn't
mean it's not workable. It must means there's a
lot of places where you shake your head.

Or is it so shake your headable that
we really do need to do a laser-like approach and
fix it? Where do you come down on that?

CDR MAKSYM: General, I think unlike
its predecessor, it is legally palatable to
maintain the statute.

BGEN(R) SCHWENK: And do you choke on
yourself saying that or not?

FEMALE PARTICIPANT: It looks like it.

(Laughter)

CDR MAKSYM: Well, General as you
know, I'm fundamentally a good lad. I'll go
along with --

(Simultaneous speaking.)

CDR MAKSYM: Look, I think this goes
to what I was probably frustrating the Dean with
a little bit, in trying to answer her very sound
question, which was I really do think that if
you're -- if you don't have experienced judges,
you can't sit there, interpret a statute and fix
it on the bench.

So you'll have these collapses, these
appellate collapses that will come along. I can
only speak to the sea Services. When I see guys
like Quincy Ward going away and Chris Reismeyer
pretty soon and Dan O'Toole's gone, and even this
humble creature testifying in front of you, he's
gone, I don't see a big heavy bench coming up,
because career-wise being a judge wasn't the
right thing to be.

So you're not going to get that damage
control that we had a few years ago, when we
saved the statute, former statute from itself.
So I think the most compelling reason General,
and Dean, back to your old question, is the most
compelling reason to go in and fix it is because
the mechanics within the uniformed Services are
no longer on duty.

Maybe that's a reason you kick it back
and say, okay, we're going to make this thing
idiot-proof, and here's how we're going to fix it. So you know, if the Services continue to create judges and have them serve for two years and replace them with another jurist, that guy can come in. He can fix it or Gale can come in and fix it.

So that would be my reason for going in. Short of that, I think if you had an experienced bench, you could fix it.

BGEN(R) SCHWENK: So I take that as a "you need to fix it"?

CDR MAKSYM: Yes.

LTCOL(R) WARD: Well sir, if the choices are leave it alone or make these changes, but there's an unknown there of where the changes might go.

BGEN(R) SCHWENK: I mean I guess the question is if we leave it alone, what happens?

LTCOL(R) WARD: I think we can survive on that. I mean --

BGEN(R) SCHWENK: You don't seem overly happy to say that.
LTCOL(R) WARD: The problem is that there's just always the tendency, and this is not -- I mean this is a military court, but just always, just sometimes, just kind of leave it alone. That's a hard thing to do. By nature, we're just so -- we just keep tweaking, doing a little bit there, a little bit there. That's a hard thing to do.

The less complicated, the better.

Consider who winds up at the end of this, you know, members, and I think leaving it alone is an option that should be considered. It hasn't been that long.

BGEN(R) SCHWENK: Colonel Orr?

COL(R) ORR: Umm, I'd say we can leave it alone. Minor modifications, but I believe the decisions that you want -- I mean I just prefer consistency and reliability. Everybody knows what the rules are when you show up, what the defenses are and so you don't have, you know, different outcomes just because on Tuesday, one person got tried, but on Wednesday another person
got tried for the same thing.

BGEN(R) SCHWENK: And right now there's a problem with which defenses are acceptable?

COL(R) ORR: Yes, because that's the problem. That's correct.

BGEN(R) SCHWENK: Colonel Grammel. By the way, I appreciate your comments earlier that you looked at the 11 issues that Representative Holtzman and crew gave us, and you said you had some thoughts. If you could drop them off, because I don't think any of us are going to ask you to please go through your 11 comments.

(Laughter)

BGEN(R) SCHWENK: And for the other three of you, if you have any thoughts on any of the 11 or all of the 11 and you want to zap them into the staff, that would be great, because I'd love to go over them. Thank you.

COL(R) GRAMMEL: General, I appreciate if Article 120 was not changed, then we would survive. What would help the survival rate is if
(Simultaneous speaking.)

MALE PARTICIPANT: It's not an existential --

COL(R) GRAMMEL: If the Joint Services Committee did its job.

BGEN(R) SCHWENK: You mean the Joint Services Committee with one full-time person and everybody else part-time.

COL(R) GRAMMEL: Right, and maybe they need more staff on the Committee, because there's been no executive order implementing the 2012 statute here in 2015. What could happen is the changes that I think should be made, those could all be done by executive order and possibly with an Air Force model.

And what it would do is it would make -- it would give us consistency across the board, across Services and everything. It could answer questions. There's some unanswered questions right now that a change in statute could do.

So I think all the changes that I
think should be made could simply be done by executive order. I know that the Joint Service Committee is extremely busy, and I know what would probably happen is this is so complex, they probably couldn't come up with 100-percent solution.

So what happens is we just never get any solution all around the board. So the judges were having to go with the bare statute, and then, you know, implement it themselves, which was added to the challenge.

BGEN(R) SCHWENK: Okay, thank you sir.

ACTING CHAIR HOLTZMAN: Professor.

PROF SCHULHOFER: Yeah, I have three questions. The first one I'm going to put out is --

BGEN(R) SCHWENK: You're allowed three questions?

(Simultaneous speaking.)

PROF SCHULHOFER: I have one question, just one, but it has three parts.

(Laughter)
PROF SCHULHOFER: The first part, I'm just going to ask you, maybe you could email us your reactions. I don't want to take more time with it. But you mentioned that with respect to indecent conduct, and I was wondering whether you thought that term should be left undefined, or whether you had something specific in mind that should specify it.

I know -- I don't know if there's actually a similar decision, but there's been some talk about a case, I think from Turkey, where a Service man brought -- a sailor brought a civilian male from the city back to quarters and had sex with him, and was prosecuted, I think, under 134, and it was held to be conduct inimical to the Service, in what seemed to be just reinventing the prohibiting on same sex relationships.

So there would be a concern about whether to, you know, leave that undefined or how to define it. But perhaps that lends itself more to email or something afterwards. What may be
more general here, these two are related. One is
for all of you, do you find -- did you find in
your experience on the bench that panel members
generally understood your instructions, or did
you get a sense that they were having trouble
understanding what you read to them and how they
explained the offense?

The second is perhaps related to that.
I think there's some sense that leaving 120 alone
perhaps is survivable or palatable, but some of
the impetus for change, I think, comes from a
perspective of people who feel that 120 is
basically grounded in the idea that rape and
sexual assault are forcible conduct.

And to the extent we're trying to --
some people feel we should communicate a message,
that the essence of the offense is just a
disregard of someone's preferences, disregard or
lack of willingness, whether or not there's some
aberrational force or extensive force, that that
should be the concept of the offense.

Leaving 120 in place might be
workable, but it would be -- it would be
reaffirming -- I guess I should put it as a
question. Would leaving 120 in place tend to
reaffirm the conception that panel members may
bring to a trial, which is that rape and sexual
assault are forcible offenses?

CDR MAKSYM: I'd simply argue,
starting from the bottom, that I don't think
creating a new statute, much akin to the answer
we had to Colonel Schinasi's question earlier, is
going to educate anyone on anything. I just
don't -- it's not going to get to the Fleet.

All they're getting right now, as we
discussed earlier, is a very one-sided training
process, which is passing down a lot of
misinformation, which is hurting our ability to
pick from a fair venire.

On your second question, do panel
members understand. You know, I presided over
hundreds and hundreds of cases literally, and
sometimes -- these were always the toughest
cases. When you form -- I learned over time to
try and form my instructions as far away from the
verbiage of the statute as possible, because they
were lost.

But if I carefully reigned them in, it
was very doable. They would -- they'd be waiting
for things which the new -- like on consent and
matters such as that, that the new statute
doesn't give them, and that was disconcerting to
members sometimes.

PROF SCHULHOFER: Thank you.

LTCOL(R) WARD: Your first question,
I believe, was do we need to define, assuming we
look at a way of adding indecent conduct or
something like that.

PROF SCHULHOFER: You can skip that.

We won't get into that.

LTCOL(R) WARD: Okay. As far as the
members and their understanding instructions, I
mean I certainly had my doubts. I think the hope
is, of course, that we're giving them those lucid
signposts that they're supposed to be. But I
think they go in there and they kind of look at
it and they just pick an instinctual reaction to it.

If it's an issue of consent, they're looking at the behavior of the victim. They just go in there and say, does this narrative that I just heard, does this jibe with my sense of whether this was a willing participant, someone who was incapable of making that decision, and then they apply the same thing to the accused.

So I mean that's why I'm always in favor of less is better. The less complex the statute, the shorter the definitions. One example is the definition of consent. Why do we need the word "competent person"? You know, that's just -- it's just kind of put in there, and it came from the Benchbook instructions on the new-old.

But you know, I don't know that that's helpful to them, when you look at the rest of the definition of consent, because you give them, this is what consent is. This is what the context, consent is not, you know, and then look
at your facts and make a decision.

But introducing that second phrase, "freely given agreement by a competent person," now they're thinking about competent. Well, who's competent, 18? What does that mean? We know that competent has a different, you know, for us. But for the lay person, who knows? So I have my doubts. That's why I think that the simpler, the better.

PROF SCHULHOFER: Colonel Orr.

COL(R) ORR: Yeah. I'd have to say most of the juries that I've been involved with, they understand the instructions. Do they always follow the law? No. I think they go with their gut, and sometimes they make the tough choice that I heard you, Colonel, but this just ain't -- this is not right. We're going to do right by this kid, either one.

So I mean the fact of the matter is if we can just make them as clear as they should, so that they understand the decision they're making, I think we've done our job.
COL(R) GRAMMEL: My experience with the court members has been that they have understood the instructions, even when they're very complex and convoluted. You know, I like to watch them and if they have a quizzical look on their face, I'll stop, repeat it, you know, see what they're confused about and then go forward.

But what I base that on is not their looks when I'm giving them the instructions. But when they come back with the verdict, sometimes there's several offenses, including the lesser included offenses. There's exceptions and substitutions by variance. And I look at what they did and compare it to the evidence that came out in trial. Usually I was impressed by how well they understood the evidence and the law and then they applied it.

There was one of the two rare cases where I think that might not have happened. But I think the court members, they are able to understand. I think our court members are -- I think in civilian juries, but it's just they're
more educated and they're used to tough
decisions.

So I don't think that's a weakness in
the military justice system at all. As far as
amending the statute and whether that sends the
right message about what sexual assault is or
isn't, I think that is a factor in making
amendments.

You know, a good example you
mentioned, I think, in one of your papers, or
perhaps it might have been an email about -- also
I think last August to the JPP, you talked about
within the definition of bodily harm is
essentially an offense by itself, which is, if
there was no bodily harm, we still have a crime
if it's not a consensual sexual act or sexual
contact.

In the Article 120, between 2007 and
2012, that was a separate crime. It was called
wrongful sexual contact, and it had a maximum
punishment of one year confinement. And all it
was sexual act or sexual contact, not consensual,
and that was it.

It didn't have any force or constructive force or surrounding circumstance, like someone who's incapable of consent. It had nothing else. But that's hidden in the definition, and that doesn't make sense. One is it's confusing, and logically it's confusing, too, whereas if you pull it out and it's not now sexual assault, bodily harm by doing nothing; instead, it's wrongful sexual contact, has a way out because it's less culpable than all the others. It has a lower maximum punishment.

And that will send a message that what we're talking about is all of these are non-consensual offenses. The bottom one is just pure sexual act, contact, plus no consent. Then on top of that, if there are these added surrounding circumstances or types of means, you know, force or something else, then it increases all the way up.

But I think that's an easy fix, a light fix, that I think sends a message that
would be helpful that you want to send.

PROF SCHULHOFER: Thank you.

ACTING CHAIR HOLTZMAN: Ms. Kepros.

MS. KEPROS: How many questions did he get?

(Laughter)

(Simultaneous speaking.)

MS. KEPROS: And my questions, forgive me, are very technical. I am not in the military. I'm a civilian public defender in Colorado, and so I cannot read this without, in my own brain, referring to the statutes that I'm familiar with in my practice.

One of the first questions I have for you is, my take on this affirmative defense of mistake of fact is that it's sort of trying to deal with the fact that there's not a knowingly mens rea in all these sex assault crimes.

