

## UNITED STATES DEPARTMENT OF DEFENSE

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## JUDICIAL PROCEEDINGS PANEL

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## JUDICIAL PROCEEDINGS SUBCOMMITTEE

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## MEETING

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THURSDAY  
APRIL 9, 2015

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

9:30 a.m.

1  
2  
3 LT. COL. GREEN: Well now we can get  
4 to the more meaty part of what we get to do.  
5 Again, I'm Kyle Green. I think I got a chance to  
6 meet almost everybody here.

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

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

19 I thought maybe before we turn it over  
20 to Ms. Holtzman and talk about the work of the  
21 Subcommittee, it might be helpful if we just go  
22 around the room and everybody introduce

1 themselves so that you know each other and kind  
2 of know each other's backgrounds.

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

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

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

14 (Laughter)

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

19 In any case, I -- the reason I'm here  
20 today is I'm on the -- I'm chairing the JPP  
21 Panel, the Judicial Proceedings Panel, which  
22 called for the creation of this Subcommittee.

1           I was a member of Congress for eight  
2 years. I served as District Attorney of  
3 Brooklyn, New York. I was Comptroller of New  
4 York City. And then for the past more than 20  
5 years, I've been in private practice in New York.

6           That's my background. Are you next?

7           BRIG. GENERAL SCHWENK: Go this way?

8           ACTING CHAIR HOLTZMAN: Sure.

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

15           And I ran several advisory committees.  
16 When Jim Freeman said that there weren't that  
17 many run by OGC, we took that as a good thing  
18 because we didn't want to have to run any.

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

22           (Laughter)

1                   PROFESSOR SCHULHOFER:   Stephen  
2                   Schulhofer.   I teach at NYU Law School.   Before  
3                   that -- I've been teaching at NYU since 2001.  
4                   Previously I taught at the University of Chicago  
5                   and at the University of Pennsylvania.

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

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

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

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

1 Public Defender.

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

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

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

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

21 So, I'm a civilian. I'm learning a  
22 lot. I read a lot to be here today.

1 (Laughter)

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

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

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

15 LT. COL. GREEN: Ms. Woodward?

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

21 I don't know what's more confusing for  
22 you is understanding the military side of this?

1 Or for me not being a lawyer and understanding  
2 all that.

3 (Laughter)

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

6 (Laughter)

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

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

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

20 That's my background.

21 COLONEL SCHENCK: I'm Associate Dean  
22 Lisa Schenck from GW Law School. I'm the Co-

1 Director of the National Security Law Program. I  
2 teach military justice.

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

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

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

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

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

22 So I sat in a little cell with an

1 accused who was charged with some form of sexual  
2 assault or not. I heard the story from their  
3 side. Certainly from the Government's side.

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

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

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

17 (Laughter)

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

22 (Laughter)

1 DEAN ANDERSON: Currently I'm Dean at  
2 the City University of New York School of Law.  
3 And my scholarly area of expertise and focus is  
4 rape law and sexual assault.

5 I'm also on the American Law Institute  
6 with Stephen Schulhofer, focusing on trying to  
7 figure out what the Model Penal Code should say  
8 about these very important issues. And so that's  
9 part of the dialog that we've had over an  
10 extended period of time.

11 Although I think our dialog spans  
12 earlier -- earlier discourse. Let's see, I'm  
13 sure there are other things.

14 I was for many years the Policy Chair  
15 of the National Alliance to End Sexual Violence.  
16 But I've also worked as a defense attorney around  
17 sexual assault issues. So I have sympathies on  
18 all sides.

19 And am very pleased to be here. Thank  
20 you.

21 MS. FRIEL: My name is Lisa Friel.  
22 I'm a former prosecutor from the Manhattan DA's

1 Office in New York. I went there right out of  
2 law school and I had a three-year commitment  
3 there that I thought would be forever. And I  
4 stayed 28 years.

5 (Laughter)

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

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

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

20 And then we did private investigations  
21 as well, using the expertise. I've gathered a  
22 group of former prosecutors that I had trained

1 and from other offices. And we do this kind of  
2 work.

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

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

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

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

20 And to have three kids that have gone  
21 through American colleges here with this issue, I  
22 think has really helped me think about what

1 should the laws say? What's fair to both sides  
2 of this kind of thing?

3 So that's who I am.

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

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

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

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

20 The Services -- the military Services  
21 have detailed personnel to support OGC. I was  
22 detailed by the Air Force Judge Advocate General

1 over to DoD to support initially the Response  
2 Systems Panel. And then was asked to move over  
3 to the JPP afterwards.

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

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

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

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

21 In addition to that, I know you've all  
22 worked with Roger Capretta on getting orders and

1 your travel and those types of things. And so  
2 Roger and Dale -- Dale is our Chief of Staff and  
3 Roger is our Chief Administrator, who are going  
4 to be our primary points of contact to help you  
5 with those travel details and vouchers and orders  
6 and all those kinds of headaches to get you to  
7 wherever we need to make sure you have the  
8 opportunity to go.

9 Your primary points of contact  
10 obviously as you're going through the process are  
11 going to be Lieutenant Colonel Hines and then  
12 Sharon Zahn. And they're really the team that we  
13 designated within our Staff to focus on  
14 Subcommittee support.

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

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

1 needs of the Subcommittee and supporting it.

2 But again, we're here to serve you.  
3 And so we will try to help you. And it's our  
4 goal to get you materials and to try to help put  
5 all the materials and prepare you as much as  
6 possible.

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

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

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

22 Ms. Holtzman, do you have any topics?

1           ACTING CHAIR HOLTZMAN: Sure. First  
2 of all let me welcome you all here. Some of you  
3 I recognize from prior service. So you really  
4 are gluttons for punishment. But, I just want to  
5 say thank you so much for being willing to help  
6 out again.

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

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

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

22           And some of the Members who are here

1 today served on that Panel. And -- or served on  
2 subcommittees as part of that Panel. We produced  
3 a report.

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

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

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

20 The Judicial Proceedings Panel is  
21 really charged with looking at a lot of technical  
22 issues in the process. The legal process of

1 handling sexual assault cases.

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

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

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

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

22 I'm not going to tell you where I

1 think it belongs on the spectrum of imperfect.

2 But it's not perfect.

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

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

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

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

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

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

1 '17.

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

4 (Laughter)

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

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

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

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

22 There's a lot of respect for the

1 Members of the Panel and the seriousness with  
2 which these issues have been approached. And so  
3 I tell you this because a lot of people are going  
4 to be paying a lot of attention to what we're  
5 doing.

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

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

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

21 And then the issue of how to deal with  
22 abusive and coercive relationships within the

1 military. Which is of very special concern. Two  
2 pieces of legislation were introduced by members  
3 of Congress. They testified before the JPP.

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

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

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

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

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

1 we'll do our work until we finish.

2 Of course, I'm not chairing this, so  
3 I -- maybe Barbara Jones will crack a very  
4 serious whip.

5 (Laughter)

6 ACTING CHAIR HOLTZMAN: But, I'm  
7 suggesting that I just think it's probably likely  
8 if you don't get finished then, you know, pretty  
9 intractable and if we have serious questions,  
10 then we'll take the time that's necessary to come  
11 to the right conclusions.

12 But, the anticipation is or the hope  
13 is, I should say, realistic or not, that February  
14 2016 we will report on this subject to the  
15 Secretary of Defense.

16 I mean, the Subcommittee will have  
17 finished so that it can submit its report. The  
18 report doesn't have to be in writing, but it can  
19 be in writing, to the JPP. Which then can amend  
20 it. Change it. And then the JPP submits what it  
21 wishes to the Secretary of Defense.

22 And by the way, I know all of you will

1 be pleased, particularly those of you who dealt  
2 with the Response Panel, we have a writer, a  
3 staff writer. A technical writer to help us  
4 produce our reports.

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

7 (Laughter)

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

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

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

17 But if anyone would like to take a  
18 break.

19 ACTING CHAIR HOLTZMAN: Well, should  
20 we take a five-minute break? Yes, okay. We'll  
21 take a five-minute break and then we'll come back  
22 and start it then.

1                   (Whereupon, the above-entitled matter  
2 went off the record at 9:55 a.m. and resumed at  
3 10:12 a.m.)

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

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

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

14                  MR. SULLIVAN: Thank you very much,  
15 Madam Chair. Gosh, I look around this room and I  
16 see such titans in the field that I feel like a  
17 finger painter who has been asked to come and  
18 discuss portraiture with Rembrandt and Van Gogh.  
19 So I'll be --

20                  (Laughter)

21                  MR. SULLIVAN: Let me give you a road  
22 map of what we're going to do this morning. So

1 we're going to start with an overview of the  
2 military justice system, and then from there I'm  
3 going to go into a legislative update to brief  
4 you about some of the legislative developments  
5 over the last two years. And then I'm going to  
6 stop -- no matter where I am, I'm going to stop  
7 at 10:45. That's because I am fascinated by  
8 military justice. I could talk about military  
9 justice all day. As General Schwenk knows, some  
10 days I do. And so if left to my own devices,  
11 I'll just hog all the time.

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

19 Okay. So let me start with an  
20 overview of the military justice system. So the  
21 military justice system governs the active duty  
22 military justice members, you know, more than 1.4

1 million active duty military members, which is a  
2 larger population than in 11 states and the  
3 District of Columbia. So it governs quite a  
4 large population, and it governs them 24 hours a  
5 day, seven days a week, 365 days a year.

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

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

22 And there are some rare instances in

1       which the UCMJ also applies to civilians.  So,  
2       for example, when we're on a combat deployment,  
3       Congress has authorized the military to try  
4       Service members that are accompanying -- I'm  
5       sorry, by civilians that are accompanying the  
6       military in the field.

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

13                We can also try active duty retirees.  
14      So, Professor Schinasi, we can try you for  
15      whatever it is that you engage in.

16                (Laughter)

17                MR. SULLIVAN:  We also try persons in  
18      custody of the Armed Forces serving a sentence  
19      imposed by court-martial.  So after Professor  
20      Schinasi is prosecuted and confined at the USDB  
21      at Fort Leavenworth, we can also prosecute him  
22      for his misdeeds there.  Okay.

1           Like I said, so there is Van Gogh. I  
2 mean, again, I'm in a room with titans, and the  
3 bigger painters --

4           (Laughter)

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

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

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

21           MAJ GEN(R) WOODWARD: So the Air  
22 Forces aren't subject to --

1 (Laughter)

2 MR. SULLIVAN: I have heard that  
3 argument, but --

4 (Laughter)

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

15 And the reason it was called Rocks and  
16 Shoals is because Article 4 of the Articles for  
17 the Government of the Navy included the  
18 provision, "The punishment of death, or such  
19 other punishment as a court-martial may adjudge,  
20 may be inflicted on any person in the naval  
21 service who intentionally or willfully suffers  
22 any vessel of the Navy to be stranded or run upon

1 rocks or shoals," hence giving that code its  
2 nickname.

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

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

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

18 Okay. So the UCMJ establishes the  
19 military justice system's structure. It enacts  
20 punitive articles. It sets up the crimes,  
21 including Article 120, which criminalizes four  
22 forms of sexual assault that we will talk about

1 after 10:45. And the code also delegates a great  
2 deal of authority to the President within the  
3 military justice system.

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

14 If there is a pretrial agreement, a  
15 plea bargain, that plea bargain isn't cut between  
16 the defense counsel and the prosecutor. It  
17 requires the approval of the commander. And then  
18 after the trial is over, the commander on the  
19 back end can also exercise some clemency  
20 authority, although that clemency authority was  
21 greatly reduced by the National Defense  
22 Authorization Act for fiscal year 2014.

1           Okay. So the UCMJ establishes four  
2           fora at which criminal charges within the  
3           military can be resolved. And these go in order  
4           from least severe to most severe -- non-judicial  
5           punishment, which -- and we will talk very  
6           briefly about each of these levels -- summary  
7           courts-martial, special courts-martial, and  
8           general courts-martial.

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

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

21          So, as I said, the least severe is  
22          non-judicial punishment. It could be -- any

1 Service member has -- so NJP is done by the  
2 commander, and the Services vary a great deal in  
3 how they carry out NJP, with the Air Force giving  
4 a great deal of procedural protection at NJP, the  
5 Navy probably giving the least amount of  
6 procedural protection at NJP.

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

15 As I said, there are substantial  
16 differences among the Services in how they carry  
17 it out, and it is not a criminal conviction. So  
18 the next -- and so NJPs can carry out a number of  
19 punishments, including correctional custody,  
20 which is almost never used anymore. Really, the  
21 maximum punishment that is used in practice is  
22 restriction for up to 60 days. There can also be

1 a forfeiture of pay, a reduction in rank, and in  
2 cases of Service members attached to or embarked  
3 upon a vessel, they can be sentenced to three  
4 days' confinement on bread and water.

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

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

22 Okay. So the next level

1                   BGEN(R) SCHWENK: They get as much  
2 bread and water as they want, right?

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

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

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

21                   So the next most serious forum is the  
22 summary court-martial. And once you get to a

1 summary, it's done pretty consistently across the  
2 five Armed Forces, and it -- if you put a lawyer  
3 that is used to practicing in U.S. District Court  
4 and you drop them into a special court-martial or  
5 general court-martial, they'd know what was going  
6 on. You know, it would translate, very similar  
7 to the way that federal trials are tried. There  
8 are some unique military factors, but, again, a  
9 lawyer would be able to navigate the system if  
10 they were dropped in there.

11 Convictions by special courts-martial  
12 are federal convictions and carry substantial  
13 collateral consequences as federal convictions.  
14 So, for example, a sex offender registration  
15 could arise from either a special or general  
16 court-martial conviction, loss of right to own  
17 firearms could arise from a special or general  
18 court-martial conviction. You know, felony  
19 disenfranchisement could arise, depending upon  
20 state law. So a number of factors arise from the  
21 fact that this is considered a federal  
22 conviction.

1           It appears that the right to elect to  
2 be tried either by a military judge or by a panel  
3 of members -- as we said, the commander will  
4 choose those members if they elect to be tried by  
5 a panel of members. And if the accused is  
6 enlisted, the accused has a right to have that  
7 panel consist of at least one-third enlisted  
8 members from a unit other than the accused.

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

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

1 by special courts-martial.

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

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

17 The accused also generally can elect  
18 to be tried by judge alone, except in a capital  
19 case those can only be tried before members.  
20 And, once again, the procedures for general  
21 courts-martial are fairly constant across the  
22 five Armed Forces.

1           Okay. So, and the maximum punishments  
2 include dishonorable discharge. They can give --  
3 depending upon whether the offense, you know,  
4 carries the possibility of -- they could adjudge  
5 up to a dishonorable discharge, which seems to be  
6 even more stigmatizing than a bad-conduct  
7 discharge and will result in the forfeiture of  
8 virtually all veteran's rights.