And I wonder, wouldn't that work, or is there some other function to that affirmative defense? Because rather than just saying, have the government prove the defendant knew the
person was impaired and did the bad thing, or
knew there was no consent and did the bad thing.
Instead we say, here's the bad thing. Now the
defendant has to put on some evidence that raises
the issue. Now it has to be an affirmative
defense. And the instructions get really, really
complicated. I'm wondering, you know, do you
think that would work, or am I just not
understanding how the scheme is set up?

CDR MAKSYM: Good question. I know
that, within the Beltway, that's about as close
to heresy as you're going to get. Look, there's
a lot of us who were saying that when the
original statute went away, and that's been the
unspoken trench fighting ground, you know, right
there.

And I just don't think it's viable.
I don't think it would ever happen, for a number
of reasons that I'm not qualified to really even
get into on the political side. I simply would
point out I think if you brought back, I think
the answer really is to bring back the defense,
because, look, ladies and gentlemen, the members are considering it anyway. It's there. And that's what they're making their decision based upon when they're in the members' room. There's nothing we can say to them that's going to stop them from doing that. So that would be my only way to answer that.

MS. KEPROS: Anybody else with thoughts on that?

LTCOL(R) WARD: Well, we have had a long tradition on mistake of fact applying to virtually any offense. So, you know, it's in the Manual in one form. Adding it to the statute, you know, I think is a good thing. I don't agree with the affirmative defense of consent.

But I just find it -- mistake of fact is also a very difficult defense to prevail on, because it's always going to be weighed objectively. It's not just the intent or what the accused is thinking. It's always going to be cast in the bigger picture of an objective person standard.
So, to answer your question, would some of this be fixed by -- in a way, what you're suggesting, it's a good question. It's almost like going back to where we're starting to shift the focus back to what it was in the original statute, which did look at the actions of the victim and instead of, you know, not so much the actions of the accused.

But I don't know if that would really make a difference. And lots of times these are general intent crimes in many jurisdictions. So I don't know. But I think mistake of fact, adding that as an affirmative defense, that alone doesn't, you know, gum it up too much. There's a long tradition there, and whoever said it is absolutely right. Regardless of what you tell them in the instructions, they're going to be looking qualitatively at what both parties did. And if they believe, they have doubt based on what he did, it looks like someone maybe was mistaken, then they might find reasonable doubt whether you give them the instruction or not.
And no matter how you characterize consent, you're looking at the actions or inactions of what the victim did. So I don't know that moving the, shifting the focus back to putting a mens rea requirement in there when there's not one is going to make things, you know, better or not. But I am in favor of adding the mistake of fact alone to the statute.

COL(R) ORR: Yeah, and that's my concern, is it's there. Either tell the jury you can't consider it, or tell them they can consider it. But right now, you'll leave it up to everybody to figure out what it is, and, you know, mens rea should count for something. You know, generally, if you do something bad, you should be intending to do be something bad.

COL(R) GRAMMEL: First of all, I want to comment on a side topic someone brought up. As far as focusing in on what the alleged victim did at the time, I never saw that as being off limits, because what we have is we have an offense that involves two people, and you can't
make a fair decision without looking at what the
two people were doing at the time. You know,
that's obviously going to be relevant.

But as far as -- two different things.

An affirmative defense of consent, and then the
affirmative defense of mistake of fact as to
consent. I think it's a philosophical question.
Are all the offenses in Article 120 non-
consensual? And if the answer's yes, and we're
thinking, of course, because they're all non-
consensual, and therefore consent would be a
defense.

If the person consented, they're not
guilty of any offense under Article 120. If
that's true, and one sentence in Article 120 goes
in and says "consent is a defense," that will
take care of over half of the problems that the
judges and others are dealing with, because then
in every case we'll just say consent is -- if
it's raised. It would have to be raised by the
evidence, and the judge makes that decision, and
it has to be proven just like any other defense.
But if that's true, that will take care of the
problems.

Mistake of fact, I wouldn't recommend
putting mistake of fact into the statute, and the
reason is whenever you're dealing with mistake of
facts, you have to look at what facts you're
talking about.

In some of these offenses, there's
more than one thing that mistake might be about.
It could be rape by force that was consent to the
sex but not the force, or there might have been
consent to the force but not the sex. And I've
seen it. I've had a rape case involving S&M, two
people in the S&M community. The guy was
convicted of rape. You know, it was a very
interesting case, but that's one of the examples
where the members, they followed the
instructions. It was amazing. And the person
was convicted.

So what you are going to do for
mistake of fact? It's in the Manual for Courts-
Martial, RCM 916, and it has the standards. And
also some of the things where there might have
been mistake within Article 120, the standard is
just an honest mistake in fact, and some of it's
honest or reasonable. For consent, for all of
the offenses, would be honest and reasonable.

But let's say it was -- the other
person was mistaken about the identity. That has
to be fraudulent. And if the accused did some
things, didn't know the other person thought he
was someone else, then the mistake of fact would
only have to be honest. It wouldn't have to be
reasonable.

If we go into the statute and talk
about mistake of fact, and we don't talk about
which fact we're talking about, we may confuse
some people when in some cases the standard's
going to be different. But in the military, the
folks that want mistake of fact, they want honest
and reasonable, which is, for the prosecution,
that's not a high threshold, because that's a
negligence standard.

But I think if anyone that argues for
a mistake of fact gets honest and reasonable,
when it's talking about consent, they're more
than happy with that. So my answer would be one
sentence into the statute saying consent is a
defense to all the offenses in Article 120, but
not put in mistake of fact because I think it's a
little more complex than you could cover in the
statute. And I think the judges could handle it
from there.

MS. KEPROS: That was really
fascinating. Thank you. Actually, that was
really helpful for me.

I have to actually ask you one more
question, because your comment about BDSM was
something else that jumped out to me when I was
reviewing these statutes, and I think it also
raises this question about whether or not consent
is a defense to, you know, the very first way you
can even commit rape.

Is there consensus on that, either in
case law or in practice? I'm a little concerned
that you can have people engaging in forceful yet
consensual sexual activity and they are going to be adjudicated.

COL(R) GRAMMEL: Right, in the case I was talking about, I gave the instruction that consent was a defense. Consent to the force, also consent to the sex. Consent to either would negate rape, because you need both. Now, if they had found consent to the sex but not the force, they could have convicted him of assault. That was a lesser included offense.

And if they had found consent to the force but not the sex, I can't remember if I had a LIO. But if we had this wrongful sexual contact that we were talking about, they could have convicted him of that. So, I forgot the question. I think you're talking about -- in the S&M, that case was unique, because what happened was she was a member of the S&M community and she was online. He wanted to get into it. He was just starting. And she needed a place to live. She moved to his place. The first night he goes out, they engage in stuff. They didn't use a
safe word. That's part of -- I guess as part of
the community, you're supposed to.

He didn't follow the procedures, but
it's clear she didn't consent, and it's clear --
he says he thought, and it's possible, but the
members thought it wasn't reasonable, his
mistake, despite the fact that everything he did
to her she had put it online, that she liked that
stuff happening.

Well, if it's pure -- if it was S&M,
and someone consented to the force and they
consented to the sex, the way I interpret the
statute, that wouldn't be a crime. And I think
if the Subcommittee disagrees with that, I think
we have, you know, a very important difference
there.

MS. KEPROS: Well, and that's my
concern, because the way I'm reading some of this
statute, I think it makes it one.

COL(R) GRAMMEL: Makes it one?

MS. KEPROS: Makes it a crime.

(Simultaneous speaking.)
ACTING CHAIR HOLTZMAN: You can't consent to grievous force.

MS. KEPROS: Right.

LTCOL(R) WARD: But you could always consent --

(Simultaneous speaking.)

MS. KEPROS: -- to bodily harm. But then what is the function of the first --

ACTING CHAIR HOLTZMAN: Then there's no bodily harm if you consent to it.

(Simultaneous speaking.)

MS. KEPROS: Then what is unlawful force?

LTCOL(R) WARD: You can always instruct on consent. The problem is that we get -- I think it's confusing, because if it's an affirmative defense, and then even if we do away with the preponderance thing that says there's just some evidence. But we have many crimes where we instruct on different factors depending on what the evidence raises.

So consent is always relevant to the
force. I mean, you know, it can be instructed on when the circumstances warrant it. But to create this umbrella of what's an affirmative defense and then I'm not going to instruct on it. Well, if there's factors in there, I think that was one of the problems with the new-old statute, is that judges felt it was hard to say, well, there's some evidence of consent. If it's a force-based offense, then, whether or not force is used, consent's relevant to that, it's the other side of the coin.

And I don't think it needs to be put in a separate compartment. But it can always be a note in there about the consent's relevance. And mistake of fact's a little different, because that requires, to me, you know, some evidence of what his subjective belief was.

In a case where we went round and round on it, can you consider circumstantial evidence and make the leap that he was aware of that? You know, there's no statement to police, there's no
statements from another party or any admissions.

So can you have mistake of fact when it's just circumstantial evidence, and he was there so you assume that he would have known that a reasonable person might have a mistaken belief.

So I actually look at mistake of fact differently. I think it does need to be an affirmative defense, but I think you could always have consent defined, and it's relevant and you could be instructed when it's raised on virtually any of these offenses.

LTCOL HINES: And I would note that's in the Benchbook, right?

LTCOL(R) WARD: Yeah.

(Simultaneous speaking.)

LTCOL HINES: -- there were some questions before lunch today about is our statute, is consent part of the statute? And I think one of the answers to that is, if it's raised. It's in the Benchbook. That's it. The Benchbook instructions are at Tab 4. But if any judges want to --
LTCol(R) WARD: They're in the

Benchbook, but note that for this one crime, how

many pages is that section of the Benchbook?

Fifty-five?

LTCol HINES: There's a boilerplate.

When it's raised, if the judge determines consent

has been raised by the evidence, there's a

boilerplate instruction.

LTCol(R) WARD: That tells them to

consider all these questions.

LTCol HINES: And the idea is that

it's not really a defense -- and correct me if

I'm wrong. But the idea is it terminates the

causal link between what the government has

alleged, i.e., force for -- or whatever the

government has alleged is the method by which the

accused has completed the sexual conduct.

Consent is relevant for the members on

the question of whether the government has proven

that beyond a reasonable doubt. And you instruct

on consent, and then the members determine, well,

if we find there's consent, then that terminated
the causal link and so there was no crime committed.

PARTICIPANT: The problem is the instruction doesn't tell the members that.

(Simultaneous speaking.)

COL(R) GRAMMEL: It tells the judge that, but if the judge doesn't pass that nice information on to the members.

PARTICIPANT: Correct.

LTCOL HINES: But the note to the judge is actually written better than the instruction to the members.

CDR MAKSYM: That would not be the first time, that anomaly, that the Benchbook instruction was perhaps more eloquent than the statutory language.

COL(R) GRAMMEL: I just think that if consent is a defense to all the offenses, one sentence saying consent is a defense would fix all those problems. And I don't know. Do any members of the Subcommittee see an offense, in 120, where consent would not --
ACTING CHAIR HOLTZMAN: Yes.

COL(R) GRAMMEL: Which one, ma'am?

ACTING CHAIR HOLTZMAN: It explicitly says that you cannot consent to grievous bodily harm. I don't know which section that is.

(Simultaneous speaking.)

ACTING CHAIR HOLTZMAN: "A person cannot consent to force causing or likely to cause death or grievous bodily harm, or being rendered unconscious." That's for 8 under consent.

COL(R) GRAMMEL: So someone would be guilty of aggravated assault under Article 128. But what if someone consented -- and this happens in real life. People consent to force like that and sex. Is that rape? Or is it just aggravated assault under Article 128? I mean, I asked the question wrong. I should have said, does anyone think that consent to the sexual activity is not a defense of --

MAJ GEN(R) WOODWARD: Yeah, under certain circumstances. Mental disease or defect,
physical disability or --

COL(R) GRAMMEL: No, no. But,

General, the way the definition works for
consent, those people aren't competent to give
it. So it excludes those circumstances.

So if the definition of consent is
drafted properly, and has parameters, and
everyone that can give consent gives consent is
well-defined, then we can just simply with one
sentence say consent's a defense. And that will
be it. If it's a competent person that gives
consent, is it a defense?

MS. FRIEL: So you're saying there's
a difference between what is legal consent and
what is factual consent? So the mentally
incompetent person, somebody who's mentally
disabled and has the mentality of a ten year-old,
by law we say can't consent, and they're saying,
yeah. Kids consent all the time factually, but
we by law say that they can't. So if you can
think of that framework, it's much easier to
understand.
MAJ GEN(R) WOODWARD: You can coerce me into consenting, right?

MS. FRIEL: But there's no consent.

If you said yes --

(Simultaneous speaking.)

COL(R) GRAMMEL: -- when I marked up the 120 that I sent ahead, I tried to do that. I probably didn't do a perfect job, but I think we can draw up the definition for consent to exclude people who aren't competent to consent, people who are coerced, and also people who consent to something that's different than they think: the idea, the person, the purpose of the activity.

If we exclude that from the definition of consent, and we're talking about valid consent, then I think a valid consent would be a defense to everything. I think that that would resolve over half the problems that the judges are dealing with right now and the panel members.

When we have confusion in the courtroom, you know who that hurts? It hurts the prosecution. I mean, so if we can alleviate
confusion, I think it helps litigate the cases.

COL(R) SCHENCK: I don't see that in your suggested amendments to the article, and you said the one line about consent. I'm just --

COL(R) GRAMMEL: Oh no, I'm sorry.

It's in (g)(8).

COL(R) SCHENCK: And my second question is, mistake of fact as to consent, you don't believe there should be anything added regarding mistake of fact as to consent?

COL(R) GRAMMEL: No, ma'am. It's not necessary, because mistake as to any essential fact is going to be a defense already. I think it's a defense, but it just doesn't need to go into the statute because it's too complex to put into the statute.

COL(R) SCHENCK: I'm just concerned about the fact that Congress took it out, you know what I mean? The congressional change therefore implies that Congress doesn't want us to have that in there.

And so that conundrum between mistake
of fact over here in the Manual, and the fact of
the specific changes as to Article 120 by
Congress over here taking out the affirmative
defense of mistake of fact because of the Prather
case. I mean, I'm just concerned that judges on
the bench are going to do --

COL(R) GRAMMEL: Yeah. What is the
rule? We don't care what it is, just what --

COL(R) SCHENCK: Yeah. What is the
rule, right?

COL(R) GRAMMEL: Yeah, give us the
rule.

COL(R) SCHENCK: So that's, I mean --

LTCOL(R) WARD: Right. But we have
affirmative defenses that have existed for many
offenses and they're not part of the statute.
That's the thing. This was the first statute,
with a few exceptions, that the UCMJ had
affirmative defenses listed in the statute.

COL(R) SCHENCK: Right. Right,
because, I mean, maybe I'm not recalling
correctly, but one of the changes had mistake of
fact as to consent, affirmative defense as to
mistake of fact as to consent, right, and then
CAAF said, burden-shifting, take it out.
Congress said, okay, we're taking it out, so it
was taken out.

And then now, what you're saying to
me, people on the bench are going to say "Oh,
yeah, mistake of fact is over here. We're going
to use it." I've got to tell you, there's a
bunch of trial judges out there who probably
wouldn't do that, right?

LTCOL(R) WARD: Exactly.

COL(R) SCHENCK: I mean, they need
people like -- they need that oomph back in
somewhere. And, you know, personally I look
towards you as an expert. On the bench, from the
school, you know what I mean? I look to you, and
I didn't see that in there. So I guess --

COL(R) GRAMMEL: Right. I just think

--

ACTING CHAIR HOLTZMAN: Excuse me. I
want to just try to get some order here. Ms.
Wine-Banks hasn't had a chance to ask any
questions, and we want to try go in order.

If you've got questions and you've
been skipped over or whatever, could you just
hold them, or if you have further questions, so
we can get through, and then give people a chance
to ask them later?

MS. WINE-BANKS: I don't mind waiting,
because the conversation's quite interesting.

ACTING CHAIR HOLTZMAN: All right.

Well, if you don't mind then, please, go ahead.

COL(R) GRAMMEL: I just thought it
wasn't necessary to put. I actually think
mistake of fact would be a defense, because under
the existing RCM 916, it is. If there's a
concern that people would be confused whether or
not it would be a defense, then I think it could
going, you know, and it would be inserted in
right after saying consent's a defense.

I just don't like -- I would say
mistake of fact as to consent, or any other
esential fact, is a defense. I'll tell you,
mistake of fact has confused a lot of people,
because they always use mistake of fact, and they
don't say what fact they're talking about.

That's what we were talking about a little while ago. You could have mistake of fact as to the force or mistake of fact as to the sex. And I've seen cases -- well, I've seen people charged with rape and they were convicted of assault. And I've seen people charged with rape and they're convicted under the intermediate statute with wrongful sexual contact.

So I've seen the members come back and say we think there was consent -- actually, I think they thought it was mistake of fact, as to either the force or the sex but not the other, and I've seen both situations. So I wouldn't have a problem if it went in right after consent is a defense, to say mistake of fact as to the consent or any other essential fact is a defense. I just didn't think it was necessary.

ACTING CHAIR HOLTZMAN: Do you have any other questions? Ms. Wine-Banks.
MS. WINE-BANKS: I'm not really sure this is within our particular jurisdiction, but several of you mentioned the training being a problem, and if it's okay, I'd like to hear a little more about how you think the training -- and did you mean the training, preventive training of troops, as to what is appropriate and not appropriate? Or did you mean training of advocates, judges as to what the rules are?

CDR MAKSYM: Yeah. I can only speak to the sea Services. I was referencing the training of judge advocates and jurists. The reality is that we're dealing with a statute here that is in many ways more complicated than is dealt with by civilian prosecutors and civilian jurists who have a much heavier case load year-round.

The case load in the Navy-Marine Corps trial judiciary is about 300 trials by general court-martial a year. So, thankfully, we don't have thousands of cases in the sea Services. And a good portion of those happen to be these kind
of alleged offenses.

The problem, and you're all very experienced in your own areas, and as many of you know, the problem in the litigation is, it's kind of like if golf is your game. If you don't get out there to the practice tee, you're never going to be any good. And we find that a lot at the bench and bar in the Navy-Marine Corps.

The more experience, the better you do. And I'm just concerned that we haven't -- you know, we've developed, in the sea Services, especially in the Navy, a litigation career path. Well, it's great to have something we call a career path, and we created a simulated one-star admiral. You know, you get the pay and rank the day you retire. They haul your flag up and haul it back down. And so we now have, you know, a leader in that way, and then we have people that are designated as litigators.

Well, just because I tell some lieutenant commander who's had six cases that she's a litigator doesn't make her one. So I
think one of the things that we have to do, and
this really gets into a crunch issue, which is,
you know, how do we run this business when you
don't do it enough?

It's a crucial issue. And one of the
things I've recommended over the years is
affiliating with the Federal Defender Program,
affiliating with U.S. Attorney's Offices, sending
our skilled litigators, or the ones we think and
presume are skilled, out to live with them for a
couple of years at a time, so they can gnash
their teeth a little bit and come back and be a
little more expert than they otherwise would.

LTCOL(R) WARD: In my experience, on
the training issue, there are two things. One
was the topic of consent, and good intentions
don't always lead to good results, and the focus
being, in that training environment, we were
trying to develop a positive culture. It's very
easy to see where these vignettes and these
things about, you know, alcohol and consent and
then you get the takeaway being, stay so far
away, one drink equals no consent.

And then you get members sitting in
the panel box that refuse to yield from that.
And unfortunately you get trial judges that, you
know, are right there next to the prosecutor, try
to drag them over, you know, to get them
rehabilitated, you know. If they're going to
hold fast to that view then they're not
qualified.

That's one big one. The issue of
consent, how it's addressed during the training,
and when it's at odds with what the definition of
consent is in the Manual.

And then second one is that sometimes
the sexual assault prevention training will, in a
number of ways, address the topic of what we
usually call counterintuitive behavior.

They explain that people that go
through this trauma, there's no set pattern.
There's no right way to respond. Any number of
things can happen, you know, whether it be
delayed reporting. But, you know, that all gets
lumped in the category of counterintuitive behavior.

And sometimes that topic is addressed in this training, and I think you start to see a little bit of that come out during voir dire. So these are kind of the issues that come up during voir dire that are problematic, that result from training, those two.

MS. WINE-BANKS: How would you fix the training to solve that?

LTCOL(R) WARD: I don't necessarily know that, you know, first of all, I think if they're going to touch on topics that are legal topics under the UCMJ, that they need to be accurate. That's one. So, people have to be careful to dispel those misconceptions, like any alcohol at all. That's not what it says. Use the definition in the Manual to do the training, number one, would be the easiest way.

But then also to be more sensitive that these two things are going to overlap in a courtroom, and to make sure -- and that's really
just something to emphasize through the jurists,
to make sure they understand to not, you know --
I think there's just -- I don't know if it's just
that little military drive-on, what it is, but I
was guilty of it too. But there's just an innate
tendency, I think, of trial judges, to try and
keep the person on the panel perhaps when they
shouldn't. Unfortunately, there's been a lot of
focus on member disqualification in the last few
years among all the Services, so I think that's
changing. But that's the other way, I think, to
address it, is to be sensitive to it.

COL(R) ORR: Yeah. I would say both.

As far as the overall training, commanders are
told to basically, to get a whole lot of people
spun up and trained over a short period of time,
in addition to everything else. So, sometimes
it's just an extra duty that sometimes commanders
feel they don't have.

Then when they realize they have to do
it, that sort of comes across as well as "okay,
I'm doing this, but really I need you to get the
airplanes flying." So it's kind of mixed in with
the rest of it.

The problem with training the
litigators is they have a model in the Air Force
that we -- it takes 12 years to grow a staff
judge advocate, in other words, so you can be in
charge of something else. Because we have so
many disciplines, such as labor, environmental,
claims, torts, hospital, all of those things in
there, you've got to rush some of the folks
through all these disciplines in order to do
that. If you spend six or seven years in the
trial, guess what? You're not going to be a
staff judge advocate and you're going to pretty
much level out.

So you have these competing interests,
those folks that want to litigate, which is fine.
But sometimes it comes at a cost. So if you have
enough time, money, and resources, then of course
you can do all of it. But the reality is we
don't. So, just looking at it objectively, folks
are doing the best they can with what they have,
but it's not a perfect solution.

MS. WINE-BANKS: So you're saying that

it's the commander of a unit that does the

training and not --

COL(R) ORR: No, no, no. Just

responsible for making sure that the training is

conducted. So you have folks that this is their

first time on the job, and they provide the

training. And it's good, but it's in conjunction

with a whole lot of other things that you have to

be trained on, and some of it is very general.

And when you're trying to apply

specific facts to a specific case, sometimes the

concepts don't merge together, and it's

unfortunate.

COL(R) GRAMMEL: Ma'am, I'll talk

about the second part, the training of the

litigators or the experience. What happens in

the military, as Colonel Orr was just talking

about, is there are a lot of different

disciplines that a judge advocate has to do in

all the Services, and they rotate through. For
their career, they have to be rotated through.
So they don't get a lot of time in criminal law.
These are very highly qualified young men and
women, good attorneys, and they work hard and
they try hard. But if you don't get the
experience, you don't get there.

So, I don't envy the leaders in the
JAG Corps, they have to balance that, and they
understand that if they kept people in more,
they'd have experience, but then that hurts that
person's career if they don't rotate people
through. So it's hard, and the only way, I
think, you know, if Congress wanted to drive it
and say, you know what?

And I'll tell you, as someone who's
been in the military justice system for a while,
if there was one way to improve what happens in
the courtroom, it's simply more experience for
everyone.

And if Congress wanted to drive that
train and say, "hey, you're going to do this,"
they could put in a qualification for counsel.
Not necessarily both of them, but the lead
counsel has to have so many cases or years or
whatever. Then the Services would have to follow
suit, and they'd have to bend to make that
happen.