9           Confinement for up to the maximum for  
10 the offense, total forfeiture of pay and  
11 allowances, reduction to the lowest enlisted  
12 grade -- again, enlisted only -- and death if  
13 death is statutorily authorized for the offense.  
14 There are 15 offenses under the UCMJ that carry  
15 the death sentence, though all six Service  
16 members on military death row at Fort Leavenworth  
17 were convicted of felony murder or premeditated  
18 murder, or both.

19           Okay. Both special and general  
20 courts-martial you need two-thirds to convict.  
21 And if you don't get two-thirds, it's an  
22 acquittal. So if you have a 12-member court-

1 martial and you have seven that vote to convict,  
2 five that vote to acquit, that's an acquittal.  
3 Jeopardy attaches. Can't be tried again. So you  
4 can't have a hung jury at the finding stage.

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

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

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

1 percent drop in the number of special courts-  
2 martial, to about 1,000.

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

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

19 All right. So let's look at how a  
20 case goes through the system. So let's say you  
21 have a sexual assault that is reported, and let's  
22 take an Air Force case. So the commander must,

1 by DoD regulation and by statute, must refer that  
2 case to a military criminal investigative  
3 organization. So in the Air Force instance, that  
4 would be Air Force OSI.

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

14 And then, the wing commander will  
15 decide should this case go to an Article 32  
16 preliminary hearing. The Article 32 preliminary  
17 hearing was revised by statute in the NDAA for  
18 2014. It is an adversarial hearing. Unlike a  
19 grand jury proceeding, the accused is there; the  
20 defense counsel is there. The defense counsel  
21 can present witnesses. The defense counsel can  
22 cross-examine the prosecution's witnesses.

1           So the wing commander will decide to  
2           send a case to the 32, and then --

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

9           MR. SULLIVAN: Thanks so much.

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

18           Now, that numbered Air Force commander  
19           at that point is -- the commander cannot send the  
20           case to a GCM unless it has gone through a 32 and  
21           they received legal advice from their staff judge  
22           advocate. And so the staff judge advocate has to

1 make certain -- give certain advice. Do the  
2 charges state an offense? Is there probable  
3 cause? Is the -- are the charges warranted by  
4 the evidence presented at the 32? And what is  
5 the appropriate disposition?

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

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

22 As a result of some changes that

1 Congress made in 2014 and 2015, or NDAAs for 2014  
2 and 2015, there is review of a decision not to  
3 refer charges. So it's a one-way review. If the  
4 commander decides to refer charges in a sex  
5 assault case, there is no further review  
6 required. But if the commander decides not to,  
7 further review is required.

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

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

21 There was -- Congress had a concern  
22 that it might be the case that the SJA isn't

1       adequately representing the interest or  
2       advocating the interest or expressing the  
3       interest of the prosecutor. So Congress changed  
4       the -- had put an additional trigger. Say, if  
5       the Service's chief prosecutor thinks the case  
6       should go, and the numbered Air Force commander  
7       doesn't refer the case, then the Secretary of the  
8       Air Force has to review it.

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

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

17               So if the numbered Air Force commander  
18       sends the case to trial, then the case really  
19       goes within the control of the military  
20       judiciary, which is independent of command. So  
21       the Chief Trial Judge of the Air Force will  
22       assign a trial judge to preside over the case,

1 and then it is within the trial judge's control.  
2 And, again, the resulting process would look a  
3 lot like what you are used to in the civilian  
4 system.

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

21 Except there is one major exception,  
22 and that is if there is a plea bargain, if the

1 parties struck a pretrial agreement -- let's say  
2 it limits the amount of confinement for the case,  
3 then that empowers a convening authority on the  
4 back end to grant that clemency. But pretty much  
5 the clemency on the back end now is limited by  
6 what is agreed to at the front end. We've got a  
7 couple of exceptions, but they are just so narrow  
8 they are probably not even worth discussing.

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

20           So once the commanding authority  
21 approves it, the case will automatically go on  
22 appeal to the Air Force Court of Criminal

1 Appeals, which sits at Andrews Air Force Base or  
2 Joint Base Andrews in Maryland. That court will  
3 review the case. After that, the accused can ask  
4 the Court of Appeals for the Armed Forces to  
5 review the case. That would be discretionary  
6 review.

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

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

18 MR. SULLIVAN: What an excellent  
19 question. So in the case of all of the Services  
20 except for the Coast Guard, all of these judges  
21 are military members. And so they are assigned  
22 by the Judge Advocate General of their Service to

1 sit on that court. All of the judges on the  
2 Court of Appeals for the Armed Forces are  
3 civilians appointed by the President, confirmed  
4 by the Senate, for 15-year terms.

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

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

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

18 Okay.

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

21 MR. SULLIVAN: Please.

22 PROF. SCHULHOFER: -- focusing on this

1 question of discretion. You were very clear  
2 about how the numbered Air Force commander's  
3 discretion not to prefer charges is constrained.  
4 But I was wondering down below, once the assault  
5 is reported, working up from the bottom, there is  
6 -- you said that it -- the report must be  
7 referred to the OSI --

8 MR. SULLIVAN: Correct.

9 PROF. SCHULHOFER: -- investigation.  
10 If they find sufficient reason to believe an  
11 offense might have been committed, is there  
12 discretion at that point at the next level where  
13 it says charges preferred by squadron commander?

14 MR. SULLIVAN: Yes.

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

17 MR. SULLIVAN: Yes.

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

21 MR. SULLIVAN: It is not. So it is  
22 before an officer. The Congress recently -- when

1 Congress recently changed it, they provided that  
2 that officer should, unless there is a compelling  
3 reason not to be, should be a lawyer. Before  
4 that, it didn't even have to be a lawyer. But  
5 the Secretary of Defense requires that in all  
6 sexual assault cases the 32 preliminary hearing  
7 officer must be a lawyer. So they have to be a  
8 judge advocate in some Services.

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

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

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

22 You know, and, again, not -- they are

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

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

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

19 DEAN ANDERSON: Just to clarify, on  
20 the discretionary moments that you identified  
21 with the squadron commander, and then in Article  
22 32, at both of those moments this could be kicked

1 to a special court-martial or a summary court-  
2 martial or a non-judicial punishment. Or at what  
3 kind of discretion to do different forms of -- in  
4 other words, you know, when is it mandatory that  
5 it becomes a general court-martial? When the  
6 others?

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

10 DEAN ANDERSON: Right.

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

21 So if you're going to send it to a  
22 court, you can only send it to a GCM. And then

1 that is also tied into that mandatory discharge,  
2 because, as we discussed, only a GCM can dismiss  
3 an officer, which is the punitive discharge for  
4 an officer -- dismissal. Only a GCM can adjudge  
5 a DD, a dishonorable discharge, to an enlisted  
6 member, and that's a mandatory punishment if  
7 someone is found guilty of one of those offenses.

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

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

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

15 MR. SULLIVAN: It could. There is --

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

20 MR. SULLIVAN: A squadron commander  
21 could, but, interestingly, that would not bind  
22 superior commanders. So --

1 DEAN ANDERSON: Indeed.

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

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

20 Now, they couldn't send it to a GCM  
21 unless it had already gone to a 32. But this  
22 individual -- I mean, you can always -- a case

1 can always go up the chain, so this individual  
2 could also direct a 32 and then make the review  
3 of the 32 himself or herself. So it doesn't  
4 always proceed this route, but this is the norm.  
5 It's the rare case where the superior commander  
6 says, "No, I'm going to handle that," but those  
7 cases do exist, and in some cases, say national  
8 security cases, in the Department of the Navy,  
9 the Secretary of the Navy has said only three-  
10 stars can resolve those cases.

11 Yes, ma'am.

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

14 MR. SULLIVAN: At an O-6 or above.  
15 That's a great point. So a sexual assault case,  
16 under -- by the direction of the Secretary of  
17 Defense, the initial disposition authority, so  
18 the first person to make the decision does this  
19 case go or not go, it has to be a special court-  
20 martial convening authority who is at least a  
21 colonel or a Navy captain. That's a great point.

22 So that -- a constraint on just that

1 --

2 COL(R) SCHENCK: And if they choose  
3 not to refer, doesn't it have to go to the  
4 Secretaries of the Services?

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

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

22 Okay. So we're going to stop there,

1 because otherwise I will talk about --

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

10 MR. SULLIVAN: That's not statutory.

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

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

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

17 MR. SULLIVAN: That would not apply.

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

22 Okay. So now we're going to dive down

1 and explore the statute that prohibits rape and  
2 other forms of sexual assault within the  
3 Department of Defense.

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

12 So it only covered rape. So if you  
13 wanted to cover some other form of sexual  
14 offense, say forcible sodomy, that would be  
15 covered under Article 125, because, again, it was  
16 only forcible vaginal intercourse that was  
17 covered by 120. So 125 would cover forcible  
18 sodomy, and sodomy was construed by the military  
19 courts broadly to include oral sex in addition to  
20 anal sex, or it could be charged as an assault  
21 under Article 128, or it could be charged as an  
22 attempt under Article 80.

1           Now, there is something in the  
2 military called the General Article. There is --  
3 Article 134 prohibits any act that is of a nature  
4 to discredit the Armed Forces. It prohibits any  
5 act that is prejudicial to good order and  
6 discipline within the military. It prohibits any  
7 -- it prohibits a Service member from violating  
8 any non-capital federal criminal offense,  
9 including -- if you are on base, including state  
10 law for similar crimes.

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

19           Of all things, for some reason  
20 Congress never prohibited negligent homicide for  
21 Service members. So the President did -- what  
22 the Manual for Courts-Martial did, if you commit

1 negligent homicide and it prejudices good order  
2 and discipline, or is service discrediting, we  
3 can get you.

4 So the President specified certain 134  
5 offenses that are of a sexual assault nature, so  
6 assault with intent to commit rape or sodomy. In  
7 1951, when President Truman issued the first of  
8 the post-UCMJ Manual for Courts-Martial, that was  
9 included as a 134 offense. Indecent assault,  
10 indecent acts with a minor.

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

18 So you'll recall that when Congress  
19 passed -- when Congress passed the rape statute  
20 in 1950, it could only be committed by a man  
21 against a woman. So it was made gender-neutral,  
22 and the marital exception was eliminated in 1992.

1 You'll recall when Congress passed it it was  
2 defined as committing that act on a woman not his  
3 wife. And so Congress took out that exception  
4 for marital acts in 1992.

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

10 In 2006, as we will see, Congress  
11 substantially rewrote Article 120 leading to much  
12 consternation, wailing, and gnashing of teeth.  
13 Due to that wailing and gnashing of teeth, in  
14 2011, Congress again rewrote Article 120. And  
15 then, in 2013, they amended the Article 120 once  
16 again to take out an extraneous period. And I'm  
17 serious. So that was the final edit; it removed  
18 a period from Article 120.

19 Okay. Now, exactly as Representative  
20 Holtzman said before, because there is no statute  
21 of limitations for rape in the military, right  
22 now you could have a court-martial trying someone

1 today at Fort Bragg under the 2011 version, even  
2 though it had the extra period. Or, more  
3 seriously, you could have somebody there being  
4 prosecuted under the 2006 version.

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

15 And then one particular problem that  
16 might arise -- let's say you have a scenario  
17 where the victim says, "Yeah. I was sexually  
18 assaulted sometime in 2012, but I can't remember  
19 exactly when." Well, then the government is  
20 going to have to prove beyond a reasonable doubt  
21 that it was either under this regime or this  
22 regime.

1           They'll have to prove that date beyond  
2 a reasonable doubt, which leads to one of the  
3 problems with constant revisions of the statute,  
4 and that is the obligation of the government, the  
5 prosecution, to prove beyond a reasonable doubt  
6 that the act occurred while one particular  
7 version of this was in effect. I don't think the  
8 period would matter.

9           Okay. So how did that 2006 amendment  
10 that proved to be so problematic come about?

11 Well, the fiscal year 2005 NDAA told the  
12 Secretary of Defense to review the UCMJ and say  
13 whether any provisions should be changed. So  
14 within the Department of Defense, there is  
15 something called the Joint Service Committee. So  
16 each of the Judge Advocates General sends a  
17 representative to this Joint Service Committee  
18 that makes recommendations about changes to the  
19 Manual for Courts-Martial and then also  
20 recommends changes to the Uniform Code of  
21 Military Justice.

22           So this issue got referred to the

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

9 And so now you'll recall the origin of  
10 Article 120 as a 110-word statute. It now  
11 becomes a 2,830-word statute as a result of that  
12 2006 change. And so it now includes not only  
13 rape and carnal knowledge, but 14 separate  
14 offenses, only one of which contains a lack of  
15 consent element. So before 2006 we always  
16 thought of rape in the military as being  
17 intercourse committed by force and without  
18 consent. That's the way we thought about it.

19 But the key change in 2006 was to  
20 remove that consent aspect from it. And so here  
21 is a list of all of the various 14 offenses that  
22 were included within that provision.

1           Okay. And so these changes applied to  
2 acts that occurred on or after October 1, 2007.  
3 But very soon after it came into effect, you had  
4 trial judges starting to rule that points of it  
5 were unconstitutional. And largely they said  
6 that it was unconstitutional because taking away  
7 that consent meant the government no longer had  
8 to prove beyond a reasonable doubt something that  
9 they -- that the judges viewed as an intrinsic  
10 aspect of this particular offense.

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

21           So finally one of these cases goes up  
22 to the Court of Appeals for the Armed Forces. It

1 was a case, United States v. Neal, where the  
2 trial judge had said taking away the government's  
3 obligation to prove consent in a forcible context  
4 was unconstitutional and CAAF disagreed.

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

13 But then, in 2011, CAAF invalidated  
14 the part of Article 120 that dealt with an  
15 incapacity case, so a case where someone is  
16 typically too drunk to consent. CAAF said in  
17 that instance, you are forcing the government --  
18 you are forcing the defense to disprove an  
19 element when you have the preponderance standard.  
20 And they said that was unconstitutional.

21 Moreover, they said that that burden  
22 shift, where it forced -- the defense has the

1 burden of showing by a preponderance of the  
2 evidence that there isn't consent, and then the  
3 burden shifts to the government to prove beyond a  
4 reasonable doubt that there is consent, they say  
5 that's a factual impossibility. They said that's  
6 a legal impossibility, and so they were critical  
7 of that aspect as well.

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

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

21 Now, again, this is an important  
22 object lesson I believe. Obviously, no one in

1 Congress meant to abrogate the parental  
2 compulsion --

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

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

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

20 You know, if you looked at the  
21 statute, you might -- it might not cover laws  
22 that you might think it covered, but there are

1 other parts of the Manual that covered those  
2 things, and we had this substantial case law  
3 overlay. So, for example, force -- force was  
4 generally thought of -- the force required to  
5 commit the act was sufficient force to satisfy  
6 the elements. So that was by case law.