So if someone thought experience is
our -- that is our Achilles' heel, I think the
only way you can do it is just more experience.

ACTING CHAIR HOLTZMAN: Can I just
make a suggestion? This is a subject that is way
off our mandate. We've got enough
responsibilities just dealing with this one
statute. I know we'd love to go off the statute
and go off subject, but if you want to talk about
it after hours, if you don't mind, because people
still have questions about this. Yes?

MS. FRIEL: So I have a question about
the statute, about sexual assault, I guess,
(1)(A), threatening or placing another person in
fear. I have two questions about that. First,
as structured, it doesn't say fear of what. I
mean, it seems to be connected to some kind of
wrongful action. And I'm used to a statute up in New York, our statute was, you put somebody in fear of being physically injured or kidnaped or something of that nature or something, or to a third person. And I always taught the young DAs that you've got to ask when somebody says "I was afraid of something," what were they afraid of?

If they say, I was afraid I was going to get hurt, okay, we're there. If they say, I was afraid I was going to, you know, somebody wasn't going to like me, I was going to become unpopular. I mean, you heard all kinds of things people were afraid of.

And I can see, in a military context, afraid of losing your job or losing your rank. There are some things that, you know, with threatened or -- that would matter, and you would want it to be in here. But this seems to have no parameters.

And then the wrongful conduct thing is so confusing to me, and I think in one of the reading materials they brought up a great
scenario. So, here's someone who's, let's say, commander, somebody younger. They've done something wrong, okay? You have a right to do something to them. You tell them that if they'll sleep with you, you won't do that to them. So you're not threatening wrongful conduct. You're about to engage in wrongful conduct by not reporting something, probably. That doesn't seem to fit in the way the statute's written. How is this working practically, this section? Because it seems very confusing to me.

CDR MAKSYM: Well, I'll just hit on the second point. I'm a little concerned about it. You know, United States v. Ariana, which I presided over, it just got affirmed by N-MCCCA, and that was a classic case under the middle statute in new-old where a chief on a submarine tender essentially used his office to coerce sexual favors.

I agree with you. The question is, is there a hole there now? Is there kind of a -- you know, under the revision. And I just
expressed the concern, I think, that probably is
one of those laser areas that we were talking
about that might need to be visited.

LTCOL(R) WARD: I also didn't see that
many cases, so I'm afraid I don't have a lot from
it. It's a good question. I hesitate because,
you know, the lawful action is to probably report
them. To use that in this way, to me, makes it a
wrongful action. I think there's a very good
argument for that. So I'm not -- certainly you
have, I think, identified a potential problem.

MS. FRIEL: But you're not seeing it?

LTCOL(R) WARD: Well, you know, again,
I haven't had those cases, so I don't think I can
really answer your question.

COL(R) ORR: You know, we saw those
primarily in the recruiter/trainee scenarios,
where, I mean, the recruiters or the trainers,
once they're there, before they come in,
basically tell them -- they're not going to hurt
them or anything like that. But they basically
tell them, if you want a job here, if you want to
come in the military in this career field, you're going to do X.

So they do X because they were scared that they weren't going to get a job, or they weren't going to be allowed to stay in their career field. So there's a lot of regulations out there that say, generically, that they're not there. But those are all communicating a threat that put them in fear of something.

Now, a lot of people would say, so what if I lose my job? I don't care. I'll just get another one. That's where the subjective part comes in, and it sort of does need to be open-ended and fact-specific.

COL(R) GRAMMEL: Ma'am, I think the areas where the action that's threatened is not wrongful, I think a vast majority of that would be covered by, I think, the next round of the Subcommittee is going to look at the senior-subordinate relationship and coercive relationships.

I think almost all those would fall
under those, and I think that would take care of it. If we expand it beyond wrongful, I think it's hard to articulate a way that won't bring in things we don't want to bring in.

I had a lot of drill sergeant sexual assault cases. In some cases, and this happens, because I had the young female soldiers testify in court about it, they go into basic training, they said, they enter into a bet with their other trainees about who's going to get drill sergeant first. And it just happens.

It's not fair to the female trainees who were coerced into relationships to treat them the same as people like that, that situation. I think that situation can be handled with the relationships, the per se prohibition against relationships. But when someone's coerced, then we have to treat it this way.

But I think if we don't have the action as wrongful, then I think it's hard to put a parameter around it, because it's possible that the other person might have been the first one.
Like, she comes in late and says, hey, if you
don't report me, I'll give you a favor or
something.

   Now, do we count that as non-
consensual? No, but it's still going to be
prohibited. It should be prohibited in some way,
but I don't think under this subsection.

   ACTING CHAIR HOLTZMAN: Well, I wanted
to ask a couple of questions. First, I guess, as
a former legislator, it pains me to hear that
incoherent statutes don't matter, because I don't
know how to deal with that.

   (Laughter)

   ACTING CHAIR HOLTZMAN: Anyway, to be
serious for a moment, I have many questions about
the meaning of this statute, and I just wondered,
you know, laser-like changes, how they can be
accomplished. I don't know the answer to that.

   But, I mean, I think the issue of consent is a
really important one that's been raised. And
consent is in here, in the text of 120. But what
does it connect to?
It's, like, just hanging out there.

Does it connect any one of these other actual criminal sections? It's not rape, is not connected to rape, sexual assault, aberrant sexual conduct, abusive sexual conduct, et cetera. So it's just out there. So, somehow, people thought consent was important, but they didn't know how to connect it, or the drafters of this thought it was important enough to put, you know, ten lines, at least. I'm just eyeballing it. They're not connected to anything.

DEAN ANDERSON: Well, it's in 120(a)(5).

ACTING CHAIR HOLTZMAN: Yeah.

DEAN ANDERSON: It's in 120(b)(3).

ACTING CHAIR HOLTZMAN: I'm sorry.

Then I may stand corrected.

DEAN ANDERSON: So it's a term that's used sparingly.

(Simultaneous speaking.)

MS. FRIEL: Incapable is sometimes the same as consent, the way we're defining it.
ACTING CHAIR HOLTZMAN: Exactly.

DEAN ANDERSON: There's no definition of incapable that's in there.

ACTING CHAIR HOLTZMAN: Right, right.

So I don't consider it to be actually, you know, whatever. I just think it's kind of unusual for a statute to spend so much time about something, and not inherently connect it in some strong way.

The other thing that troubles me about this, and then of course some of the parts of lack of consent are very troubling to me. I don't know whether -- how you feel about them. But the -- for example, let's look at (8)(C), the second sentence.

"All the surrounding circumstances are to be considered in determining whether a person gave consent, or whether a person did not resist or cease to resist, only because of another person's actions." Well, what does that mean? Is there a burden on the victim to resist? Does that imply that?

I mean I haven't really parsed it
carefully, but just reading this raised that issue for me. Are we saying to the victim, well wait a minute. We're going to look at how you resisted to determine -- or whether you resisted to determine whether there was consent here.

So that's problematic for me. I mean I just have to have -- feel like I needed more grounding into what that means. But I started off reading the statute "A. Rape. Any person subject to this chapter who commits a sexual act upon another person by (1) using unlawful force against that other person."

What is unlawful force? Is there a lawful force that you can use, I mean, to accomplish sex? Yeah. So, I mean, from the beginning, what message are we sending to anyone who's reading the statute? Then if you go, of course, if you dare, a very courageous person who turns the page and then tries to understand, you know, what this means, what unlawful force is, oh my goodness.

It means "an act of force done without
legal justification or excuse." Well what's that bringing into the statute? I mean all of the sudden we're going into the world of never-never land. What does that refer to? How do you interpret that? Where are we going with that? I mean what's a legal justification or excuse?

So I mean to me, just being a former unreconstructed, unrepentant legislator, I kind of have a hankering for understandable statutes. Doesn't mean I always get them, but I do have that hankering. So I don't know how you deal with that. Have you had to deal with these issues?

CDR MAKSYM: Well as you know, this was the mainstay of the problem with the last version of the statute.

ACTING CHAIR HOLTZMAN: Listen, I'm not blaming you about anything.

CDR MAKSYM: No, no. I'm saying --

(Simultaneous speaking.)

CDR MAKSYM: No, that was the mainstay of the problem. That's the battle we've been
fighting for years now, is the language that's chosen, and for whatever reason it was chosen.

A lot of the replacement language, or the language that's been excised, it's almost in some places that if we keep part of, you know, a statute we had and then we drop part of it and we add others. I couldn't agree with you more. I echo your frustration.

ACTING CHAIR HOLTZMAN: Well, I'm just wondering how you handled it. I mean just, you know, smart instructions?

CDR MAKSIM: Yeah. I mean oftentimes, in fact I referenced before, I think it was in answer to Ms. Kepros' question, was you -- I don't want to say dummy down the language, but you civilianize the language, and you make it, you know, discernible to the user. It's sometimes a very difficult task.

I wish I had a brilliant answer for you, but I don't. I mean it's just -- that was the yeoman's work of being a trial judge, functioning with the last two statutes, and that
was the problem. As we referenced earlier, in many cases we had to come up with bench instructions that, you know, overtook the statute. So the statute without them was unsavable, so --

MAJ GEN(R) WOODWARD: Or you have non-lawyers on the -- as members, and they don't parse every word. But sorry.

ACTING CHAIR HOLTZMAN: Dr. Anderson.

DEAN ANDERSON: I wish I were a doctor, but I'm not.

(Simultaneous speaking.)

DEAN ANDERSON: No, no, no. Just Michelle is fine. You're retired from the military, which is very interesting in terms of your ability to speak on these issues, and tell us about your experience in explicit ways. You all seem to want to make clear in the statute that consent is a defense to any of the charges under 120.

But I, as I read the history, it seems like the removal of consent where one could in
the statute was designed to lessen the focus on
the victim's behavior, and the propensity to
blame a victim for a sexual assault.

Your position articulated implicitly,
as I interpret it, again and again today has been
that the Services have gone too far in focusing
on sexual assault, that the environment is toxic
and biased against the accused, that there is
one-sided and misguided sexual education, that
there -- at times at least, that there is a --
that commanders have lost their ability to --
well, they're at least more hesitant to make hard
decisions, and that there's this inexorable
movement toward Article 32 hearings, even if the
facts don't warrant it.

I'm wondering, it's fascinating for us
to hear this perspective, and please tell me if
I've mischaracterized your perspective. It seems
to me that the military continues to lose the
public battle on sexual assault, in terms of how
folks perceive what's happening in the military,
which is very different than your perspective.
Many well-read people believe that their bias runs exactly the opposite way, or continues to run exactly the opposite way, in terms of how the military looks at these cases. So I'm wondering why is there such a disparity between how the public still understands the military in these cases in your perspective, and what does that mean, do you think in terms of how we should respond?

I mean the existence of the JPP or the existence of the Panel is in response to a public outcry, that the military has not done enough and failed to respond to bias against -- systemic bias by the way, to the experience of victims.

It seems to me that y'all are telling a very different story, that the pendulum has swung too far the other way. If that's true, and if I'm characterizing that accurately, what do you think that means in terms of how we should respond in our deliberations and our recommendations?

CDR MAKSYM: Well, let's just start
with the terminology you used, the victim. How do we know? We don't know until the jury comes back in and tells us whether she's a victim or he's a victim, or alas not. I mean it's -- when you have your venire going to mandatory training. But this training isn't, oh, this is a bad thing. This training is some of this nonsense of if you take one drink, you can't consent to anything.

And this has become, you know, we've come very close to tilting the balance. I mean you have to put this in context. We're dealing with a system. Unlike a homeless person in Washington, D.C., a military volunteer in any of the Services does not enjoy the right to have a jury of his or her peers return a unanimous verdict of guilt.

On top of that, you have the exercise of a statute, which by its terminology and by all of the training that's going on at the Fleet level, I'll speak just to the sea Services, is garnering in a whole lot of potential jurors' minds a presumption of guilt.
Judges have to, at least in the Navy and Marine Corps, have to face that every day, where we have to again re-educate, say there's a presumption of innocence here. I'm sorry. Please don't take my comments as in any way negative, but it's just --

I mean I sat on the bench longer than anybody in recent Navy and Marine Corps history, and I'm here to tell you. When you see jury after jury after jury coming in and saying, well, she said he did it. Isn't that the game? I mean aren't we finished? Can't we move on to sentencing?