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

15 So, again, I think it's a very  
16 important object lesson that would then stretch  
17 out to when you enact a statute such as this,  
18 there is a particular danger of missing some  
19 theory that is recognized by case law, and then  
20 enacting a statute that accidentally doesn't  
21 carry through. I'm sure that there is not a  
22 single member of Congress that either intended to

1 or would have wanted to eliminate that theory of  
2 liability, and yet the courts held that the 2011  
3 change -- I'm sorry, the 2006 change -- even  
4 though it was a 2012 case, it was a case that was  
5 litigated in the 2006 version of the statute --  
6 had done so.

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

18 So let's take a look at those. Okay.  
19 So the four offenses under Article 120 are rape,  
20 sexual assault, aggravated sexual contact, and  
21 abusive sexual contact. So basically we have two  
22 variables. We have the degree of invasion of

1       bodily integrity, and then we have the theory of  
2       liability. How does one commit that violation of  
3       bodily integrity?

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

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

20              So if we have -- so if we marry up the  
21      most serious way of committing the offense with  
22      penetration, that is the most serious offense,

1 rape. Congress took away the death penalty in  
2 2011, so this is punishable by up to confinement  
3 or life without eligibility for parole.

4 And then we have penetration offenses  
5 committed by a less serious means. So no longer  
6 a threat of death or grievous bodily harm, but a  
7 threat other than of death or grievous bodily  
8 harm. Bodily harm or the victim is unconscious.  
9 Here again, remember, you caused the victim to be  
10 unconscious. Here the victim is unconscious and  
11 the person basically exploits that situation. So  
12 then -- so when we have these theories of  
13 liability with penetration, then we get sexual  
14 assault, which is the second most serious offense  
15 punishable by up to 30 years' confinement.

16 Okay. So then we have the non-  
17 penetration offenses, so, you know, the contact  
18 offenses. And so, once again, we have -- if they  
19 are committed by certain means, those are  
20 considered the most serious offenses --  
21 aggravated sexual contact. And then if they are  
22 committed by the means that would distinguish

1 sexual assault for rape, that is the least  
2 serious of these, abusive sexual contact.

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

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

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

19 Sorry.

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

22 Okay. So, again, so maximum punishment

1 for the most serious offense, rape, life, no  
2 eligibility for parole; sexual assault is 30  
3 years' confinement; aggravated sexual assault, 20  
4 years; and then abusive sexual conduct, seven  
5 years.

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

13 Yes?

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

18 MR. SULLIVAN: Excellent question. So  
19 before the NDAA for 2014, there was no minimum  
20 punishment. So you could have -- and in fact,  
21 there was one case in which you actually had --  
22 someone -- there has probably been more than one

1 case, but one case I can think of, where you  
2 actually had a Service member convicted of rape  
3 and the sentence was no punishment. Literally,  
4 no punishment.

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

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

18 And then there are certain rules -- an  
19 enlisted member could enter into a plea bargain  
20 under which that dishonorable discharge gets  
21 knocked down to a bad conduct discharge, so the  
22 less stigmatizing of the two. But they must be

1 thrown out with what we would call bad people.

2 DEAN ANDERSON: So that essentially  
3 for penetrative offenses, if there is a  
4 conviction, you are going to be thrown out.

5 MR. SULLIVAN: Correct.

6 DEAN ANDERSON: Okay.

7 MR. SULLIVAN: That's exactly right.

8 And then --

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

11 MR. SULLIVAN: Correct. So  
12 incarceration is still entirely within the  
13 discretion of the sentencer, and in the military  
14 if -- remember when we talked about how generally  
15 the Service members elect whether to be tried by  
16 members, which is the equivalent of a jury, or by  
17 a judge alone. If the accused elects to be tried  
18 by members, then the members also sentence.

19 So the judge doesn't sentence where  
20 the person is tried by members; the members  
21 sentence. So it's the members that would decide  
22 how much confinement, but the judge would tell

1       them you must sentence them to a dishonorable  
2       discharge.

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

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

16              Okay. Or penetration by something  
17      other than the penis, by an object or a person's  
18      body part, with an intent to abuse, humiliate,  
19      harass, or degrade any person, or arouse or  
20      gratify the sexual desire of any person. So it  
21      doesn't even have to be, you are trying to, you  
22      know, arouse the sexual desire of either the

1 victim or the accused. It can be of a third  
2 party. That is still the prohibited intent.

3 Okay. So note especially where it  
4 says "another person's body or by an object."

5 Okay. That is going to become important. And  
6 then, again, accomplished through one of the five  
7 theories of liability.

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

18 Rendering the victim unconscious.

19 Again, not that the victim is unconscious -- that  
20 is sexual assault -- but the person is  
21 responsible for making the victim unconscious.  
22 Or for administering basically a date rape drug

1 to the individual. Those are the five theories  
2 of liability that will kick it up from sexual  
3 assault, 30-year maximum, to rape, life without  
4 eligibility for parole maximum.

5 So sexual assault, which is the next  
6 most serious offense, again, defined as the same  
7 kind of penetrative offense, but accomplished  
8 through one of seven theories of liability.

9 Threatening or placing the victim in fear, and no  
10 longer fear of death or grievous bodily harm, but  
11 placing them in fear.

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

18 Inducing the belief that the  
19 perpetrator is another person. So now the victim  
20 is asleep or unaware, no longer that the person  
21 made them asleep or unaware, but they are asleep  
22 or unaware. They are incapable of consenting due

1 to impairment by drug, intoxicant, or similar  
2 substance. This is the case we see most often.  
3 This is the theory of liability that we see most  
4 often. It is number 6 right there.

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

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

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

22 Okay. So the definition of "sexual

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

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

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

22 So she goes in complaining of foot --

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

7 DEAN SCHENCK: Yes.

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

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

1 says by a body part.

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

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

18 The government doesn't like that, so  
19 they appealed the case to the Army Court of  
20 Criminal Appeals, which Dean Schenck used to sit  
21 as a judge on. And so the Army Court of Criminal  
22 Appeals reverses the trial judge and says, "No.

1 A sexual contact offense can be committed with an  
2 object."

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

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

15 One can easily imagine countless more  
16 examples, including indirect contact by items  
17 such as gloves, condoms, sex toys, and  
18 sadomasochistic devices, that would easily fit  
19 within the umbrella of sexual contact, if the  
20 other mens rea factors, you know, the specific  
21 intent factors, were also satisfied. So they say  
22 the stethoscope satisfies that.

1           So we had CAAF say, no, the statute  
2 does reach that instance. And then they go on to  
3 say -- they go on to parse the language, then,  
4 and they say touching may be accomplished by any  
5 part of the body, is unambiguously permissive and  
6 not exclusive. I don't think the judge knows  
7 what "unambiguously" means. I think there is  
8 some ambiguity there.

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

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

20           Okay. So we talked about how the  
21 Court of Appeals for the Armed Forces can  
22 exercise discretionary review over the service

1 court's decisions. So on the 23rd of March, the  
2 Court of Appeals for the Armed Forces decided  
3 that it would review the Army court's decision in  
4 that case. So they granted the petition in  
5 Schloff.

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

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

22 So the court is going to hold oral

1 argument on that issue on August 28th. The  
2 court's term ends on August 31st and will almost  
3 certainly issue its opinion by then. The current  
4 term of the Chief Judge of the court ends on July  
5 31st. So in all likelihood, its decision will be  
6 issued by July 31st.

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

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

19 But if, for example, the accused loses  
20 -- let's say CAAF comes out and affirms the Army  
21 court opinion, it would be an almost certainty  
22 that the Service member will then ask the Supreme

1 Court to review the case. Extremely unlikely  
2 that that will happen, but it's possible.

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

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

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

1 likelihood that Supreme Court review will be  
2 granted.

3 Okay. Yes?

4 PROF. SCHULHOFER: This is really a  
5 side point, but there are a couple of Justices  
6 who love this kind of issue. You probably know  
7 they recently granted cert on the issue of  
8 whether throwing fish overboard was a violation  
9 of Sarbanes-Oxley.

10 So who knows, but it is possible that  
11 if the defense loses that Justice Scalia and  
12 several others would love to sink their teeth  
13 into this issue.

14 MR. SULLIVAN: And following up on  
15 Professor Schulhofer's comment about the fish  
16 case, one of the dissents actually cited Dr.  
17 Seuss' One Fish, Two Fish, Red Fish, Blue Fish,  
18 actually cited that in the dissent to the famous  
19 fish obstruction of justice.

20 So we have looked at one way in which  
21 this issue has gone up on appeal within the  
22 military system.

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

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

17           The Navy-Marine Corps court rejected  
18 that, and then the Court of Appeals for the Armed  
19 Forces denied the petition in that case. The  
20 Court of Appeals for the Armed Forces declined to  
21 review the Navy-Marine Corps court, just like the  
22 de novo certiorari denial of a petition by CAAF

1 has no precedential effect. This isn't  
2 necessarily saying CAAF agrees with NMCCA's, you  
3 know, rationale in Torres, but they declined to  
4 review that.

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

16 And then they also point out that it  
17 is further limited by the statutory language that  
18 the condition has to be known, or reasonably  
19 should be known, by the appellant. So the Navy-  
20 Marine Corps court pointed to this language to  
21 reject a facial challenge to the new version of  
22 Article 120.

1                   Now, the accused in that case of  
2 course has sought the Court of Appeals for the  
3 Armed Forces' review of that decision. The court  
4 extended the deadline for submitting the  
5 supplement, which functions like a cert petition,  
6 it's the argument to the court why they should  
7 exercise their discretionary jurisdiction.

8                   They extended that deadline to March  
9 30th, so that supplement was only very recently  
10 filed. It will probably be another couple months  
11 before we know whether the Court of Appeals for  
12 the Armed Forces will take on the Corcoran case  
13 and give us its thoughts about whether there is a  
14 vagueness problem with the language about  
15 "incapable of consent." Okay?

16                   Okay. Finally, the -- normally what  
17 happens when Congress passes a criminal statute  
18 is the Manual for Courts-Martial will be changed,  
19 and Part IV of the Manual includes the  
20 President's guidance in terms of what the  
21 elements of the offense are. Now, those are not  
22 binding on the courts. You know, the elements of

1 the offense of course are done by statute. And  
2 as Marbury v. Madison said, it is inherently the  
3 province of the judicial department to say what  
4 the law is.

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

17 And then ultimately, you know, if they  
18 opted, the Department of Homeland Security said  
19 the Coast Guard can weigh in, even though they  
20 already had the vote of the Joint Service  
21 Committee. And then ultimately it will be  
22 presented to the President for the President to

1 sign. But that is how these -- that is how these  
2 should -- the system should work. Sometimes they  
3 come back.

4 General Schwenk is smiling.

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

10 Now, unlike the elements, which,  
11 again, are a judicial construct where the courts  
12 will consider the President's views but they are  
13 not binding, the President, under Article 56, has  
14 been delegated the authority to set maximum  
15 punishments for non-capital offenses. So what  
16 the President says the maximum offenses are goes.

17 So after Congress adopted the statute,  
18 the President did promulgate the maximum  
19 sentences for these offenses. In fact, we saw  
20 those before. It was the President that said,  
21 "Confinement for life for rape." It was the  
22 President that said, "Thirty years' confinement

1 for sexual assault." That came from the  
2 President.

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

8 However, the normal supplemental  
9 materials have not yet been signed by the  
10 President, so the elements have not yet been  
11 signed by the President. The definitions have  
12 not yet been signed by the President, and so they  
13 have been -- the Joint Service Committee  
14 published them for notice and public comment in  
15 2012, but they have not yet been promulgated by  
16 Executive Order.

17 Okay. Please.

18 DEAN ANDERSON: So I'm interested in  
19 this fascinating thing that happens when there is  
20 judicial decisions -- when there are judicial  
21 decisions interpreting language, and then there  
22 is a revision which undermines the decision-

1 making that has already interpreted the language  
2 of the statute.

3 MR. SULLIVAN: Yes.

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

13 MR. SULLIVAN: Right.

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

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

1 amendments.

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

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

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

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

18 MR. SULLIVAN: Exactly. And so  
19 traditionally --

20 DEAN ANDERSON: In addition to the  
21 sexual offense.

22 MR. SULLIVAN: Traditionally, yes.

1 And, again, I -- there may be a case -- I'll look  
2 that up. You know, there may be a case that has  
3 delved into that under the 2011 appellate  
4 decision, but, if so, it doesn't come to mind. I  
5 understand the question, but I just don't -- I  
6 don't think the courts have --

7 DEAN ANDERSON: Thanks.

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

10 All right. Any other questions? Yes,  
11 please.

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

14 MR. SULLIVAN: The 1950 version?

15 MS. KEPROS: No. The current statute.

16 MR. SULLIVAN: Oh, okay.

17 MS. KEPROS: The first means of --

18 MR. SULLIVAN: Yes.

19 MS. KEPROS: -- committing it?

20 MR. SULLIVAN: Yes.

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

1 also chargeable?

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

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

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

17 MS. KEPROS: Right.

18 MR. SULLIVAN: And so now if -- if  
19 merely the force necessary to commit the offense  
20 was sufficient, then any act of sexual  
21 intercourse would be rape. I mean, literally,  
22 you know, so -- which obviously Congress didn't

1 intend. So I think that that theory would  
2 probably no longer survive because it would --  
3 you know, no one would think that Congress meant  
4 to make any act of sexual intercourse by a  
5 military member, you know --

6 (Simultaneous speaking.)

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

16 Yes, please.

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

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

21 DEAN ANDERSON: Right.

22 MR. SULLIVAN: So force means of

1 committing --

2 DEAN ANDERSON: My question was  
3 about --

4 MR. SULLIVAN: No. I understand that,  
5 but I just think that the same sort of analysis  
6 is implicated where we used to have -- we used to  
7 define "force" in a certain way. In a certain  
8 regime, that included --

9 DEAN ANDERSON: Yes.

10 MR. SULLIVAN: -- it included a  
11 separate obligation to prove lack of consent.  
12 But if we are just going to use force as a proxy  
13 for it, we can't --

14 DEAN ANDERSON: Right.

15 MR. SULLIVAN: -- that definition.

16 DEAN ANDERSON: That's different. So  
17 I have an interesting question about the 2011  
18 amendments on rape. The first theory of  
19 liability is the use of unlawful force against  
20 the victim. And I know what historically the  
21 word "unlawful" is doing floating around in rape  
22 statutes. It is a function of the marital rape

1 exemption, but that is not what is going on here.  
2 So what is the word "unlawful" doing there?

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

10 DEAN ANDERSON: Right.

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

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

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

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

21 MR. SULLIVAN: So Congress may have  
22 intended that. Again, I don't -- I will check

1 this, but I don't believe there has been case law  
2 construing that -- the use of unlawful conjoined  
3 with force there. But I will check that as well.