You know, there's this -- you see that more and more as this kind of training has gone on and on. We used to get members that came in with completely open minds. Now I am not for a minute denying some of the horrific instances of deprecation towards women that have taken place in the military.

But I see the issues as very different. I don't care if the person, what
gender they are, I don't care what race they are, I don't care whether they're Catholic, Protestant or Jewish or anything else. I don't care. I just insist that when they're in my courtroom, they're going to get a fair group of members, and they're going to have the government of the United States, who has deprived this American uniformed person, citizen volunteer of his temporary liberty, well, darn it, they're going to have to prove by legal and competent evidence beyond any reasonable doubt that he or she is guilty.

With all the things that are happening on the periphery of the issue, it affects what happens in the courtroom, and we're seeing that in manifest ways.

ACTING CHAIR HOLTZMAN: Well, we're a little bit over our timeframe. Does anybody have any urgent questions they want to ask? Because now we have deliberations.

COL(R) GRAMMEL: Can I respond to that?
(Simultaneous speaking.)

MALE PARTICIPANT: Consider yourself admonished.

COL(R) GRAMMEL: Clearly so. I think the reason is public relations on the part of the military, and the reason is the military's used to getting told, hey, this is what you've got to do and then do it.

If any military person comes back and says, you know what? Our military justice system isn't broken, they're going to get told, you're part of the problem. If you don't see it's broken, you just don't get it, you're part of the problem.

The anecdote I have is I was driving home a couple of years ago, and I heard on CNN a story about, you know, what the NCOs are doing in the Army, and how bad the Army was. What it was was this NCO had sex with three junior soldiers, and the Army's not handling it right.

Well what happened? I was the judge for that trial. What happened was some female
soldier ended up in a hotel room with an NCO.

She wakes up and she could tell he had sex with her. She reports it. She had been drinking, but she reports it. They're off post. They go to civilian cops. They look at the case and they say "we're not touching this."

You know what? That's normal. I see that all the time. I see cases where they don't touch it, comes in. Some of them are acquitted, some of them are convicted. That one, they brought in, CID, the investigators researched it. They seized a phone. When they seized the phone, they found pictures of her, but pictures of also four other females.

They went to all the places he had been stationed and found three of those other females. They gathered all the evidence. He was convicted and got 30 years in prison. The civilians didn't want that case. The military picked it up. They investigated. They did an outstanding job, they prosecuted and he was convicted.
CNN reports it as the military isn't handling the soldiers right. I don't see how on earth that story became a bad story for the Army. It just doesn't make sense. But that's part of the reason why. We see it. In the military, there is a big push to push the cases forward and people are doing that. They're not making tough calls.

So we talk about the pendulum, and it goes back and forth, and I think the judges would probably agree that we've probably gone beyond where we need to go with the pendulum, and it probably has to correct itself, and we don't want to go too far before we have to correct it too much.

I was never known as a milquetoast judge, and the judges, the most government-oriented judges are extremely concerned about what's happening inside the courtrooms, because they feel morally responsible. So I think as we go through this, you're going to realize -- we've got to realize the balance.
There's a lot of different issues at stake, and I think -- I do think that even within our courtrooms, I don't think we have handled the victims properly. I think that's the one thing where I said before, we need to focus on the culture and we need to focus on the responders.

I think the courtroom, the military justice system, is working fine. I mean one area where there was a fix was to some extent we did need to incorporate, handle victims better than what we were doing. I think we're there, so I think that's a plus.

But overall, the judges right now are extremely concerned that, in their courtroom, something might turn out that might not be justice, and they're disturbed about it, even the most prosecution-oriented judges. So I think that's ground truth right now from the bench.

MAJ GEN(R) WOODWARD: Well, there's many cites to this and I'll talk to you, you know, offline, if you'd like to. But I can show you OSI reports, for instance, that are so biased
against the victim right from the beginning, that
you don't even get a good investigation, and
those you can see case after case after case of
them.

So there's so many aspects of the
system that, you know, you guys see it from one
perspective, that you think it's leaning too far
this way. But it's so far this way on the biases
of everybody involved, from, you know, peers all
the way to commanders, that, you know, balancing
it as an unbelievable issue.

CDR MAKSYM: I would simply say no
matter how we handle --

ACTING CHAIR HOLTZMAN: You had --
sir.

CDR MAKSYM: I'm sorry, go ahead.

ACTING CHAIR HOLTZMAN: I'm just going
to one other person, two others. You haven't
said anything, Colonel Orr, do you have anything?

COL(R) ORR: I was going to basically
say what you, you know, pretty much what she
said, is that it is -- I believe it's a
perception problem, I mean, the reality of what's going on in the military. It will take some time for the reality to catch up with what I believe is actually going on.

Yes, the military has done a horrible job for years about how they treated victims, and how receptive they were to the complaint.

Conversely, when you say they went too far, my comment was at some point --

DEAN ANDERSON: No, I was wondering if you thought it went too far.

COL(R) ORR: Yeah, at the point where the decisions, the right decisions are ultimately being made, but they don't have to be made at the appellate court level. A lot of the cases that get to us could have been either stopped or corrected or it's -- to me it's like sometimes a waste of resources, to bring it all the way up to us, to say that didn't occur here, when clearly some commanders are reluctant to just say, very well. This is the charge. You guys deal with it, because we're not. That's what I mean by
going too far. Not that it wasn't getting to the right place.

ACTING CHAIR HOLTZMAN: Okay. Well let me just say thank you very much to the panel. We have to start deliberations, which we're 15 minutes late for, and we'll take a little break. Let's take a little break now. So thank you very much.

(Simultaneous speaking.)

ACTING CHAIR HOLTZMAN: And we really appreciate you helping us think this out.

(Whereupon, the above-entitled matter went off the record at 3:43 p.m. and resumed at 3:59 p.m.)

ACTING CHAIR HOLTZMAN: Can we get started deliberating, so we can end our deliberating because you have all these other wonderful conversations? Colonel Hines, do you want to tell us what we need to be focused on right now?

LT COL HINES: Yes. Rather than strict deliberations, as we discussed, it's
probably way too early in the process to deliberate. What I envision more for this last 30 minutes or however long this goes is a discussion between subcommittee of, touch again on the preliminary plan we have for the way forward; talk about what our plan, the Staff's plan, for the presenters in the May meeting, if that plan sounds acceptable to all the Subcommittee Members; if there are issues that come up today, for instance, that the Subcommittee Members would like to hear about, whether that's materials that the Staff needs to go out and get or maybe some other presenters that you would like to hear from. You know, those types of things, just sort of a brainstorming session for the way ahead.

MAJ GEN(R) WOODWARD: That case that he brought up, I didn't write down the --

LT COL HINES: Commander Maksym, ma'am?

MAJ GEN(R) WOODWARD: Is that what he said?
LT COL HINES: He mentioned several cases.

MAJ GEN(R) WOODWARD: He said one that we would specifically look at.

LT COL HINES: He mentioned, I believe it's called Edmonds.

MAJ GEN(R) WOODWARD: Edmonds, yes.

LT COL HINES: Okay. So we have U.S. v. Edmonds, and we can track that down. I'm not sure where that is in the system, if it's at the Navy court or if it's on appeal at CAAF, but we can, we'll go out and find that.

MAJ GEN(R) WOODWARD: If it's on appeal, can we look at it, though, or are there going to be constraints?

LT COL HINES: If it's at the Navy court, we can probably get the briefs that were filed to see what was raised by the defense or what the government said. If it was decided, obviously, by the Navy court, there should be an opinion that we can go out and get. And if it's on petition to CAAF, we can get the CAAF petition
and those documents, as well. So we'll go out
and get as much as that material for Edmonds as
we can.

ACTING CHAIR HOLTZMAN: I think one of
the things that would be helpful, at least to me,
and I don't know if anybody else feels the same
way, but I think it would be real helpful for
someone to go through the statute and kind of
raise all the problems, the drafting problems,
that there are, whether it's problems that
pointed out. I'm not sure that my initial
comment was correct that the consent may raise
issues of blame the victim but, you know, someone
just to go through it, the Staff, if they could
just go through and pull out all the problematic
parts or things that could be problematic in the
statute, I think that would be helpful, at least
to me. I guess that's a lazy person's way out
but --

LT COL HINES: Would you like the
Staff to do that, ma'am, or --

ACTING CHAIR HOLTZMAN: Does anyone
else think that would be helpful?

    MAJ GEN(R) WOODWARD: Or if anybody,

I mean, I think we've all, I can see everybody
wrote notes and things like this. Maybe we could
send an email to Colonel Hines that some of us
see those things, just a list, and you could
compile them altogether.

    LT COL HINES: I think that's a great
idea, ma'am. Anything that anyone has noticed,
either from looking at the read-ahead materials
or what you've spotted today, if you want to just
shoot me an email on it and, obviously, I'll copy
Kyle and Kelly and everyone. The more sets of
eyes that are looking at it, the less likely you
are to miss something. We could put together
something on that.

    ACTING CHAIR HOLTZMAN: Do you have a
list of who's going to be presenting at the next
session, so if we have any other suggestions
about --

    LT COL HINES: I have a preliminary
list, ma'am. We sent out the official request.
I don't know that they've responded with an
official, so we don't have a green light on
specific names yet. We've sent the requests out.
But, generally, it's going to be about three to
four seasoned prosecutors, so not, you know, your
first-tour captain in the Marine Corps, but
someone who, hopefully, is of my rank who's a
prosecutor in a senior prosecution position.

The same with the group of defense
counsel who are of similar experience, a group of
appellate counsel from the appellate government
and the appellate defense divisions who -- the
appellate defense counsel who are defending
Marines and sailors, soldiers, and airmen who
have now been convicted and now they're appealing
their convictions, what kind of issues are they
raising in their briefs to the court and what's
the government seeing, as well. And then in the
afternoon, a group of civilian counsel.

So some of the people we've requested
have already spoken to the Panel before. There
are some other people who haven't. So that's how
I envision maybe stacking the May meeting --
seasoned prosecutors, seasoned defense counsel,
appellate counsel, and then civilian
practitioners because, as you know, the civilian
practitioners have oftentimes varying or views
that vary a lot from the uniformed practitioners.

ACTING CHAIR HOLTZMAN: Civilian
practitioners who practice in the civilian world
or civilians who practice in the military world?
What are we talking about? I mean, are you
talking about --

LT COL HINES: Most of the civilian
practitioners that I have thought about are
people who have practiced in the military justice
system.

MS. FRIED: As defense counsel then?

LT COL HINES: Well, as both while
they were in uniform, but now they're out. For
instance, there are, the majority of those people
are going to be defense counsel because they're
now civilians. But I was also thinking about
calling some people from some of the victims
advocacy organizations who have been practitioners, as well, like maybe Don Christensen --

        MAJ GEN(R) WOODWARD: What about victims --

        LT COL HINES: -- he's been requested and I think he said he's available.

        COL(R) SCHINASI: I mean, is there any value to having representatives from CID or OSI come in and talk about what they do and how they're doing it?

        ACTING CHAIR HOLTZMAN: Why? That's really not analyzing the statute. I think our real focus from the JPP was to decide whether the statute needs to be changed and, if so, how.

        COL(R) SCHINASI: Well, I was thinking, from the police's point of view, they would have some sense of their efficiency connected with implementing the law and how good the law is. They might have some insight into what we could do with respect to it, too.

        COL(R) SCHENCK: Because they make the
first decision regarding substantiated or
unsubstantiated and, at least in the Army, they
still, what we call, title people. So they'll do
a report of investigation that has to go to that
0-6 commander, and if they determine that their
level falls into one of these categories in the
statute, it kind of sets the way of where the
case might go.

ACTING CHAIR HOLTZMAN: Okay. Well,
if it's going to affect, if it's related to the
statute, then, sure, I think it would be -- I
mean, personally, you have to talk to Judge Jones
about that.

COL(R) SCHINASI: The other thought I
had, and this may be too delicate or also beyond
the panel, but I think it would be very
interesting to talk to a general court-martial
convening authority, someone who has actually had
to do this and do it in near time and listen to
his or her concerns with respect to the law and
the process of how it works. And so that would
give us a much broader sense of what really
happens, and I think it would be very illuminating.

MAJ GEN(R) WOODWARD: I can do that for the court cases I've had, if you want. But, you know, I'll be honest with you, only one came in front of me. All the 18th Air Force ones that I saw come through, I guess I could talk to some --

COL(R) SCHINASI: I was thinking about, you know, a line commander, a division commander. In the Army, that's where most of the cases are going to come from, the divisions. And so someone who is seeing a lot of cases or is prosecuting a lot of cases, it would be interesting to hear their relationship with their staff judge advocate and how will all this actually work out.

ACTING CHAIR HOLTZMAN: But how is this related to the statute? I think if it doesn't relate to the statute, it's not --

COL(R) SCHINASI: Because these are the people who are responsible for implementing
the statute.

ACTING CHAIR HOLTZMAN: Yes, I think you'd have to -- right.

MS. WINE-BANKS: But I would say that, if you're going to speak to prosecuting attorneys and defense attorneys, we probably want to speak to victim attorneys, as well.

DEAN ANDERSON: Didn't you say that --

MS. WINE-BANKS: That's different than victim advocates, although perhaps I have my terminology wrong because sometimes that happens.

But as I understand it, there are -- I'm not talking about who advocate for victims and are non-attorneys. I'm talking for people who are --

ACTING CHAIR HOLTZMAN: Special Victims' Counsel.

MS. WINE-BANKS: Yes, exactly. And to the extent that there are any, at this point in time, who have some experience with that work, they would be useful, I think, in terms of understanding the statute.

LT COL MCGOVERN: I think we can
provide a lot of the things we're looking for through previous transcripts. We didn't want to overwhelm the Subcommittee with reading materials, but, between the RSP and the JPP, we have received a lot of this testimony. So if you're particularly interested in MCIOs, we can provide that to everybody and point it out to you. But certainly the commanders and for the JPP, we pulled in the Special Victims' Counsel to say what issues are you seeing with Article 120 and trial counsel and defense counsel. And from that, Colonel Hines identified some of those trial counsel, defense counsel who could probably go deeper, and then appellate counsel, what was coming up on appeal.

So maybe, not to bombard you with reading materials, but we may have some of the testimony for you already.

MS. FRIED: Just to follow-up on Colonel McGovern's answer, I believe the RSP had testimony from convening authorities and the staff judge advocates describing their
relationship. So maybe if we can't bring them here, that may be something we can all --

COL(R) SCHINASI: That would be great.

MS. FRIED: We'd at least have that and that's pretty recent, so.

COL(R) SCHINASI: You know, current numbers, what the reported cases are, how many cases, what percentage of a docket is this, so we get some kind of objective measures to what it's like because it's only --

MAJ GEN(R) WOODWARD: Well, it depends on which command.

COL(R) SCHINASI: Well, that's right.

And which Service.

LT COL HINES: Well, and to follow up on Ms. Holtzman's, you know, comment, which she continues to reiterate, the Panel has looked at this issue writ large. And as Kelly said, we heard or the Panel heard from several Special Victims' Counsel in the fall about the SVC programs, VLC programs, how that has operated so far since those programs have been stood up. We
heard from some of the law enforcement
individuals.

And so I think what I try to do here,
when we were narrowing down on the 17 issues that
the Panel sent to the Subcommittee, which is to
sort of stack our witnesses with people who are
working everyday with the statute. Not to say
that investigators aren't working with the
statute or victims' counsel are, but the people
who are having to deal with 120 prosecutions
everyday are people like judges, prosecutors,
defense counsel, the appellate counsel. Not to
say that investigators or victims' counsel don't
have -- might not have something relevant to say
about 120, I'm just trying to -- I'm just
suggesting that this is a better way for us to
maybe narrow the focus down to the 17 issues that
the Subcommittee has to address at this time.
Kyle?

LT. COL GREEN: And I think the
Staff's perspective, having gone through this
through the RSP and then through the JPP,
obviously the panels we bring to you, the four you heard from today create an anecdotal body of evidence for you to consider cases and individual perspectives and individual opinions and trying to rectify that between your valuable time, limited time, and where does that create value versus where does it, you know, where does it just not necessarily create a lot of value added for you. So any of those groups that you want to hear from, I mean, I would encourage that perspective.

One of the things this morning, I mean, the perspectives that you bring to this on your own is so varied and so, I mean it's a wealth of information.

So one of the things the Staff is aware of is, I mean, frankly, we could probably close the room off and you all could decide a lot of these things on your own just from your backgrounds and perspectives. Where you want those anecdotal evidence to bring to your perspectives, that's really where we want to
focus our attention and bring that to you.

MAJ GEN(R) WOODWARD: It makes me think, especially when I listen to the people in this room and how brilliant they are, it seems like reading in advance what's already been done by the JPP and then spending a majority of our time when we're together discussing those issues, it seems almost more valuable than too many witnesses.

ACTING CHAIR HOLTZMAN: Well if the witnesses have some perspective on 120 that the JPP hasn't heard, that would be helpful.

MAJ GEN(R) WOODWARD: Right, okay.

ACTING CHAIR HOLTZMAN: But if the JPP has already heard this, then --

MAJ GEN(R) WOODWARD: We just need to read that portion.

ACTING CHAIR HOLTZMAN: Yes, right, because --

LT. COL GREEN: Or it could get drawn out. If there were specific issues -- one of the things I told Colonel Grammel today, he spoke to
the JPP in August, and, at that point, it was pretty much a blank slate of what do you think about Article 120, versus now where the JPP has provided very specific issues that it believes, identified over the course of its meetings, really warrant the Subcommittee's attention, so he's able to focus his views and we can get views from individual presenters. And we can solicit views either through testimony or written views specifically from people. That may be helpful --

DEAN ANDERSON: I just think there's a lot of value to the colloquy and the opportunity to hear live testimony and to interact with it and to come up with questions that are specific to our charge, which are, just of the nature of the JPP, are going to be much more pointed from our perspective because we have a narrower charge.

So I wouldn't want to -- I guess that's my way of saying I wouldn't want to eliminate the possibility of interacting live because I think it's just so valuable. And you
get a really different feel for what's going on when you can interact with people live than you do by reading testimony.

MS. WINE-BANKS: I agree with that.

I wonder, in the past, have you heard from any defendants or any victims -- although I thought it was interesting how the word "victim" may change. The plaintiff, I know it's not a plaintiff, but I don't know what else to call the victim. Complaining witness, complaining witness. As to how they interpreted it? I mean, for example, how does a defendant know what not to do or what he or she can do for their interpretation of 120 and any complexities?

PROF. SCHULHOFER: I had a couple of areas that I just want to put out to you whether people think they're worth exploring. One was we got a clear sentiment from this panel that, in their view, we shouldn't rock the boat, we should try to limit ourselves to laser-like changes.

Personally, when I think about this in comparison to things I know from the civilian
world, like the U.S. Sentencing Commission which has about 400 amendments, each of them prospective only, the fact that there are three statutes in play doesn't impress me. But that is a sentiment, and I would like to hear from them what sorts of laser-like changes they think would be adequate.

And I'm thinking of that for two reasons. One is they might convince me or others that problems can be solved by laser-like changes. If not, I think I'd like us to be able to say in our report that this sentiment was expressed, that we explored it, and we got these reactions and we concluded that they wouldn't fix the problem because they kept referring to laser-like changes. But I think we want to come down one way or another on that issue, which is sure to be important to DoD. I think it would be good to have kind of a record from which to proceed on that. That would be one.

The second is on these anecdotal impressions, which I think are helpful, but I
wonder, I don't know if it's part of the process here, some of these issues lend themselves not only to live testimony on which I agree with Michelle, but the possibility of a questionnaire. I don't have questions formulated yet, but perhaps with Staff or the rest of us by deliberation -- we have a year or we have many months -- perhaps we could formulate some questions that we could distribute to any of these constituencies and including even active -- I don't know if active judges would answer questions about, you know, the kinds of things we've been talking about, like give us something more than anecdotal impressions.

The third thing, the last thing I would suggest is -- this is where I may be outside the terms of reference, but I'm having trouble breaching the two of them. I'm concerned that this question about whether 120 works is too narrow because most things work. The world doesn't come to an end, things don't stop. And generally speaking, people get along with what
they have. And I'm a little worried that that may be an overly narrow perspective on what we might think a revision of 120 should be focused on.

So this is where it gets to the question of training, not of lawyers but training of the 1.8 million active duty individuals. I know that's outside our terms of reference, but I'd be interested if there's some way to get a sense of how the people who do this training, how the commanding officers and how the, I suppose there are consultants who are brought in to actually do the training, how do they use Article 120? Do they take it into account when they teach? Are they really telling people that one drink makes you --

MAJ GEN(R) WOODWARD: Right. Because it's so confusing. You know, that's a good example. When I did the focus groups across the Air Force when I first got in to find out, okay, where are we starting with and what are our issues, every SARC who does the training at each
of the wings had a different answer to the
question. So then when I would turn to my lawyer
and say, okay, answer the question, he would take
ten minutes to answer the question and everybody,
you know, sat there and turned upside down and
still didn't understand it after he was done. So
if it's that confusing when a lawyer answers the
question, that's problematic when you're talking
about an 18-year-old airman.

So I don't know if it's easier to
figure out a better way to explain what is, you
know, competent, what, you know, is incapable of
consent. But, you know, it's obviously
problematic.

PROF. SCHULHOFER: Exactly. I know
that training in itself is not part of our
mission, but I think the way that 120 is used in
or affects the training, I think that would be
very relevant.

ACTING CHAIR HOLTZMAN: One of the
points that prompted me, and I think I've said
that to a few people here, as a member of the JPP
panel to think about viewing 120, even though
it's been changed so many times in such a short
period of time, is that we heard some testimony
-- isn't that correct, Kyle?

LT. COL GREEN: It is.

ACTING CHAIR HOLTZMAN: That the
statute itself was being used as a training tool,
right? For the recruits.

DEAN ANDERSON: That's kind of opaque.

ACTING CHAIR HOLTZMAN: That's a good
way to put it. That's a very diplomatic way to
put it. I appreciate the diplomacy.

So I think the impact that the statute
is having on people's perception of what behavior
is acceptable could be very important. I don't
know how we get at that, though.

MS. KEPROS: Is there a way to survey
members who've sat on panels? Is there an
identifiable pool that we could even do like a
survey linking --

PROF. SCHULHOFER: I think that's kind
of a no-go area, isn't it?
LT COL HINES: Yes, there's a rule.
The rule in the military justice system is similar to what it is in state and federal court that, you know, no member can reveal how they or any other member voted in a case. We actually tried to do this one time. I've been a judge twice, and we actually, the Air Force JAG School tried to bring in eight former jury members to talk about, you know, this is what went on in the deliberation room to sort of ferret out these issues, and the presentation got shut down within the first ten minutes because there was a judge in the audience who said we can't do this, you know, this is illegal.

So I think it would be invaluable, just like it is when you're a prosecutor or a defense counsel to talk to your juror after trial, but I don't see a way that we're going to be able to --

MS. KEPROS: We can do that in my state. We routinely talk to jurors, and it's a big source of information. So --
COL(R) SCHENCK: We can't talk about the deliberative process. The problem is if we invite them here they're going to start talking about --

MS. KEPROS: I understand. I understand. Well, so anyway, that was one question I had because, obviously, they don't have the training to, they could speak directly to was there a conflict in what they were hearing, but that may not be an option.

The other thing I guess I'm struggling with is what I found most helpful in the conversation today was when the questions were very specific and when these judges all spoke to what they thought a statute meant or how they actually tried to apply it. And I would find, frankly, it very useful just to hear what you guys all think, even aside from having additional witnesses, just because I think we're all bringing different experiences to the table here.