4 DEAN ANDERSON: Thanks.

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

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

17 CAAF, last month, reversed the Joseph  
18 decision in a case called Rodriguez and said  
19 that, in fact, there is only about a one in 500  
20 chance that that would actually transmit a  
21 disease, and whatever means -- "likely" means,  
22 one in 500 isn't "likely."

1           And so -- but that aggravated assault  
2           concept that -- in fact, in the Joseph case, it  
3           was the wife of the individual who consented,  
4           knowing the person was HIV-positive, consented to  
5           having unprotected sex with the individual. And  
6           the court, in addition to saying that was  
7           aggravated assault, said you can't consent to an  
8           aggravated assault under military law.  
9           Therefore, it is prohibited.

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

19           BGEN(R) SCHWENK: If I ever read the  
20           2012 draft MCM language, I have long since  
21           forgotten. But how much depth does the MCM  
22           provision go into on 120 and implementing 120?

1 MR. SULLIVAN: It does --

2 BGEN(R) SCHWENK: Is it --

3 MR. SULLIVAN: It's not a treatise.

4 You know, it goes into --

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

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

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

21 MR. SULLIVAN: I believe the case law  
22 states that it has both a subjective and

1 objective component. And it has an objective --

2 ACTING CHAIR HOLTZMAN: What does that  
3 mean?

4 MR. SULLIVAN: So --

5 ACTING CHAIR HOLTZMAN: You have to  
6 prove both?

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

15 So if they -- if the defense produces  
16 some evidence that a reasonable and honest --  
17 that the accused reasonably and honestly believed  
18 that that form of touching would not be offensive  
19 to a normal human being, then that would be --  
20 that would -- then if the defense produces some  
21 evidence of that, the burden would shift to the  
22 government to disprove that defense beyond a

1 reasonable doubt.

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

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

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

20 ACTING CHAIR HOLTZMAN: No. It just  
21 --

22 PROF. SCHULHOFER: I know there was a

1 lot of discussion of defense -- the defense in  
2 the commentary, but I can't keep it all straight  
3 right now. Is the defense that you refer to, is  
4 that within the four corners of Article 120, or  
5 is that coming from a separate provision?

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

16 Okay. So Congress has delegated  
17 rulemaking authority to the President, and so the  
18 President has carried out that rulemaking  
19 authority in part to recognize certain defenses.  
20 So the defense of reasonable and honest mistake  
21 of fact is specified in the Rules for Courts-  
22 Martial.

1           So any general intent offense, so any  
2 offense that doesn't require the government to  
3 prove the accused was thinking a certain thing  
4 when they committed the offense, any general  
5 intent offense, it is a defense that the person  
6 reasonably honestly had a mistake of fact, with  
7 certain extremely limited exceptions.

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

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

20           So general intent offense has the  
21 reasonable and honest mistake of fact. If the  
22 government has to prove a specific intent, that I

1 had some specific thought, there's an honest  
2 belief, even if not reasonable, that is  
3 inconsistent with that requirement for the  
4 government to prove that particular thought would  
5 be a defense.

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

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

21 PROF. SCHULHOFER: I assume the  
22 government -- the military is not challenging the

1 Commander-in-Chief's determination that a  
2 culpability defense is a rule of procedure and  
3 evidence. We wouldn't normally think so.

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

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

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

22 And let me just refer -- Article 36

1 had a moment in the sun fairly recently. You'll  
2 recall the Hamdan v. Rumsfeld case where the  
3 Supreme Court invalidated the military  
4 commissions that were in effect before the  
5 Military Commissions Act of 2006. Some reporting  
6 incorrectly said that they held it was  
7 unconstitutional. They did not. They held that  
8 it violated Article 36. That was the basis for  
9 which those commissions were invalidated in  
10 Hamdan.

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

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

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

1 offensive touching.

2 So you are committing the crime by  
3 committing the crime.

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

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

11 MR. SULLIVAN: Yes. It --

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

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

22 ACTING CHAIR HOLTZMAN: To that person

1 or in general?

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

5 ACTING CHAIR HOLTZMAN: And that that  
6 was reasonable.

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

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

22 So then the question of whether the

1 victim consented or not becomes an element of the  
2 prosecution's case?

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

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

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

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

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

1 and said -- you know, I brandished a lethal  
2 weapon and --

3 ACTING CHAIR HOLTZMAN: Well, that's  
4 A.

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

7 ACTING CHAIR HOLTZMAN: A.

8 MR. SULLIVAN: Right.

9 ACTING CHAIR HOLTZMAN: Sexual  
10 assault. B --

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

14 MS. FRIEL: It's almost like --  
15 because the next one for the grievous bodily harm  
16 is that it almost looks like it should have been  
17 physical injury and serious physical injury. And  
18 physical injury -- different, you know, injury,  
19 not the force, and that is New York law. That is  
20 why this looks so unfamiliar to me, that under  
21 New York law the force of the act of penetration  
22 is not -- it doesn't count for the force if you

1 are looking at a forcible sexual assault. There  
2 has to be force apart from the act of the  
3 penetration.

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

7 MS. FRIEL: Yes.

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

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

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

1 statute, as was the case before 2006.

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

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

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

21 PROF. SCHULHOFER: I wanted to go back  
22 to the question that Liz Holtzman was raising

1 because I think the concrete context for that  
2 would be the one that you said is the very most  
3 common one you see, which is two Service members,  
4 both pretty intoxicated, and the guy makes sexual  
5 advances, which is the -- in some sense the norm,  
6 and the woman perhaps pushes his hand away --  
7 perhaps her head is spinning, we don't know --  
8 and he penetrates her.

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

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

17 PROF. SCHULHOFER: Right.

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

22 PROF. SCHULHOFER: No. I'm sorry. I

1 didn't want to get into the case where the victim  
2 is incapable, whatever that means, but just the  
3 case where the victim is intoxicated, not  
4 incompetent, but just, you know, drunk, loud,  
5 boisterous, kidding around, but she is standing  
6 on her feet, she is conversing or laughing or  
7 whatever.

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

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

18 MR. SULLIVAN: Right. There isn't an  
19 opportunity for that sort of dialogue between the  
20 members and the judge. So the judge will  
21 instruct on any theory of liability that the  
22 judge thinks there has been some evidence to

1 support. But the scenario that you described  
2 tends to be charged under the -- and tends to be  
3 -- the government tends to try to prove that as  
4 six and saying that the victim -- the victim in  
5 that case is incapable of consenting and --

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

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

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

22 MR. SULLIVAN: Yes. Under the number

1 6 theory of liability, the victim was incapable  
2 of consenting. That's how it tends to be  
3 charged.

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

6 PROF. SCHULHOFER: b(3)(A). Right.  
7 Okay.

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

15 MS. FRIEL: I mean, that would be  
16 similar to New York law and similar to a lot of  
17 college policies. Mere intoxication doesn't make  
18 you violate the policy. It's intoxication that  
19 rises to a certain level, and then people  
20 defining "capacity" different ways in different  
21 policies or in different laws. But generally  
22 they try to draw a line between just getting a

1 little drunk and what level, should that be  
2 considered a criminal or violative of college  
3 policy.

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

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

17 (Simultaneous speaking.)

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

22 MR. SULLIVAN: Right. And, again, I'm

1 just saying that, as an empirical matter, is the  
2 way that these cases tend to play out. That  
3 isn't to say that there -- you know, there are  
4 any number of cases where they are charged as  
5 rape, where the theory is that there was -- you  
6 know, that it would have been -- in pre-2007 it  
7 would have been by force and without consent.

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

20 ACTING CHAIR HOLTZMAN: Just going  
21 back to the point again about bodily harm, and  
22 pulling up on the point that Ms. Friel mentioned,

1 because if you look at rape, the first one is  
2 using unlawful force. We're not into that here.

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

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

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

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

21 ACTING CHAIR HOLTZMAN: What I'm  
22 trying to say is, if two is lesser, you don't

1 really have a lesser. You've gone down to bodily  
2 harm, which is like, where did that come from?

3 Just my take on the draft --

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

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

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

20 ACTING CHAIR HOLTZMAN: That's what  
21 they've done. So, in other words, right, so it's  
22 --

1           BGEN(R) SCHWENK: You can't consent to  
2 grievous bodily harm, you could consent to lesser  
3 forms. So it's going to be offensive, meaning --

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

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

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

21          BGEN(R) SCHWENK: So no obligation on  
22 the individual to try to be not overcome or

1 restrained or whatever. I think it is supposed  
2 to be objective.

3 ACTING CHAIR HOLTZMAN: But if you  
4 look at the C, it had --

5 MS. KEPROS: It just -- it defies any  
6 meaning. What is an objective person for  
7 purposes of being overcome?

8 MS. FRIEL: Does it mean someone 5'2"  
9 and my size or somebody else that is much bigger  
10 and stronger? And so which is the reasonable --

11 MS. KEPROS: Right, looking at the two  
12 of you, I'm trying to conceive of who is that  
13 objective person?

14 MS. FRIEL: Yeah.

15 ACTING CHAIR HOLTZMAN: Are we being  
16 unfair to you, Mr. Sullivan?

17 MR. SULLIVAN: No. No. Again, I'm  
18 not here to defend what Congress did, so --

19 ACTING CHAIR HOLTZMAN: We're just  
20 trying to understand what they did.

21 MS. KEPROS: I have another practical  
22 question about what is being done around the

1 "bodily harm" definition. Because if I  
2 understood the instructions section in Tab 4  
3 correctly, in the charging sometimes the  
4 allegation will be non-consent, and sometimes the  
5 allegation will be an offensive touch.

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

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

18 MS. KEPROS: Sure. And then related  
19 to the honest and reasonable mistake of fact  
20 defense, there is reference in these instructions  
21 to having mistake of fact as to consent under  
22 some circumstances, although it is not even like

1 a real affirmative defense. It's kind of a  
2 "here's stuff you should think about." It  
3 doesn't say, therefore, you acquit the person; it  
4 is just kind of, these might bear on your  
5 analysis of whether the government has met their  
6 burden.

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

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

19 MS. KEPROS: Okay. But then so to  
20 refer to it as this instruction does, as a  
21 mistake of fact as to consent, is kind of  
22 misleading.

1           MR. SULLIVAN: Right. So, again,  
2           there's a general defense that, you know, apart  
3           from what is in any benchbook instruction as to  
4           120, there is a general defense to any specific -  
5           - I'm sorry, to any general intent offense, that  
6           there is a reasonable and honest mistake of fact.

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

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

20          MS. KEPROS: And there was discussion,  
21          obviously, in the cases about this burden shift,  
22          double shift, that kind of issue.

1 MR. SULLIVAN: Which is gone.

2 MS. KEPROS: Right. Which is gone.

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

7 MR. SULLIVAN: That is the standard.

8 The standard under the law is some evidence.

9 MS. KEPROS: Some evidence?

10 MR. SULLIVAN: Some evidence.

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

13 MR. SULLIVAN: Oh, yes.

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

16 MR. SULLIVAN: Correct.

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

20 MR. SULLIVAN: Yes.

21 MS. KEPROS: Okay.

22 MR. SULLIVAN: Yes. That is fairly

1 standard. Again, the distinctions there, again,  
2 tend to be strict liability offense, general  
3 intent offense, specific intent offense, but once  
4 you are within there then the defenses function  
5 fairly similarly, you know, in their relevant  
6 category.

7 MS. KEPROS: Okay. Thank you.

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

10 (Laughter)

11 PROF. SCHULHOFER: I don't see him.  
12 Okay. Well, that's a very hard act to follow.  
13 That was very clear and very, very comprehensive.  
14 And it's a good thing -- I think it's a good  
15 thing that we used more time with you, because I  
16 haven't thought about taking the full hour  
17 anyway, and I think I can give an overview of the  
18 Model Penal Code fairly quickly. And maybe a  
19 little bit of time can be spent on issues and  
20 questions from --

21 LTCOL HINES: Professor, would you  
22 like to take -- we've got until 12:30, I think,

1 is when we are going to have lunch brought in.  
2 Does anyone need just a quick five- or 10-minute  
3 break?

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

6 (Whereupon, the above-entitled matter  
7 went off the record at 11:51 a.m. and resumed at  
8 12:06 p.m.)

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

12 PROFESSOR SCHULHOFER: Thank you.  
13 Well, we have 24 minutes before lunch, so I will  
14 try to do this quickly. The idea is that I will  
15 discuss the ALI project to revise the sexual  
16 assault provisions of the Model Penal Code.

17 We don't have Maria, on our staff, to  
18 warn us about not speaking for the organization,  
19 but I'm not speaking for the organization.  
20 Everything I say is just purely my personal  
21 opinion. I think I'm likely to say "we think  
22 this," or "we think that." It's not the royal

1 we, but it's not the ALI we either. It's just  
2 that this is an emerging view among many of us.  
3 But everything is still unofficial and probably  
4 will remain unofficial for at least another  
5 couple of years until we finish our work.

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

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

19 The ALI, the current version of the  
20 Model Penal Code was promulgated in 1962, but the  
21 sexual offense provision, Article 213, is  
22 actually even older than that because it was

1 drafted in the 1950s. And then it worked through  
2 the ALI process until the entire MPC was  
3 officially approved in 1962. So the text is  
4 currently still -- the official MPC is  
5 egregiously out of date, and, unlike the UCMJ,  
6 the unrevised MPC still has gendered language, it  
7 still has the Victorian vocabulary of the 1950s.  
8 It still endorses a broad marital rape exemption.  
9 It still approves very antiquated procedural  
10 evidentiary provisions.

11 That said, the core problem, the most  
12 fundamental problem in the current MPC is, I  
13 think, a problem that continues to persist in the  
14 UCMJ, and that is that the whole structure of the  
15 statute is premised on the traditional idea that  
16 rape is a crime that involves physical force or  
17 threats of violence. So this force-based  
18 conception is inherent in the MPC. I think it  
19 permeates the UCMJ, with some qualifications that  
20 we've been trying to tease out. And it also  
21 continues to be the law in roughly half of  
22 American states.

1           The concern is that this approach is  
2 much too narrow. And so there's an emerging  
3 view, I think, certainly in academic commentary,  
4 in the civilian case law, in the FBI definition  
5 of rape, which is used only for statistical  
6 purposes, but it's important, and it's an  
7 emerging view also in many state statutes that  
8 sexual offenses should include all forms of  
9 sexual penetration without genuine consent  
10 irrespective of the concept of force.

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

22           So where we are. The ALI approved --

1 you'll see our timeline is quite a bit more  
2 leisurely than the last committee.