But, I mean, I would just as soon have a panel that works through different vignettes.
or, you know, what do you do if this is the fact pattern or if this is the evidence, what crime is this, and just seeing where are people getting stuck, right? Because that's how you know if it's workable, right? If there is consensus about, hey, when this happens, this is how you charge it, this is a fair or unfair way that it gets sorted out. Here's where maybe there could be an exceptional circumstance because I know the thing I found myself doing, and that's why I brought up the BDSM situation.

When I'm working through the statute is say, well, wait a minute, then would it be a crime if such-and-such happened? What if you have somebody who's drunk but they're up and walking around and interacting with everybody? Should that be a crime, and why is it or isn't it, given the way the statute is drafted?

So, I mean, I guess I would welcome that kind of information or feedback on how would you apply something or to what scenario do you think this should apply, what are you thinking
about? You know, we can't think of everything, but I think we can come up with some things that we might recognize aren't fitting very well with the current statute.

BGEN(R) SCHWENK: I think, following up on that comment, it seems to me the more they are focused, our witnesses are focused on the 11 issues that we're supposed to be looking at and they come in here ready to talk about issue one, here's what I think, here's what I think, here's what I think, here's what I think, here's what I think. We ask our questions about one, and we go to two, we go to three. And the ones they don't have a problem with, fine, that panel doesn't have a problem with it. But we can move through it, and it helps us stay on our task and it helps us better understand where they're at.

And in the interest of time, you know, if we took a morning to do that and if the three panels to start off with the next time or the defense dudes, you know, trial and appellate, the prosecution guys, trial and appellate, and the
Special Victims' Counsel, and we went through all that, then in the afternoon we can sit down and go through it ourselves and start figuring out where we're going.

It seems to me the tasking that we have is to actually recommend changes and toss the language in the direction of the JPP. It's not too soon for us to really talking about where are we at, and I see us going down the path of two things. One is, in deference to what everybody's concern, you know, the TJAG's concern and others about don't screw the statute up, you know, we've been through enough, is the laser-like how would we fix 11 things or whatever number of those we think need to be fixed as best we can do laser-like.

And the other one is this statute is a mess. If we were rewriting the statute, what would we do? How would we rewrite it? So we have two products eventually to give them: our best effort at a rewrite and our best effort at a laser-like. And then if we wanted to have fun
and giggles, we could vote and let them know what our vote is. Not that they would care, but we could vote and feel good about it, and then they could decide what to do and what to send forward and what not.

But I guess my experience with these things is the sooner we get narrowly focused and start focusing on our product, whatever the heck it ends up, the better we come to grips with things. And then we ferret out other issues where we might we better get those guys back and ask about this or we better, you know, something else. Those are my thoughts. I won't talk anymore.

MAJ GEN(R) WOODWARD: I second everything he just said. I think getting the speakers to come in, having them focus maybe even to the point where we don't even ask questions until all of them go through their piece and then we can only ask questions for the amount of time that's left and keep us on schedule, and then keeping us in the afternoon where we can have the
LT COL HINES: Well, we'll certainly go back. Our typical practice is any of the presenters are at liberty to come back after the fact based on questions they were asked to submit written materials. We've had them do it in email. We've had them prepare written materials that -- and I plan on doing that with a judge because I know some of them pulled me aside and said, hey, I'd really like to, we ran out of time, but I would like to submit something on --

BGEN(R) SCHWENK: Well, that's why I'd ask them to come back on all 11 things.

MAJ GEN(R) WOODWARD: And I think if we're more clear up-front, then it will save time, right? You don't have to come back --

BGEN(R) SCHWENK: Well, then we can focus on it and know they were knocked up on the side of the head in the invitation this is what we're going to talk about. And then they're free to add three things at the end. I mean, we'll always give them some time to add their own.
COL(R) SCHENCK: And then they can
come prepared.

BGEN(R) SCHWENK: Right. But then
they're prepared, they're focused, and, you know,
it's a better use of our time.

MAJ GEN(R) WOODWARD: I remember when
I took it back to the RSP, they told me you're
not even going to talk, all you're going to do is
answer questions. And then they start off with
saying, okay, you've got five minutes to talk,
you know. So as a witness, I mean, it really
helps if you're very clear and say we want you to
address this and here's how much time we have.

ACTING CHAIR HOLTZMAN: Yes. I think
it was a mistake for anybody to come in here and
say, I'm just ready to answer questions. I mean,
we tried to put an end to that at RSP. So people
come and they're prepared to say, summarize their
statements in five minutes, their points in five
minutes, and then we can just move on.

DEAN ANDERSON: So this list of 11
issues we need to tackle, where is that list of
11 issues? Is it in -- sorry, sorry, just to clarify.

LT COL HINES: Tab 17, ma'am.

DEAN ANDERSON: Got it. Yes, I remember this.

LT COL HINES: And there's the report from the Panel that was issued in February.

MS. WINE-BANKS: I have a question. You said 17 and 17, but there's actually only 11.

LT COL HINES: Well, and the reason -- that's a good question. Thanks, ma'am. Because my outline, because we had decided we were going to bifurcate, the plan was, if we tried to dig into all 17 issues, the last six of which deal with coercive and abuse of authority, that would be too ambitious.

MS. WINE-BANKS: So just the first 11?

LT COL HINES: Yes, ma'am. So that outline just contains the first 11. I've got another outline on what witnesses came and talked about the other. I just didn't want to, as Kelly said, I didn't want to give you the fire hose
right at the starting line.

But, anyway, to answer your question, ma'am, the panels, where they refer those issues to the Subcommittee is in the report. I think they just -- 36 to 37 are the first 11 issues and 43 for the 6 issues. So that's what my outline was built --

DEAN ANDERSON: Got it. It was very helpful, extremely helpful.

LT COL HINES: Thank you.

DEAN ANDERSON: Thank you.

LT COL MCGOVERN: Just to recap what the due-outs are from the Staff so far that I've heard, first you would like us to go through the current Article 120, Rep. Holtzman, and point out issues that have been identified by the Staff or previous presenters, circulate it to the Subcommittee Members. You guys do bubble comments and send it back to us. We can combine that for you all before you meet next time so everybody -- is that the type of document you're looking for?
DEAN ANDERSON: Could I just ask a
question on that? Is that independent of the 11
issues? Is that in addition to the 11 --

LT COL MCGOVERN: That is the 11.

DEAN ANDERSON: That is the 11 issues.

LT COL MCGOVERN: The 11 issues would
be incorporated into --

DEAN ANDERSON: But we're not trying
to expand 11, are we?

BGEN(R) SCHWENK: I think we may be.
I think that if what I suggested is where we end
up, which it may not be, which is answer the 11
laser-like precision, maybe a couple more that we
find, and also rewrite something. On the rewrite
something, we're looking at all the issues.

And so I think, and I think earlier
when we were talking, I was under the impression
that, you know, Kelly or Glen or somebody was
going to shoot us out an email and say here's the
11 issues and here's others that people have
mentioned about the language in 120. And then we
come back with, and here's some more that I think
in 120, so they get a master list of our current concerns or potential concerns with 120 and then go from there.

MAJ GEN(R) WOODWARD: Well, has anybody articulated clearly, if we didn't do the laser issue, you know, what are we addressing if we completely rewrite it? I mean, are we just correcting those issues, or are we addressing something more conceptual, and what is that broader conceptual thing that we're addressing if we completely do a rewrite?

LT COL MCGOVERN: The only thing that the JPP has received was from Professor Schulhofer who said, I believe he said we should start from scratch, and he used the Model Penal Code as an example possibly. But, otherwise, most people have recommended laser-like --

PROF. SCHULHOFER: If I could just amend that a little bit, I did suggest and I think it's still my feeling, tentatively, that we should start from scratch. Whether you use the Model Penal Code as a model or not I think is
anybody's guess. I don't feel committed to that.

I suggested one possible example of a way you
could make a clean start and come up with
something that's coherent.

ACTING CHAIR HOLTZMAN: So other state
statutes that I asked the Staff to distribute,
which might be also vehicles that one could look
at, not to mention the federal statute, but I
think it would be extremely helpful, whether
we're doing a laser approach or whether we're
ultimately going to rewrite the statute, is to
get in one place, to the extent we possibly can,
the list of the problems in the statute so that
we can -- I mean, even if we want to rewrite it,
we need to know what are the issues that we find.
So I think that that would be a very useful
exercise to go through. And, you know, maybe if
you do enough lasers, you have a whole new set.

LT COL MCGOVERN: The second due-out
I had was pulling additional transcripts where
they have the RSP or JPP spoken to Article 120,
to get those to you so you can identify if you
need more information. And then, three, there's the concern about training, and we could ask the SAPR folks for at least their training packets or what are they training on, what's the standardized packet, and you'll at least have that.

ACTING CHAIR HOLTZMAN: Or maybe you can ask them, Kelly, specifically -- sorry. Could you ask them specifically how they use 120 in their training? If they do, how they use it, when they use it, any examples of that would be very helpful.

LT COL MCGOVERN: The example of having one drink being used in training has been around for a few years, so you would think --

DEAN ANDERSON: Is it apocryphal, or is it -- I mean, it would be good to see if it shows up anywhere in the literature they actually distribute or if that is something that is an interpretation or a take-away based on sort of high-end concern.

MAJ GEN(R) WOODWARD: I can tell you,
for the Air Force, when I came in and we heard
that when we were doing the focus groups when I
first came in, and this was the summer of 2013,
and we did everything we could to find out who
was saying that, to cut them off and give them
verbiage that we thought was reasonable for them
to teach. The big problem is the verbiage we
give them to teach is so difficult, you know.
And so I don't know if it falls within our
purview, but just interpreting 120 and giving
them an interpretation of what we think 120 is
may be a viable thing, you know. Something
that's reasonable to say this is effective to
pass on to an 18-year-old and have them
understand it would be nice if we could that.

MS. FRIEL: The same problem is going
on on college campuses all across the country.
The policies we talk about being capable of
consent from intoxication and, yet, the word on
campus is if you've been drinking at all, and
administrations are all trying to do exactly what
you described --
DEAN ANDERSON: Or they're worried about the word on campus, so you don't actually know what's actually being communicated because the materials that are communicated --

MS. FRIEL: All I can tell you is that we were doing markup at Dartmouth, which is my alma mater, and we had rooms for kids who were on the judiciary panels before they changed their whole method, and we talked their policy, your statute Article 120, and almost every kid in the room said, "Well, that's not what we were told on campus. We were told "no" if you're drinking at all." Every single one. It was amazing.

How can that be? I mean, you come in at orientation and we say this, and somehow it changes over time.

Now, that's a couple of years ago.

Now maybe we're getting somewhere. But --

MAJ GEN(R) WOODWARD: This is what we had with SARCs and commanders. They would say, okay, here's what the law is, if you will; here's what I say, you know. If you have a drink you're
making yourself vulnerable or if you had sex with
somebody who just had a drink you're vulnerable.

   MS. FRIEL: Right. It's not illegal.

It's just --

   BGEN(R) SCHWENK: I think they're
trying to tell 18 and 18-year-olds you're putting
yourself at risk if, and one of them is the
person you're going to have sex with has been
drinking, you know. And then they can go on, and
then that reduces down to one drink.

   LT COL MCGOVERN: I would like to
propose that when Glen does bring in the trial
counsel and defense counsel, since you don't have
the actual panel members to ask, you may want to
ask the counsel how hard is it for you to sit a
panel because of the training they received, and
that's really where you're going to hear the
trickle-down effect of the difficulties they're
facing and what is still being heard out there in
their most recent cases.

   DEAN ANDERSON: Yes, that's correct.

   PROF. SCHULHOFER: But is that in lieu
of the notion of trying to get direct information
about how --

LT COL MCGOVERN: Oh, no, sir. No, sir. I just think it's a supplemental question. As Ms. Friel said, you can always get the policy and training packet if you want to see how it's affecting the judicial proceeding. I would ask how difficult is it right now to seat the panel based on the training they're receiving because I'm pretty sure there's a standard defense counsel question. Have they been trained that one drink equals that they can't consent? If yes, okay, thank you.

LT COL HINES: That's become boilerplate for the judges' preliminary questions is you start asking because all of this, as a judge now, before you even let the prosecution or the defense talk to them, you admonish them and tell them how many of you have received training and all the arms go up. Do you understand that that has nothing to do with the legal instructions that you're going to get in this
case, and, of course, they all say, yes, we understand that. But you still see, as the trial goes along, either through questions, because in our system they can actually ask questions of the witnesses, you'll still see that, you know, well, did you just have one drink. So despite what the judge has told them, they're still thinking about what they've been trained to do.

I was going to ask, Ms. Holtzman, to go back to your point, about connecting up the issues or going through the statute. Would it be helpful to everyone if I went through, I thought what I might do is go through the statute, to the extent that I can, because the issues are sort of interwoven here in the statute. And what I'll be happy to do is -- for instance, the first, 120(a), unlawful force. That issue has come up. I've heard everyone talking about what does unlawful force mean or bodily harm. That's one of the issues that the JPP referred to the Subcommittee: is the term bodily harm ambiguous or not? I'll be happy to go through and pick
with, hopefully, laser precision, to Judge Maksym's description, but to sort of go through here and highlight, here is a definition or terminology that's part of issue three, and these are the witnesses who have spoken. Some of this is in my outline, what they said, but I can go through and say, here are what some of the witnesses have said about bodily harm, we need a fix. These three or four witnesses said we need a fix. I think that may quicken as you go through all of this. You don't have to go through the issues and then the statute and go, wait a minute, what are these? It might help you to connect up, okay, well, that's issue four, bodily harm is issue four for us to resolve and these are the people who have spoken to it.

Would that be helpful?

ACTING CHAIR HOLTZMAN: It's up to you.

PROF. SCHULHOFER: Is there an issue, like what you did at Tab 17?

LT COL HINES: Right, right, but with
a little more specificity.

COL(R) SCHINASI: With respect to what should be in the statute and what is in the Judges' Benchbook?

LT COL HINES: I'm sorry, sir?

COL(R) SCHINASI: Lots of times, the terms that we're struggling with are identified and explained in the Judges' Benchbook. So as the judge instructs the jury, he's explaining all of these terms. And so the question would be how much do you want to load up the statute with all of this information and you make the statute --

BGEN(R) SCHWENK: Yes, and that will be something we'll have to grapple with as we go through it. You're absolutely right. The same thing with the Manual. You know, which ones --

LT COL HINES: In the Benchbook, to answer your question, sir, sometimes the Benchbook does help judges. For instance, for that issue of consent, there's a great explanation in there. But then the instruction you give to the panel members is not as good as
what you're reading as the judge.

But then there are other places you have the same definition in the Benchbook that's in the statute, and the members will come back and say, "Judge, can you give us some more explanation of what bodily harm means?" and you say, "I'll re-read you the definition that I read you an hour ago," because, you know, your loathe as a trial judge to give a novel instruction and possibly get reversed. And so they look at you like, well, that wasn't very helpful.

So to answer your question, some places in the Benchbook are helpful and some are not. And so that's probably something -- that's one of the reasons we supplied it to the Subcommittee is maybe the Benchbook needs to be fixed, too.

PROF. SCHULHOFER: I had a question about our terms of reference and the 11 issues. Many of them, most of them, I think, focus on the question of whether, is the current definition of consent unclear or ambiguous? Most of these
issues focus on whether particular terms are ambiguous, confusing, or are they clear enough?
You could perfectly well imagine a statute that's crystal clear but far too restrictive or far too expansive, and it seems like that's rather de-emphasized in our charge.

One place where I saw it is on page, issue eight: is the definition of force too narrow? That's a very different kind of issue, and it's certainly something that's been a preoccupation for me and for Michelle and in our work. Our issue with the Model Penal Code isn't whether it's unclear. It's all too clear that it's very narrow. And if it's not within our charge, you know, that's fine. We're spending plenty of time on the issue anyway, so we don't need to talk more about it. But I would have thought that it was an important issue for the military to think about not only clarifying but also making a decision about whether the concepts on which 120 is grounded are too restrictive.

BGEN(R) SCHWENK: I think that's a
great point. And I think when you look at -- I think Maggie asked the question, you know, if we end up with a laser-like answer the 11 questions and anything else we think needs to be answered, and then we go to the other one, your thought was what's the concept, which dovetails exactly with what you just said.

And so, individually, we all have to be thinking, if I were doing a statute, a 120, what would my fundamental premise be for basing that statute? Would it be a consent statute? Would it be a force statute? Would it be a force and consent? We need to be thinking about that because, if we do that second half of our project, we're going to have to come to some conclusion. And it would make life easier on the Staff if we can get one conclusion. It would be better than if we had three subsets. But we are going to have to come to some -- I think that's just inherent.

But in the meantime, the shorter-term thing is, being a Marine, is answer the mail.
You’ve got 11 questions, give them 11 answers, and then we can go on.

ACTING CHAIR HOLTZMAN: Well, you also don’t have to read the word "clear" in a narrow way, an ambiguously narrow way. Yes, the statute could mean this, it could mean that, or should it mean this, or should it mean that? You can’t look at that, I think.

My sense is they want to get a good idea of the infallibilities in the statute, the flaws, the defects, you know, what’s most serious, and how they can be corrected. Can they be corrected, you know, just a couple of word changes here, or do they have to require a wholesale rewriting? And then, of course, all those fundamental issues: define force, consent, all that stuff.

MS. KEPROS: Just to be clear, I understand the JPP identified specific statutory terms and that’s where the 11 came from. But, you know, there are, within these materials, a lot of other issues that were raised by
commentators. I mean, is that going to be
included in this sort of master working list of
possible issues?

MS. FRIEL: About the statute or about

MS. KEPROS: Yes. There were other
problems with the statute identified by other
commentators.

MS. FRIED: We get our direction from
the JPP parent committee. So to the extent that
they wanted that to be considered, we have to get
some direction from the JPP --

MS. KEPROS: Okay. I guess I'm just
wondering because, you know, I certainly can make
you my own list. My statute is a little marked
up myself. But I don't want to waste my time
doing that if it's outside the purview of what
we're supposed to be working on.

LT COL MCGOVERN: Well, Ms. Kepros,
the 11 issues were designed to be as topical as
possible. So, hopefully, some of those things
you have identified are actually sub-issues to --
MS. KEPROS: Absolutely, absolutely.

LT COL MCGOVERN: You know, so, hopefully, it all will work out if you read the question broadly.

LT. COL GREEN: But the terms of reference should also allow for -- I mean, and, obviously, I think the panel would benefit if the subcommittee, through its more detailed work, identifies additional issues that the subcommittee agrees are issues. I mean, certainly, in the course of your discussion, that's something that can be raised and we should incorporate a list of anything that the subcommittee feels may warrant detention. But you do have the parameters to identify other issues to the panel.

DEAN ANDERSON: So I guess I'll just throw out that I'm not convinced that we should touch the statute after this presentation today. I understand that that sounds like it might be a minority view. And it's tentative. You know, I could be convinced otherwise. It sounds like
there's a real impulse to let things work themselves out through case law and don't undermine the development of case law by introducing yet again new statutory language.

So that's at least part of the calculus for me, so, although this is going to involve tremendous staff work, I don't want that work to presuppose an outcome. It seems to me that it's still part of our analysis about what to do with the statute, if anything, and how to -- particularly given that the White House has not moved forward with interpretations of the statute, so that's still possibly, I think, an opportunity to -- actually, I don't know procedurally what that provides as an opportunity to clarify the statute, but that was at least raised by the panel today.

So a lot of work forward, but I would want to hold out still a question in our minds about whether or not this is the right direction to go, given the repeated revisions of the statute.
PROF. SCHULHOFER: One of the concerns about that is that, insofar as the White House tried to do anything to make this statute more victim-protective than it already is, it would bump up against Hamdan, which denies the president the authority to enact rules of decision that are inconsistent with congressional statute.

So that would be a one-way ratchet if we did that. In other words, one way the White House presumably could introduce provisions that are more friendly to the defendant but can't go any other direction. At least, unarguably, it would raise an issue under Hamdan.

BGEN(R) SCHWENK: I think the Dean is right because I think the charter is we'll answer these 11 questions and then sit down and see what your answers are and decide whether it's worth it or not. We still have to do the third thing, which is we found the problem, we've got solutions, now what are the problems with the solutions and we've just introduced a net
negative and, therefore, leave it the way it is.

DEAN ANDERSON: Maybe it's being a law professor and teaching criminal statutes, I just think we could go through with a fine-tooth comb in any one of these groups and dismantle any criminal statute in front of us and come up with dozens upon dozens of problems, interpretative potential problems and actual problems. It doesn't mean that they aren't real and that we don't end up deciding to address them by rewriting the statute wholesale or with some laser-like focus. But I think it's still a question mark.

LT COL MCGOVERN: That's exactly what happened in 2004 when the JSC looked at revising Article 120 and they came up with an 800-page report with six options, but their overall recommendation was no change. So it's absolutely --

MAJ GEN(R) WOODWARD: And I think it's interesting to me that there doesn't seem to be a big undercurrent from the folks who are operating
in the field to change it. I mean, when I read
everybody's inputs, in addition to what we heard
here, it doesn't seem like there's a big
overwhelming, this is a real problem and we need
to fix it. I was surprised by that, actually,
but --

COL(R) SCHENCK: These guys have sat
on the bench with three different versions, you
know. So the laser-like is, I think, from the
trial judge perspective, the best way to go and
something that, they've already got the Benchbook
instructions and they can work with those little
pieces.

I think someone suggested court-
martial changes, which we were just mentioning as
an aside, the Court of Appeals for the Armed
Forces which reviews, of course, our military
cases doesn't really put weight, credibility in
the president's changes as they do congressional
changes. So we can never be sure about what will
happen next, so the president said let's unglue
the fences, they don't have to be listed. And
the Court of Appeals for the Armed Forces says,

oh, yes, they do. You name it, those Article 134
offenses by the president, Court of Appeals for
the Armed Forces says the pleadings have to say
and the president said they don't.

So I just throw that out to you

because that might be a good way. It wouldn't
cause a lot of trouble but --

BGEN(R) SCHWENK: But I think it was
interesting when we asked Dwight about the
Manual, the pending Manual changes and did they
address these issues. It was sort of like --

which indicates it's not a burning issue, at

least thus far in practice, because, if it were,
on the JSC list of 111 million pending actions,
fixing some definitions would be pretty high and

--

COL(R) SCHENCK: Oh, I'd like to add
to the Joint Service Committee and how it works.
When I was a major, I was on the working group.
So the Services each had a criminal lawyer as a
voting member and as a minion, you know, doing
the work on the working group. And as part of
the Code Committee, I always see the briefing
from the Joint Service Committee, and I think
their perspective, at least from the Joint
Service Committee perspective, is all these
panels are doing work on the Code, they're on the
receiving end of the Response Systems Panel's
suggested legislative change. It's now their job
to figure it out and put it in an executive
order.

And they, first of all, don't have a
staff. They just have the one major and the
colonel who votes because I specifically asked
that question. So they don't have a staff. They
don't have an office. They're all in their
different Service office. They have a monthly
meeting, and they're having all this work going
on. So the Military Justice Review Group, which
is in this building, provided their report, not
on 120 apparently.

So they're just waiting and working
and trying to get those executive orders through
the process. I'm glad I'm not on that working
group anymore.

ACTING CHAIR HOLTZMAN: Well, do we
have enough, does Staff have enough information
for the next meeting?

LT COL HINES: Yes, ma'am.

ACTING CHAIR HOLTZMAN: Okay. So some
of these issues probably will be ironed out by
the next meeting. Thank you very much, everyone.

LT COL HINES: JPP meeting will start
at 8:30 tomorrow morning.

ACTING CHAIR HOLTZMAN: Eight thirty?
Okay. Well, thanks very much everyone. Have a
nice evening.

(Whereupon, the above-referred to
matter went off the record at 4:53 p.m.)
CERTIFICATE

This is to certify that the foregoing transcript

In the matter of: Judicial Proceedings Subcommittee

Before: DOHA

Date: 04-09-2015

Place: Arlington, Virginia

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

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Court Reporter

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