3 (Laughter)

4 PROFESSOR SCHULHOFER: The ALI  
5 approved the revision project in the spring of  
6 2012. They appointed me as the reporter, which  
7 means only that I'm leading the research effort  
8 and the consultation effort and the drafting.  
9 We've consulted with a variety of ALI committees.  
10 Ultimate decisions are not for me. I report and  
11 the ALI decides. And that will ultimately be  
12 decided by the ALI membership.

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

18 One of the first issues that we were  
19 concerned about was formulating the different  
20 advisory committees that we would work with.  
21 That wasn't really my job. That's a job for the  
22 ALI management, but I was involved. And we had

1 to try to bring in a diverse group of experts.

2 Dean Anderson was one of the first people,

3 obviously, that we thought about.

4 One of our concerns was to assure a  
5 balance or a diversity, from a racial and ethnic  
6 dimension, because, at least in the civilian  
7 justice system, there are intense concerns -- in  
8 the sexual offenses as well as in other offenses,  
9 but in some ways especially in the sexual  
10 offenses -- concerns about discriminatory  
11 likelihood to charge when the defendant is  
12 African-American, likelihood of greater severity  
13 of the treatment of those cases, concern about  
14 discriminatory unlikelihood of charging when the  
15 victim is African-American. So it was very  
16 important for us, at least within the purview of  
17 the civilian criminal justice system, to make  
18 sure that we had minority representation on our  
19 advisory groups.

20 So those types of concerns may not be  
21 right within the four corners of the charge of  
22 this committee, might or might not be. Certainly

1 the Response Systems Panel, I don't know even  
2 there, but certainly more directly concerned  
3 there with charging issues.

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

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

18 The second challenge is to organize  
19 those judgments in a way that lawyers, and not  
20 only lawyers, but also ordinary people, can  
21 understand. And I was thinking a lot about this  
22 during Dwight Sullivan's presentation because, as

1 he mentioned, many of these earlier iterations of  
2 UCMJ had a case law overlay which clarified some  
3 of the ambiguities, where the courts said that  
4 there wasn't ambiguity, where I think he  
5 indicated, in an aside, a stage whisper, that it  
6 looked pretty ambiguous to him, but the court  
7 said it wasn't ambiguous, or they cleared it up.

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

1 proceeding.

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

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

1 solve the problem.

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

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

17 The third concern we have is that as  
18 we start extending the criminal law into less  
19 violent types of abuse, we want to make sure that  
20 the grading and the authorized punishments don't  
21 exceed the gravity of the offenses that we're  
22 talking about.

1           Again, that's something that's outside  
2           the purview of Article 120. For military  
3           purposes, the grading judgments apparently are  
4           imbedded in the Manual for Courts-Martial. And,  
5           personally, I don't see how we can separate  
6           those, but this committee has to decide whether  
7           our mandate extends beyond 120 into the grading  
8           judgments that are attached to those offenses in  
9           the MCM, I guess it is.

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

16           Penetration or contact by physical  
17           force; penetration or contact with a person who's  
18           impaired or vulnerable; penetration or contact by  
19           coercion, non-physical coercion, which would  
20           include non-violent threats as well as abusive  
21           positions of superior authority. That's how  
22           we're approaching it. For this purpose, I know

1 there's an interest in separating abusive  
2 authority from offenses that would fall within  
3 120.

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

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

20 I don't like the complexity of this  
21 structure. Dean Anderson referred to it as being  
22 aesthetically unappealing.

1 DEAN ANDERSON: Aesthetically  
2 displeasing.

3 PROFESSOR SCHULHOFER: Displeasing.

4 (Laughter)

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

9 (Laughter)

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

21 And one of the problems is that, as we  
22 see that there are many different ways that

1 genuine consent can be tainted, you get into many  
2 different kinds of abuse that are behaviorally  
3 distinct. They're distinct in terms of their  
4 culpability, their seriousness, their  
5 dangerousness to others in the community, they're  
6 distinct in many, many ways.

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

21           So, one point I think may be worth  
22 repeating in what I've said, the first four

1 categories that I mentioned: force, coercion,  
2 abuse of trust; those apply even when the victim  
3 didn't expressly say no. Those kinds of offenses  
4 apply even when the victim said, "Yes, I am  
5 willing." A commanding officer says come back to  
6 my quarters. She says yes and she comes back.  
7 Those kind of offenses apply even when the  
8 victims says yes because the concern is about  
9 whether the consent is freely given.

10 The last category might be the most  
11 controversial because it addresses situations  
12 where there's no exploitation, there's no  
13 coercion, there's no physical force, but there's  
14 also no consent. This was really the focus of  
15 that last problem that we were kicking around  
16 right before we took a break. The victim might  
17 have said no, explicitly, but there's no other  
18 force or overbearing. And also the victim may  
19 simply have been passive, neither cooperating nor  
20 resisting. And that could be because of  
21 willingness or it could be because of  
22 unwillingness together combined in some way with

1       fright or intoxication or something of that sort.

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

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

21              But there seemed to be much less, or  
22       maybe no commentary that I noticed, about whether

1 the absence of consent all by itself is  
2 sufficient for liability. And that's the area  
3 that I think is one of the most important  
4 judgments that has to be made. It's probably one  
5 of the most controversial within our  
6 deliberations.

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

16 So among our advisors -- and our  
17 advisors, by the way, have simply an advisory  
18 role. They don't vote on anything. The vote is  
19 at the level of the entire ALI membership. But  
20 we did take a straw vote among our advisors to  
21 see how people lined up, and about half of our  
22 advisors felt very strongly that the grading

1 judgment, about these silence/passivity cases,  
2 strongly felt that the grading judgment was  
3 insufficient and that the offense should be  
4 treated as a felony in the absence of affirmative  
5 consent. That was the view of about half of our  
6 advisors. And the other half of our advisors  
7 also felt very, very strongly and passionately  
8 that the conduct should not be treated as a  
9 criminal offense at all.

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

22 And the latter view is not that this

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

13 Yes?

14 MAJ. GEN. WOODWARD: Can I just add  
15 for -- an important part of that, as it relates  
16 to 120 and the changes that went through the NDAA  
17 in 2014 -- or, as we might say, something falls  
18 at that lower level that you would call a  
19 misdemeanor, though we don't have that  
20 differentiation, really -- but by them putting in  
21 the NDAA if you are convicted of any sexual  
22 assault conviction, it mandates an administrative

1 discharge action. That has a serious impact on  
2 some that I would put is above probably the  
3 misdemeanor level. I don't know if you want to  
4 weigh in on that. But I think that's something  
5 for us to think about, because that's separate  
6 from the 120 piece that we're looking at. That's  
7 in the statutes, right?

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

21 PROFESSOR SCHULHOFER: Yes.

22 MAJ. GEN. WOODWARD: I just thought

1 it's something that's different in our  
2 environment that we need to be aware of.

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

13 On the other hand, we are stuck in a  
14 -- not everybody would think it's bad, but we are  
15 working within a system that's once you make that  
16 judgment that it's a crime, or if it's a general  
17 court-martial offense, if it's a 120 offense or  
18 if it's a felony, and in some cases if it's a  
19 misdemeanor, that's where it's -- some people  
20 think we can't escape this dilemma just by  
21 calling it a misdemeanor. And if I understand  
22 your point, I think it is that you can't escape

1 this misdemeanor. Whenever you put it within  
2 Article 120, the collateral consequences are --

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

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

19 And by the way, actually, I assume  
20 that if soldiers go on leave -- not leave, but  
21 when they're off-base at a bar, they may  
22 encounter 16-year-old girls or 15-year-old girls.

1 That's going to be a court-martial-able offense.  
2 He may have a record that he had un-consensual  
3 sex with a 15-year-old girl. And that, you know,  
4 when you look it up when he's 40, it's going to  
5 say this is a man who had un-consensual sex with  
6 a 15-year-old girl. It's going to read very  
7 different on that sex offender registry from what  
8 actually happened. And without condoning what  
9 happened, we worry a lot about working within a  
10 system that doesn't make discriminating  
11 judgments.

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

18 MAJ. GEN. WOODWARD: But it would help  
19 us -- that's one of the things that I was -- when  
20 I was working on this -- if there was a way to  
21 not have such severe consequences, it actually  
22 helps you educate and actually helps you with

1 convictions. Because right now what happens is  
2 you don't get a conviction, so the implication is  
3 it wasn't wrong, or that person was falsely  
4 accused. So if you got more minor convictions  
5 for things, I actually think that it would be  
6 more effective in portraying that this is wrong.

7 PROFESSOR SCHULHOFER: Yeah.

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

16 PROFESSOR SCHULHOFER: Yes.

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

19 PROFESSOR SCHULHOFER: Yes. During  
20 the break, I think I overheard that you were  
21 talking about education and communicating these  
22 messages. And the ability to limit that effect

1 really would be very helpful there. And then it  
2 also would mitigate some of the pressure not to  
3 charge these cases. I don't know how that plays  
4 out within the military, but I would imagine in  
5 borderline cases, or in cases that it just looks  
6 like young people who are not very well-  
7 socialized, who are misbehaving, there must be  
8 resistance on the part of the military  
9 prosecutors to trigger those kind of  
10 consequences.

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

17 DEAN ANDERSON: Just as a matter of  
18 process to try to understand -- and I think I  
19 might have asked the same question before, but  
20 I'm not sure if I did, so I want to clarify  
21 because this keeps kicking around in my head. If  
22 there's an allegation of a penetrative offense by

1 force or non-consent, that doesn't have to go to  
2 a courts-martial. In other words, the wing  
3 commander could say, oh, let's do non-judicial  
4 punishment and then we never move then to the  
5 mandatory problems of sex offender registration.  
6 Is that correct?

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

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

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

21 DEAN ANDERSON: To be separated from  
22 the military?

1 COL. SCHENCK: Through an  
2 administrative process. And many of these junior  
3 enlisted folks that engage in this kind of  
4 ongoing misconduct don't have enough years of  
5 service to get an administrative hearing. So  
6 it's just a paperwork -- they'll get non-judicial  
7 punishment and then they're processed out.

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

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

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

15 COL. SCHENCK: That's right.

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

22 ACTING CHAIR HOLTZMAN: Isn't there a

1 problem, though, if the staff lawyer disagrees  
2 with the decision?

3 DEAN ANDERSON: Right.

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

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

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

20 COL. SCHENCK: Right, but also we have  
21 to remember that sex offenses are withheld to the  
22 O-6 level. The decision-making authority is a

1 brigade commander. That's really high up. He  
2 can send it back. He can send it back down to  
3 the captain or the company commander and say,  
4 okay, you can dispose of it however you want.  
5 But so the visibility is really high.

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

8 (Simultaneous speaking.)

9 COL. SCHENCK: At least in the Army.  
10 I can't really speak to --

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

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

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

19 (Simultaneous speaking.)

20 COL. SCHENCK: No, or a colonel.

21 BRIG. GEN. SCHWENK: So, Glen and Kyle  
22 are nice guys and all that, but they're not sharp

1 enough to handle one of those.

2 (Laughter)

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

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

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

19 We might want to have a world where  
20 there's more severe punishment and training and  
21 you're saying to the Marines, look, it's not just  
22 that you'll get separated from service if you do

1 this kind of thing. You could get a sanction  
2 within the military. You could get 30 days in  
3 the brig. The present structure doesn't seem to  
4 leave an intermediate -- if I'm right in saying  
5 that separate from service isn't always such a  
6 big deal --

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

12 PROFESSOR SCHULHOFER: This is for  
13 enlisted?

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

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

19 COL. SCHENCK: The characterization of  
20 service depends on the due process you're given.  
21 So in order to give a character of service that's  
22 unfavorable and other than honorable, a Service

1 member would have to have an administrative  
2 hearing to get there. So, at least in the Army,  
3 in order to expeditiously and use the least  
4 amount of resources we'd allow him an  
5 uncharacterized discharge. So you would get a  
6 general discharge, something that -- not  
7 honorable, but not other than honorable.

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

20 Or I can say I'm going to appoint a 32  
21 officer to investigate. One of the changes that  
22 occurred was making this investigative hearing no

1 longer an investigative hearing. It is now a  
2 preliminary hearing. There are a lot of changes  
3 with that. In the past, commanders would use  
4 those hearings to kind of flush out the evidence.  
5 You know, it's a he said, she said, everybody in  
6 the unit was drinking. I don't know. I have no  
7 idea. The cops say it's substantiated. I don't  
8 know. Let me have someone who knows what they're  
9 doing investigating call witnesses.

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

17 And the victims are not required to  
18 testify. They have the option now not to  
19 testify. Many of the victims in the Services are  
20 within the units, right? So you have the  
21 accused, you have the victim. In the past, the  
22 commander would say, okay, hearing officer, the

1 accused doesn't have to testify, but can speak  
2 through counsel and can testify. The victim in  
3 the past would have to testify. If they're in  
4 the military, they could be ordered to testify.  
5 And so those -- there's no longer that --

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

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

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

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

21 ACTING CHAIR HOLTZMAN: Then we have  
22 to go to lunch.

1           PROFESSOR SCHULHOFER: -- this  
2 dichotomy. If I were to put that in civilian  
3 terms, would you say that it used to be that a 32  
4 hearing was a kind of provable case or  
5 preponderance standard and that now it's been  
6 reduced to something more like probable cause?

7           COL. SCHENCK: I would, I guess.

8           PROFESSOR SCHULHOFER: Is that --

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

17           And, I mean, I saw cases when I was on  
18 the Defense Task Force for Sexual Assault in the  
19 Military Services. I was a senior advisor. We  
20 visited units. And there was an actual 32  
21 investigation where the victim testified she'd  
22 never had sex with anybody else, never had sex

1 with anybody else. Everyone testified. And then  
2 the DNA came after the 32 went to trial and there  
3 was an acquittal.

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

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

16 LT. COL. HINES: 1:30.

17 ACTING CHAIR HOLTZMAN: 1:30. Okay.  
18 We'll take 45 minutes for lunch.

19 (Whereupon, the above-entitled matter  
20 went off the record at 12:44 p.m. and resumed at  
21 1:40 p.m.)  
22

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

2 (1:40 p.m.)

3 ACTING CHAIR HOLTZMAN: Good

4 afternoon. We're very pleased to welcome this  
5 very, very distinguished panel of retired  
6 jurists, who we hope will be able to enlighten us  
7 a little bit about Section 120.

8 We very much appreciate your coming  
9 before the Subcommittee. And which way shall we  
10 go? Commander Maksym, can we start with you?  
11 You can go first and then -- should we withhold  
12 questions until everybody finishes, or how do you  
13 want -- or should we --

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

20 ACTING CHAIR HOLTZMAN: I don't know.

21 I think everybody should have something to say.  
22 I hope you have something to say to us, whether

1 you have prepared remarks or not.

2 (Laughter)

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

4 I mean, come on.

5 (Laughter)

6 (Simultaneous speaking.)

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

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

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

19 Madam Chairman and members of the  
20 Panel, it's a real privilege to be here today.  
21 By way of remarks, I don't want to take a lot of  
22 time. I just wanted to enjoin you to the fact

1 that I've, you know, been a judge for about going  
2 on 13 years when I retired in August from the  
3 circuit in Japan for the second time, and I've  
4 sat on the appellate court and I've sat as a  
5 trial judge.

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

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

19 I can think of Crotchett, I can think  
20 of a couple of other cases where -- which led to  
21 Prather, where slowly but surely we undid in 120  
22 Mod 2 that which was fixed by Prather and then

1 finally eradicated by what I'll call Mod 3, the  
2 newest 120.

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

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

17 It would be one thing if in this  
18 environ we had a professional judiciary. But I  
19 was the exception rather than the rule. I only  
20 can speak to the sea Services. I was a  
21 professional jurist. I sat with the closest  
22 thing you had to that in the Navy and Marine

1 Corps. I sat longer than anybody did. But I had  
2 to grind and machinate and beg and grovel to stay  
3 on the bench. And I had to take a vacation to  
4 Iraq in between, as part of the negotiated  
5 process, to do a little work there, and then come  
6 back to the bench.

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

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

1 That's the first thing.

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

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

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

19 And then finally the statute itself.  
20 I think, right now, and what I'll talk about  
21 later as you're addressing the questions, will  
22 be, you know, they fixed things in the statute,

1 but then they got rid of some of the defenses.

2 So I'll tell my little story of just  
3 how juries would come back to me. Members would  
4 come to me, ask me questions after the trial was  
5 over, and they'd say -- you know, and I work with  
6 all three statutes. They'd say, well, why  
7 couldn't this guy say something about, you know,  
8 consent. Why couldn't -- and they want to know.  
9 It's the gigantic elephant in the jury room  
10 wearing a tutu, and no one wants to talk about  
11 it.

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

1 any reasonable doubt.

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

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

16 There are serious issues about -- and  
17 it's a matter of public record. Counsel comes  
18 forward afterwards and says, "I wasn't  
19 competent." And guess what? He wasn't. So this  
20 is the kind of stuff that I think that both your  
21 senior Panel and you need to keep in the forest,  
22 as we discuss the trees that make up a statute,

1 that I think we can take medicinal action on.  
2 But not without forgetting about -- not without  
3 contemplating, in an omnipresent way, the context  
4 in which a usually inexperienced jurist has to  
5 reign over a three-ring circus -- and I mean that  
6 with no deprecation involved -- with Victims'  
7 Legal Counsel, inexperienced trial counsel,  
8 inexperienced defense counsel. Thanks for your  
9 time today.

10 ACTING CHAIR HOLTZMAN: Thank you,  
11 Commander.

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

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

22 So there was old-old, new-old and new-

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

8           Fortunately, the guidance that we got  
9 from the Army and the Benchbook and how to handle  
10 some of these issues was very helpful. I left in  
11 2011, and then on the Appellate Court, saw a lot  
12 of those cases that we dealt with. A lot of the  
13 issues that we saw there primarily dealt with  
14 instructions, the affirmative defense, the dual  
15 use, the burden-shifting, all those things that  
16 are well known in cases such as Prather.

17           And then right in the last year, year  
18 and a half before I left a few months ago, we  
19 were seeing 120 cases under the current statute.  
20 And so my perspective is probably most germane in  
21 the Appellate Court from new-old to new-new. I  
22 would say that it was a positive trend, because

1 it was less complicated, for one. Some of the  
2 instructional error issues that we saw in the  
3 new-old were gone.

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

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

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

22 As you well know, the issues of rape

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

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

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

17 In short, the case results should be  
18 the same, irrespective of what judge presides  
19 over the trial. That's why the law and these  
20 instructions are so important. I love judicial  
21 discretion, I love it, but there's too much. The  
22 old and the old-new, first with the old-new, put

1 us in a position and a difficult position where  
2 we either follow the law, the letter of the law,  
3 or we were forced to protect the rights of the  
4 accused.

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

11 So I was pleased to see most of the  
12 new articles regarding sexual misconduct in the  
13 National Defense Authorization Act for Fiscal  
14 Year 2012. For me, they clarified and prohibited  
15 many sexual activities, such as exposing one's  
16 genitalia by any means to a child, intentionally  
17 communicating indecent language to a child via  
18 communications technology, when in the past the  
19 UCMJ implied that such activity had to occur in  
20 the child's presence.

21 Now I also agree with the decision to  
22 place most of the crimes involving sexual

1 misconduct under Article 120 rather than General  
2 Article 134, because that eliminates the  
3 prejudicial to good order or discipline or  
4 conduct of a nature that would be bring discredit  
5 upon the armed Services.

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

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

19           Well, what that does is, in the  
20 context of -- first of all, I recommend against a  
21 requirement of an affirmative act of consent by  
22 the victim. That's not what I'm advocating. But

1        what I'm -- the point I'm trying to make is in  
2        many cases, especially when drugs or alcohol are  
3        involved, one or both folks involved in the  
4        incident are not beholden to the facts.

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

15               When you give a judge such discretion,  
16       you have inherently added unpredictability into  
17       the process. In sum, I recommend that the  
18       language of the statute clearly state whether or  
19       not a mistake of fact is an affirmative defense.  
20       Additionally if used, it should clearly either  
21       permit or not permit internally inconsistent  
22       decisions such as denial, a lack of memory of the

1 event, coupled with it is not in my character to  
2 force someone else; therefore, the victim caused  
3 me to believe that he or she consented.

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

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

20 As a further aside, I was actually  
21 called back to the court, the Air Force court,  
22 just at the time the Judge Advocate General had

1 instituted the victims' counsel, and I understand  
2 there's a lot of work that needs to be done on  
3 that.

4 But there are instances, from my  
5 experience as a trial judge, where you do the  
6 private hearings under RCM 912 or what was it,  
7 504 or 503, where it's just you, the accused, the  
8 victim and their counsel. A lot of times victims  
9 feel like they cannot -- they're just tongue-  
10 tied. They can't exactly articulate what they  
11 are.

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

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

21 COL(R) GRAMMEL: Grammel.

22 ACTING CHAIR HOLTZMAN: Grammel.

1 We're very pleased to hear from you next.

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

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

18 So I focused on sexual offenses. So  
19 I got to understand the way in which the old  
20 statute was able to cover all the different ways  
21 through constructive force and other means. But  
22 there's a lot of important issues in Article 120,

1 and obviously we've got to balance the rights of  
2 the accused, and understanding the rights of the  
3 victim too and the goals of the government.

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

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

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

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

20 That was painful. I've done a lot of  
21 difficult things in the Army, and that was one of  
22 the hardest things ever, was to try to take that

1 statute and then put it into a product that the  
2 judges and the court members could use during an  
3 actual trial. To try to put that into practice  
4 was extremely difficult.

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

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

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

21 DEAN ANDERSON: I do. I very much  
22 appreciate all of you all coming to talk to us.

1 It sounds as if you've got an extraordinary  
2 amount of experience under the different versions  
3 of 120. It does seem like there's an initial  
4 question that we face as I understand, within our  
5 charge, and that is whether or not to change,  
6 notwithstanding the fact that it's wildly  
7 imperfect, and notwithstanding the rapidity and  
8 frequency of change, whether or not to change  
9 again, at this time, make a recommendation to  
10 change 120.

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

19 So one theory would be, well, just let  
20 the imperfect law that we have now work itself  
21 out over time, and don't change 120 again. A  
22 different theory would be 120 is so imperfect

1 that it must be changed again, and I would be  
2 very interested to hear each of you, with your  
3 substantial experience under the variations and  
4 the pain of each variation, whether or not you  
5 would make a recommendation to change 120 yet  
6 again at this time.

7 CDR MAKSYM: You want to keep our  
8 order?

9 ACTING CHAIR HOLTZMAN: Yes.

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

21 But you know, there's a certain  
22 absurdity to all that. You know with that

1 version, the Benchbook instructions, to eradicate  
2 the burden-shifting, actually had a Benchbook  
3 instruction defining federal statute. Now that's  
4 crazy in anyone's book, you know. So you have to  
5 decide if that's what you want to do.

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

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

16 CDR MAKSYM: Well that's my point.

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

19 CDR MAKSYM: Exactly. At this time,  
20 I think you have to change it. I think you have  
21 to be very particular about setting forth, for  
22 instance, on the issue of victim's consent to the

1 accused, mistake of fact, you know, who's going  
2 to be lined up under that? Are we going to --  
3 are we going to make it back kind of like it was  
4 in Version 2, the last version, without the  
5 burden-shifting problem? Are we going to put it  
6 back in the statute or are we not? That's  
7 probably the biggest area, I think.

8           The other area that's going to have to  
9 be addressed is a definition for someone who's  
10 substantially incapacitated. Right now, we're  
11 going to Article 111 and stealing from Article  
12 111 a definition for a major felony statute. I  
13 mean that's -- I think that's ridiculous. So I  
14 think that's a big anemia in the statute, and I  
15 think we have to go in and we have to fill it.

16           LTCOL(R) WARD: Well to answer your  
17 question, ma'am, I would say there's probably a  
18 few what I would consider small changes that can  
19 be made to address specific things that are  
20 needed, without making a huge shift to the  
21 statute as it is. An example would be, and  
22 that's one of the things on the list, but just to

1 use an example, should we bring indecent acts  
2 back in? Absolutely.

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

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

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

20 PROF SCHULHOFER: I'm sorry, Colonel.  
21 Are you talking about consensual conduct, that  
22 the public would regard as indecent?

1 LTCOL(R) WARD: Yes, yes.

2 PROF SCHULHOFER: Could you give an  
3 example?

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

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

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

17 (Simultaneous speaking.)

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

20 (Simultaneous speaking.)

21 LTCOL(R) WARD: --some slight, what I  
22 would consider slight changes that could be made,

1 without making wholesale changes.

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

6 LTCOL(R) WARD: Yes.

7 DEAN ANDERSON: What about you, sir?

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

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

20 DEAN ANDERSON: Thank you.

21 COL(R) GRAMMEL: Dean Anderson, I'd  
22 be open to changing everything, but if you look

1 at how many changes are required in it, I think  
2 the number of changes that are required to the  
3 current statute are low enough where I wouldn't  
4 promote overhauling it totally. I would just go  
5 in and make specific changes.

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

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

13 MS. FRIEL: Not right now.

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

16 COL(R) SCHINASI: Colonel Ward opened  
17 this box, and it's an interesting issue to me.  
18 When we think about 120, it's a different kind of  
19 criminal offense. It has a different culture,  
20 and I'm wondering if there's a cause and effect  
21 here. Is there any way we could write 120 that  
22 would work on the cause, that would make an

1 impression on primarily the young soldiers, as to  
2 what the appropriate conduct would be?

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

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

12 I would simply say that I think the --  
13 it gets back to the Dean's question a little bit.  
14 I think any rewrite of 120 or any approach to  
15 120, whether it even goes to something as  
16 comprehensive, sir, as you're referencing, has to  
17 be laser-like.

18 It has to be very limited, and it has  
19 to make it as easy for the trial judge as  
20 possible, you know, so that the law is  
21 crystalline, and so that we're no longer in the  
22 position where, you know, judges are literally

1 making law as we go along.

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

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

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

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

18 (Simultaneous speaking.)

19 COL(R) SCHINASI: There's a  
20 fascinating connection in the military justice  
21 system between commanders and all kind of  
22 disciplinary problems. It's unique to the

1 military. The commander has all kinds of  
2 responsibilities with respect to the soldiers  
3 that he or she is responsible for.

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

20 I think a lot of times we kid  
21 ourselves that when there's a decision from the  
22 court, everybody knows what happened and so

1 everybody adjusts their behavior. That doesn't  
2 work. That's not what the law is about. But in  
3 our system, where you have commanders interested  
4 in the evolution and development of their  
5 soldiers, could we write a statute that would be  
6 more effective in getting their attention, as to  
7 what they can't do?

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

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

17 COL(R) SCHINASI: Does that help?

18 MAJ GEN(R) WOODWARD: Yeah, except the  
19 demographics of the perpetrators don't fall into  
20 that 19 year-old age group. You know, I think  
21 we've got to be careful so that we understand. I  
22 think we too often believe that this is between

1 the 19 year-olds on a date that, you know, have  
2 sexual relations and there's a misunderstanding.

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

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

16 CDR MAKSYM: I don't know if that's  
17 ever going to happen with the confines of a  
18 statutory education. It's already happening  
19 right now out there with a lot of the sexual  
20 assault prevention training that's going on  
21 across the Fleet. I can tell you in Japan that  
22 was very comprehensive training.

1                   Sometimes, though, it actually would  
2                   make it almost impossible to find a fair group of  
3                   members, because they would be so convinced that  
4                   their duty was to convict, based upon accusation  
5                   alone, that that became a two-day jury selection  
6                   process.

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

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

22                  That has to come through a culture

1 that's built around the positives, training.  
2 This is the goal, this is -- this is the way to  
3 treat one another. This is respectful behavior.  
4 This is what we expect, and when you drop below  
5 that, guess what, you know. You go to jail.

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

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

13 You're never, never going to eliminate  
14 this 100 percent. I mean if there was an easy  
15 answer, we wouldn't be here. I mean -- but  
16 that's no reason not to try. Make it as clear as  
17 possible; make it workable so people understand  
18 that there are very clear consequences to  
19 behavior that we believe is prohibited and not  
20 acceptable, and generally what happens is they  
21 have to choose another profession when this is  
22 over with.

1           But if you're going to wear this  
2 uniform, if you're going to wear the nation's  
3 cloth, this is how you will act. And that's  
4 about as good as it's going to get.

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

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

17           Unfortunately, they learn the wrong  
18 things at the training sessions. The training  
19 session I went to on sexual assault, the  
20 instructor said that if someone has drunk any  
21 alcohol at all, they cannot consent, and dead  
22 serious. Then someone asked, a young soldier

1 seriously asked what if they were both drinking?  
2 Well, the first one to go to CID was raped. Dead  
3 serious.

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

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

18 Then the last area is in the  
19 courtroom. Fix what happens in the courtroom. I  
20 may be -- I know I'm biased, but that last piece  
21 does need to be fixed. But we tried to fix it  
22 where it didn't need to be. The end result was I

1 think we ended up with probably fewer convictions  
2 than we would have had if we had kept the old  
3 thing.

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

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

1 those are fixes they have --

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

9 But I don't think we needed to change.  
10 Again, I know I'm biased in that area, but those  
11 are my thoughts. Thank you.

12 ACTING CHAIR HOLTZMAN: Colonel  
13 Schwenk, do you have any questions? General  
14 Woodward.

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

21 I think that was reinforced by going  
22 to court and getting -- not getting a conviction.

1 In their mind, that didn't mean that the accused  
2 was not guilty; that meant the accused was  
3 innocent and the accuser was guilty, and that was  
4 a -- I believe was a very detrimental effect on  
5 our ability to deal with the real problem, which  
6 is get to the culture, take care of the victims  
7 when something happens, and to deal with things  
8 properly.

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

21 COL(R) GRAMMEL: I think you put your  
22 finger on something, is, there's a push now to

1 just push everything to trial and let it be  
2 decided at trial. There's two different goals  
3 that I think are mutually exclusive.

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

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

1 they shouldn't be.

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

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

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

19 And you can give good, honest advice  
20 in that victim's interest, which would mean  
21 sometimes if there's not a good chance of  
22 conviction, don't go forward, because you're

1 going to feel like you said. He's going to be  
2 found not guilty because it wasn't proven beyond  
3 a reasonable doubt. Well she's going to feel  
4 like he's innocent, she's wrong, and that's not  
5 it at all.

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

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

21 In the past, people were given other  
22 disciplinary actions. But I mean when we have

1 all the offenses still have to be proven beyond a  
2 reasonable doubt, that's something I don't think  
3 we're willing to give up.

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

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

21 Are there a tremendous number of  
22 these? No, but there shouldn't be one. The

1 minute you have one that's substantiated and you  
2 don't make an example out of the false  
3 complainant at the time, and the decision at a  
4 political level is made, oh boy, we can't touch  
5 that person, let it go, that takes all the  
6 credibility out of the system and knocks the  
7 stuffing out of it.

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

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

17 You know, this has become so  
18 politically charged that the ability for a flag  
19 or general officer to really get into the guts,  
20 mud, blood and beer and dirt of one of these  
21 things is near-impossible to do anymore, because  
22 there's so much pressure, as the Colonel pointed

1 out, push this forward. Let this be resolved in  
2 the courtroom.

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

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

18 Finally, so I think the Colonel's  
19 point is very well taken, and the premise of your  
20 question is well taken. The need for real  
21 screening, but I don't think the real need for,  
22 the acute need for real screening of these cases

1 can happen in the environment we find ourselves  
2 in.

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

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

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

21 The only thing I would say that I'm  
22 comfortable with is that in the change from being

1 a prosecutor before the first, you know, the old-  
2 old, and being a trial judge with the new-old,  
3 and then seeing both the new-old and the new-new  
4 at the appellate level, is that just in my little  
5 limited microcosm of the cases that I saw, I have  
6 no way of knowing if they're representative  
7 across the whole or not, was that there were  
8 cases that I was surprised to see go to trial and  
9 result in convictions.

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

18 Other things that typically years ago  
19 a prosecutor would say there's just -- there's no  
20 way this case gets to a conviction, because of  
21 all these other factors. And at some point,  
22 there's an ethical obligation not to take a case

1 to trial. I did see cases, as recently as a year  
2 ago, that I was really surprised that this case  
3 resulted in a conviction.

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

15 But they're resulting in conviction  
16 more and more, and these were cases that ten  
17 years before I would have expected juries to  
18 acquit. So I saw that as something that well,  
19 we'll be careless with the narrative that was  
20 outside my world, which was in the military,  
21 these cases don't get prosecuted, and if they do,  
22 they all result in acquittals. I just didn't see

1 that, and I don't know what that really means in  
2 the bigger show. I hope that answers your  
3 question.

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

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

18 I didn't see a lot of false  
19 accusations or anything like that, but some cases  
20 are just tough to prove. Not that they didn't --  
21 they're just tough to prove, and in this  
22 environment, it's very hard for somebody in the

1 middle to turn the process off before it gets all  
2 the way up to an appellate court or to our  
3 appellate court, when they say there's nothing  
4 there.

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

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

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

17 ACTING CHAIR HOLTZMAN: General  
18 Schwenk.

19 BGEN(R) SCHWENK: Thank you. Let me  
20 return to Dean Anderson's question, where we  
21 talked about whether we need to -- whether we  
22 should amend 120 or not, and all of you thought

1 that a laser-like approach that ended up with a  
2 more workable statute was -- would be helpful and  
3 doable.

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

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

20 Let's look at the statute as it is,  
21 and is it workable? I mean we looked at it, and  
22 I think our general consensus in the discussion

1 we had today is, boy, there's a lot of parts of  
2 it you just shake your head at. But that doesn't  
3 mean it's not workable. It must means there's a  
4 lot of places where you shake your head.

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

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

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

13 FEMALE PARTICIPANT: It looks like it.  
14 (Laughter)

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

18 (Simultaneous speaking.)

19 CDR MAKSYM: Look, I think this goes  
20 to what I was probably frustrating the Dean with  
21 a little bit, in trying to answer her very sound  
22 question, which was I really do think that if

1       you're -- if you don't have experienced judges,  
2       you can't sit there, interpret a statute and fix  
3       it on the bench.

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

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

21               Maybe that's a reason you kick it back  
22      and say, okay, we're going to make this thing

1 idiot-proof, and here's how we're going to fix  
2 it. So you know, if the Services continue to  
3 create judges and have them serve for two years  
4 and replace them with another jurist, that guy  
5 can come in. He can fix it or Gale can come in  
6 and fix it.

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

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

12 CDR MAKSYM: Yes.

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

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

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

21 BGEN(R) SCHWENK: You don't seem  
22 overly happy to say that.

1 LTCOL(R) WARD: The problem is that  
2 there's just always the tendency, and this is not  
3 -- I mean this is a military court, but just  
4 always, just sometimes, just kind of leave it  
5 alone. That's a hard thing to do. By nature,  
6 we're just so -- we just keep tweaking, doing a  
7 little bit there, a little bit there. That's a  
8 hard thing to do.

9 The less complicated, the better.  
10 Consider who winds up at the end of this, you  
11 know, members, and I think leaving it alone is an  
12 option that should be considered. It hasn't been  
13 that long.

14 BGEN(R) SCHWENK: Colonel Orr?

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

1 got tried for the same thing.

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

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

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

14 (Laughter)

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

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

1 --

2 (Simultaneous speaking.)

3 MALE PARTICIPANT: It's not an  
4 existential --

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

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

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

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

22 So I think all the changes that I

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

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

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

13 ACTING CHAIR HOLTZMAN: Professor.

14 PROF SCHULHOFER: Yeah, I have three  
15 questions. The first one I'm going to put out is  
16 --

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

19 (Simultaneous speaking.)

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

22 (Laughter)

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

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

19           So there would be a concern about  
20 whether to, you know, leave that undefined or how  
21 to define it. But perhaps that lends itself more  
22 to email or something afterwards. What may be

1 more general here, these two are related. One is  
2 for all of you, do you find -- did you find in  
3 your experience on the bench that panel members  
4 generally understood your instructions, or did  
5 you get a sense that they were having trouble  
6 understanding what you read to them and how they  
7 explained the offense?

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

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

22           Leaving 120 in place might be

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

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

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

18 On your second question, do panel  
19 members understand. You know, I presided over  
20 hundreds and hundreds of cases literally, and  
21 sometimes -- these were always the toughest  
22 cases. When you form -- I learned over time to

1 try and form my instructions as far away from the  
2 verbiage of the statute as possible, because they  
3 were lost.

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

10 PROF SCHULHOFER: Thank you.

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

15 PROF SCHULHOFER: You can skip that.  
16 We won't get into that.

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

1 it and they just pick an instinctual reaction to  
2 it.

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

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

18 But you know, I don't know that that's  
19 helpful to them, when you look at the rest of the  
20 definition of consent, because you give them,  
21 this is what consent is. This is what the  
22 context, consent is not, you know, and then look

1 at your facts and make a decision.

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

10 PROF SCHULHOFER: Colonel Orr.

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

19 So I mean the fact of the matter is if  
20 we can just make them as clear as they should, so  
21 that they understand the decision they're making,  
22 I think we've done our job.

1 COL(R) GRAMMEL: My experience with  
2 the court members has been that they have  
3 understood the instructions, even when they're  
4 very complex and convoluted. You know, I like to  
5 watch them and if they have a quizzical look on  
6 their face, I'll stop, repeat it, you know, see  
7 what they're confused about and then go forward.

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

18 There was one of the two rare cases  
19 where I think that might not have happened. But  
20 I think the court members, they are able to  
21 understand. I think our court members are -- I  
22 think in civilian juries, but it's just they're

1 more educated and they're used to tough  
2 decisions.

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

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

18 In the Article 120, between 2007 and  
19 2012, that was a separate crime. It was called  
20 wrongful sexual contact, and it had a maximum  
21 punishment of one year confinement. And all it  
22 was sexual act or sexual contact, not consensual,

1 and that was it.

2           It didn't have any force or  
3 constructive force or surrounding circumstance,  
4 like someone who's incapable of consent. It had  
5 nothing else. But that's hidden in the  
6 definition, and that doesn't make sense. One is  
7 it's confusing, and logically it's confusing,  
8 too, whereas if you pull it out and it's not now  
9 sexual assault, bodily harm by doing nothing;  
10 instead, it's wrongful sexual contact, has a way  
11 out because it's less culpable than all the  
12 others. It has a lower maximum punishment.

13           And that will send a message that what  
14 we're talking about is all of these are non-  
15 consensual offenses. The bottom one is just pure  
16 sexual act, contact, plus no consent. Then on  
17 top of that, if there are these added surrounding  
18 circumstances or types of means, you know, force  
19 or something else, then it increases all the way  
20 up.

21           But I think that's an easy fix, a  
22 light fix, that I think sends a message that

1 would be helpful that you want to send.

2 PROF SCHULHOFER: Thank you.

3 ACTING CHAIR HOLTZMAN: Ms. Kepros.

4 MS. KEPROS: How many questions did he  
5 get?

6 (Laughter)

7 (Simultaneous speaking.)

8 MS. KEPROS: And my questions, forgive  
9 me, are very technical. I am not in the  
10 military. I'm a civilian public defender in  
11 Colorado, and so I cannot read this without, in  
12 my own brain, referring to the statutes that I'm  
13 familiar with in my practice.

14 One of the first questions I have for  
15 you is, my take on this affirmative defense of  
16 mistake of fact is that it's sort of trying to  
17 deal with the fact that there's not a knowingly  
18 mens rea in all these sex assault crimes.

19 And I wonder, wouldn't that work, or  
20 is there some other function to that affirmative  
21 defense? Because rather than just saying, have  
22 the government prove the defendant knew the

1 person was impaired and did the bad thing, or  
2 knew there was no consent and did the bad thing.  
3 Instead we say, here's the bad thing. Now the  
4 defendant has to put on some evidence that raises  
5 the issue. Now it has to be an affirmative  
6 defense. And the instructions get really, really  
7 complicated. I'm wondering, you know, do you  
8 think that would work, or am I just not  
9 understanding how the scheme is set up?

10 CDR MAKSYM: Good question. I know  
11 that, within the Beltway, that's about as close  
12 to heresy as you're going to get. Look, there's  
13 a lot of us who were saying that when the  
14 original statute went away, and that's been the  
15 unspoken trench fighting ground, you know, right  
16 there.

17 And I just don't think it's viable.  
18 I don't think it would ever happen, for a number  
19 of reasons that I'm not qualified to really even  
20 get into on the political side. I simply would  
21 point out I think if you brought back, I think  
22 the answer really is to bring back the defense,

1 because, look, ladies and gentlemen, the members  
2 are considering it anyway. It's there. And  
3 that's what they're making their decision based  
4 upon when they're in the members' room. There's  
5 nothing we can say to them that's going to stop  
6 them from doing that. So that would be my only  
7 way to answer that.

8 MS. KEPROS: Anybody else with  
9 thoughts on that?

10 LTCOL(R) WARD: Well, we have had a  
11 long tradition on mistake of fact applying to  
12 virtually any offense. So, you know, it's in the  
13 Manual in one form. Adding it to the statute,  
14 you know, I think is a good thing. I don't agree  
15 with the affirmative defense of consent.

16 But I just find it -- mistake of fact  
17 is also a very difficult defense to prevail on,  
18 because it's always going to be weighed  
19 objectively. It's not just the intent or what  
20 the accused is thinking. It's always going to be  
21 cast in the bigger picture of an objective person  
22 standard.

1           So, to answer your question, would  
2           some of this be fixed by -- in a way, what you're  
3           suggesting, it's a good question. It's almost  
4           like going back to where we're starting to shift  
5           the focus back to what it was in the original  
6           statute, which did look at the actions of the  
7           victim and instead of, you know, not so much the  
8           actions of the accused.

9           But I don't know if that would really  
10          make a difference. And lots of times these are  
11          general intent crimes in many jurisdictions. So  
12          I don't know. But I think mistake of fact,  
13          adding that as an affirmative defense, that alone  
14          doesn't, you know, gum it up too much. There's a  
15          long tradition there, and whoever said it is  
16          absolutely right. Regardless of what you tell  
17          them in the instructions, they're going to be  
18          looking qualitatively at what both parties did.  
19          And if they believe, they have doubt based on  
20          what he did, it looks like someone maybe was  
21          mistaken, then they might find reasonable doubt  
22          whether you give them the instruction or not.

1                   And no matter how you characterize  
2 consent, you're looking at the actions or  
3 inactions of what the victim did. So I don't  
4 know that moving the, shifting the focus back to  
5 putting a mens rea requirement in there when  
6 there's not one is going to make things, you  
7 know, better or not. But I am in favor of adding  
8 the mistake of fact alone to the statute.

9                   COL(R) ORR: Yeah, and that's my  
10 concern, is it's there. Either tell the jury you  
11 can't consider it, or tell them they can consider  
12 it. But right now, you'll leave it up to  
13 everybody to figure out what it is, and, you  
14 know, mens rea should count for something. You  
15 know, generally, if you do something bad, you  
16 should be intending to do be something bad.

17                   COL(R) GRAMMEL: First of all, I want  
18 to comment on a side topic someone brought up.  
19 As far as focusing in on what the alleged victim  
20 did at the time, I never saw that as being off  
21 limits, because what we have is we have an  
22 offense that involves two people, and you can't

1 make a fair decision without looking at what the  
2 two people were doing at the time. You know,  
3 that's obviously going to be relevant.

4 But as far as -- two different things.  
5 An affirmative defense of consent, and then the  
6 affirmative defense of mistake of fact as to  
7 consent. I think it's a philosophical question.  
8 Are all the offenses in Article 120 non-  
9 consensual? And if the answer's yes, and we're  
10 thinking, of course, because they're all non-  
11 consensual, and therefore consent would be a  
12 defense.

13 If the person consented, they're not  
14 guilty of any offense under Article 120. If  
15 that's true, and one sentence in Article 120 goes  
16 in and says "consent is a defense," that will  
17 take care of over half of the problems that the  
18 judges and others are dealing with, because then  
19 in every case we'll just say consent is -- if  
20 it's raised. It would have to be raised by the  
21 evidence, and the judge makes that decision, and  
22 it has to be proven just like any other defense.

1 But if that's true, that will take care of the  
2 problems.

3 Mistake of fact, I wouldn't recommend  
4 putting mistake of fact into the statute, and the  
5 reason is whenever you're dealing with mistake of  
6 facts, you have to look at what facts you're  
7 talking about.

8 In some of these offenses, there's  
9 more than one thing that mistake might be about.  
10 It could be rape by force that was consent to the  
11 sex but not the force, or there might have been  
12 consent to the force but not the sex. And I've  
13 seen it. I've had a rape case involving S&M, two  
14 people in the S&M community. The guy was  
15 convicted of rape. You know, it was a very  
16 interesting case, but that's one of the examples  
17 where the members, they followed the  
18 instructions. It was amazing. And the person  
19 was convicted.

20 So what you are going to do for  
21 mistake of fact? It's in the Manual for Courts-  
22 Martial, RCM 916, and it has the standards. And

1 also some of the things where there might have  
2 been mistake within Article 120, the standard is  
3 just an honest mistake in fact, and some of it's  
4 honest or reasonable. For consent, for all of  
5 the offenses, would be honest and reasonable.

6 But let's say it was -- the other  
7 person was mistaken about the identity. That has  
8 to be fraudulent. And if the accused did some  
9 things, didn't know the other person thought he  
10 was someone else, then the mistake of fact would  
11 only have to be honest. It wouldn't have to be  
12 reasonable.

13 If we go into the statute and talk  
14 about mistake of fact, and we don't talk about  
15 which fact we're talking about, we may confuse  
16 some people when in some cases the standard's  
17 going to be different. But in the military, the  
18 folks that want mistake of fact, they want honest  
19 and reasonable, which is, for the prosecution,  
20 that's not a high threshold, because that's a  
21 negligence standard.

22 But I think if anyone that argues for

1 a mistake of fact gets honest and reasonable,  
2 when it's talking about consent, they're more  
3 than happy with that. So my answer would be one  
4 sentence into the statute saying consent is a  
5 defense to all the offenses in Article 120, but  
6 not put in mistake of fact because I think it's a  
7 little more complex than you could cover in the  
8 statute. And I think the judges could handle it  
9 from there.

10 MS. KEPROS: That was really  
11 fascinating. Thank you. Actually, that was  
12 really helpful for me.

13 I have to actually ask you one more  
14 question, because your comment about BDSM was  
15 something else that jumped out to me when I was  
16 reviewing these statutes, and I think it also  
17 raises this question about whether or not consent  
18 is a defense to, you know, the very first way you  
19 can even commit rape.

20 Is there consensus on that, either in  
21 case law or in practice? I'm a little concerned  
22 that you can have people engaging in forceful yet

1 consensual sexual activity and they are going to  
2 be adjudicated.

3 COL(R) GRAMMEL: Right, in the case I  
4 was talking about, I gave the instruction that  
5 consent was a defense. Consent to the force,  
6 also consent to the sex. Consent to either would  
7 negate rape, because you need both. Now, if they  
8 had found consent to the sex but not the force,  
9 they could have convicted him of assault. That  
10 was a lesser included offense.

11 And if they had found consent to the  
12 force but not the sex, I can't remember if I had  
13 a LIO. But if we had this wrongful sexual  
14 contact that we were talking about, they could  
15 have convicted him of that. So, I forgot the  
16 question. I think you're talking about -- in the  
17 S&M, that case was unique, because what happened  
18 was she was a member of the S&M community and she  
19 was online. He wanted to get into it. He was  
20 just starting. And she needed a place to live.  
21 She moved to his place. The first night he goes  
22 out, they engage in stuff. They didn't use a

1 safe word. That's part of -- I guess as part of  
2 the community, you're supposed to.

3 He didn't follow the procedures, but  
4 it's clear she didn't consent, and it's clear --  
5 he says he thought, and it's possible, but the  
6 members thought it wasn't reasonable, his  
7 mistake, despite the fact that everything he did  
8 to her she had put it online, that she liked that  
9 stuff happening.

10 Well, if it's pure -- if it was S&M,  
11 and someone consented to the force and they  
12 consented to the sex, the way I interpret the  
13 statute, that wouldn't be a crime. And I think  
14 if the Subcommittee disagrees with that, I think  
15 we have, you know, a very important difference  
16 there.

17 MS. KEPROS: Well, and that's my  
18 concern, because the way I'm reading some of this  
19 statute, I think it makes it one.

20 COL(R) GRAMMEL: Makes it one?

21 MS. KEPROS: Makes it a crime.

22 (Simultaneous speaking.)

1                   ACTING CHAIR HOLTZMAN:  You can't  
2 consent to grievous force.

3                   MS. KEPROS:  Right.

4                   LTCOL(R) WARD:  But you could always  
5 consent --

6                   (Simultaneous speaking.)

7                   MS. KEPROS:  -- to bodily harm.  But  
8 then what is the function of the first --

9                   ACTING CHAIR HOLTZMAN:  Then there's  
10 no bodily harm if you consent to it.

11                   (Simultaneous speaking.)

12                   MS. KEPROS:  Then what is unlawful  
13 force?

14                   LTCOL(R) WARD:  You can always  
15 instruct on consent.  The problem is that we get  
16 -- I think it's confusing, because if it's an  
17 affirmative defense, and then even if we do away  
18 with the preponderance thing that says there's  
19 just some evidence.  But we have many crimes  
20 where we instruct on different factors depending  
21 on what the evidence raises.

22                   So consent is always relevant to the

1 force. I mean, you know, it can be instructed on  
2 when the circumstances warrant it. But to create  
3 this umbrella of what's an affirmative defense  
4 and then I'm not going to instruct on it. Well,  
5 if there's factors in there, I think that was one  
6 of the problems with the new-old statute, is that  
7 judges felt it was hard to say, well, there's  
8 some evidence of consent. If it's a force-based  
9 offense, then, whether or not force is used,  
10 consent's relevant to that, it's the other side  
11 of the coin.

12 And I don't think it needs to be put  
13 in a separate compartment. But it can always be  
14 a note in there about the consent's relevance.  
15 And mistake of fact's a little different, because  
16 that requires, to me, you know, some evidence of  
17 what his subjective belief was.

18 In a case where we went round and  
19 round on it, can you consider circumstantial  
20 evidence and make the leap that he was aware of  
21 that? You know, there's no statement to police,  
22 there's no testimony on the stand, there's no

1 statements from another party or any admissions.

2 So can you have mistake of fact when  
3 it's just circumstantial evidence, and he was  
4 there so you assume that he would have known that  
5 a reasonable person might have a mistaken belief.

6 So I actually look at mistake of fact  
7 differently. I think it does need to be an  
8 affirmative defense, but I think you could always  
9 have consent defined, and it's relevant and you  
10 could be instructed when it's raised on virtually  
11 any of these offenses.

12 LTCOL HINES: And I would note that's  
13 in the Benchbook, right?

14 LTCOL(R) WARD: Yeah.

15 (Simultaneous speaking.)

16 LTCOL HINES: -- there were some  
17 questions before lunch today about is our  
18 statute, is consent part of the statute? And I  
19 think one of the answers to that is, if it's  
20 raised. It's in the Benchbook. That's it. The  
21 Benchbook instructions are at Tab 4. But if any  
22 judges want to --

1 LTCOL(R) WARD: They're in the  
2 Benchbook, but note that for this one crime, how  
3 many pages is that section of the Benchbook?  
4 Fifty-five?

5 LTCOL HINES: There's a boilerplate.  
6 When it's raised, if the judge determines consent  
7 has been raised by the evidence, there's a  
8 boilerplate instruction.

9 LTCOL(R) WARD: That tells them to  
10 consider all these questions.

11 LTCOL HINES: And the idea is that  
12 it's not really a defense -- and correct me if  
13 I'm wrong. But the idea is it terminates the  
14 causal link between what the government has  
15 alleged, i.e., force for -- or whatever the  
16 government has alleged is the method by which the  
17 accused has completed the sexual conduct.

18 Consent is relevant for the members on  
19 the question of whether the government has proven  
20 that beyond a reasonable doubt. And you instruct  
21 on consent, and then the members determine, well,  
22 if we find there's consent, then that terminated

1 the causal link and so there was no crime  
2 committed.

3 PARTICIPANT: The problem is the  
4 instruction doesn't tell the members that.

5 (Simultaneous speaking.)

6 COL(R) GRAMMEL: It tells the judge  
7 that, but if the judge doesn't pass that nice  
8 information on to the members.

9 PARTICIPANT: Correct.

10 LTCOL HINES: But the note to the  
11 judge is actually written better than the  
12 instruction to the members.

13 CDR MAKSYM: That would not be the  
14 first time, that anomaly, that the Benchbook  
15 instruction was perhaps more eloquent than the  
16 statutory language.

17 COL(R) GRAMMEL: I just think that if  
18 consent is a defense to all the offenses, one  
19 sentence saying consent is a defense would fix  
20 all those problems. And I don't know. Do any  
21 members of the Subcommittee see an offense, in  
22 120, where consent would not --

1                   ACTING CHAIR HOLTZMAN: Yes.

2                   COL(R) GRAMMEL: Which one, ma'am?

3                   ACTING CHAIR HOLTZMAN: It explicitly  
4 says that you cannot consent to grievous bodily  
5 harm. I don't know which section that is.

6                   (Simultaneous speaking.)

7                   ACTING CHAIR HOLTZMAN: "A person  
8 cannot consent to force causing or likely to  
9 cause death or grievous bodily harm, or being  
10 rendered unconscious." That's for 8 under  
11 consent.

12                  COL(R) GRAMMEL: So someone would be  
13 guilty of aggravated assault under Article 128.  
14 But what if someone consented -- and this happens  
15 in real life. People consent to force like that  
16 and sex. Is that rape? Or is it just aggravated  
17 assault under Article 128? I mean, I asked the  
18 question wrong. I should have said, does anyone  
19 think that consent to the sexual activity is not  
20 a defense of --

21                  MAJ GEN(R) WOODWARD: Yeah, under  
22 certain circumstances. Mental disease or defect,

1 physical disability or --

2 COL(R) GRAMMEL: No, no. But,  
3 General, the way the definition works for  
4 consent, those people aren't competent to give  
5 it. So it excludes those circumstances.

6 So if the definition of consent is  
7 drafted properly, and has parameters, and  
8 everyone that can give consent gives consent is  
9 well-defined, then we can just simply with one  
10 sentence say consent's a defense. And that will  
11 be it. If it's a competent person that gives  
12 consent, is it a defense?

13 MS. FRIEL: So you're saying there's  
14 a difference between what is legal consent and  
15 what is factual consent? So the mentally  
16 incompetent person, somebody who's mentally  
17 disabled and has the mentality of a ten year-old,  
18 by law we say can't consent, and they're saying,  
19 yeah. Kids consent all the time factually, but  
20 we by law say that they can't. So if you can  
21 think of that framework, it's much easier to  
22 understand.

1 MAJ GEN(R) WOODWARD: You can coerce  
2 me into consenting, right?

3 MS. FRIEL: But there's no consent.  
4 If you said yes --

5 (Simultaneous speaking.)

6 COL(R) GRAMMEL: -- when I marked up  
7 the 120 that I sent ahead, I tried to do that. I  
8 probably didn't do a perfect job, but I think we  
9 can draw up the definition for consent to exclude  
10 people who aren't competent to consent, people  
11 who are coerced, and also people who consent to  
12 something that's different than they think: the  
13 idea, the person, the purpose of the activity.

14 If we exclude that from the definition  
15 of consent, and we're talking about valid  
16 consent, then I think a valid consent would be a  
17 defense to everything. I think that that would  
18 resolve over half the problems that the judges  
19 are dealing with right now and the panel members.

20 When we have confusion in the  
21 courtroom, you know who that hurts? It hurts the  
22 prosecution. I mean, so if we can alleviate

1 confusion, I think it helps litigate the cases.

2 COL(R) SCHENCK: I don't see that in  
3 your suggested amendments to the article, and you  
4 said the one line about consent. I'm just --

5 COL(R) GRAMMEL: Oh no, I'm sorry.  
6 It's in (g)(8).

7 COL(R) SCHENCK: And my second  
8 question is, mistake of fact as to consent, you  
9 don't believe there should be anything added  
10 regarding mistake of fact as to consent?

11 COL(R) GRAMMEL: No, ma'am. It's not  
12 necessary, because mistake as to any essential  
13 fact is going to be a defense already. I think  
14 it's a defense, but it just doesn't need to go  
15 into the statute because it's too complex to put  
16 into the statute.

17 COL(R) SCHENCK: I'm just concerned  
18 about the fact that Congress took it out, you  
19 know what I mean? The congressional change  
20 therefore implies that Congress doesn't want us  
21 to have that in there.

22 And so that conundrum between mistake

1 of fact over here in the Manual, and the fact of  
2 the specific changes as to Article 120 by  
3 Congress over here taking out the affirmative  
4 defense of mistake of fact because of the Prather  
5 case. I mean, I'm just concerned that judges on  
6 the bench are going to do --

7 COL(R) GRAMMEL: Yeah. What is the  
8 rule? We don't care what it is, just what --

9 COL(R) SCHENCK: Yeah. What is the  
10 rule, right?

11 COL(R) GRAMMEL: Yeah, give us the  
12 rule.

13 COL(R) SCHENCK: So that's, I mean --

14 LTCOL(R) WARD: Right. But we have  
15 affirmative defenses that have existed for many  
16 offenses and they're not part of the statute.  
17 That's the thing. This was the first statute,  
18 with a few exceptions, that the UCMJ had  
19 affirmative defenses listed in the statute.

20 COL(R) SCHENCK: Right. Right,  
21 because, I mean, maybe I'm not recalling  
22 correctly, but one of the changes had mistake of

1 fact as to consent, affirmative defense as to  
2 mistake of fact as to consent, right, and then  
3 CAAF said, burden-shifting, take it out.  
4 Congress said, okay, we're taking it out, so it  
5 was taken out.

6 And then now, what you're saying to  
7 me, people on the bench are going to say "Oh,  
8 yeah, mistake of fact is over here. We're going  
9 to use it." I've got to tell you, there's a  
10 bunch of trial judges out there who probably  
11 wouldn't do that, right?

12 LTCOL(R) WARD: Exactly.

13 COL(R) SCHENCK: I mean, they need  
14 people like -- they need that oomph back in  
15 somewhere. And, you know, personally I look  
16 towards you as an expert. On the bench, from the  
17 school, you know what I mean? I look to you, and  
18 I didn't see that in there. So I guess --

19 COL(R) GRAMMEL: Right. I just think

20 --

21 ACTING CHAIR HOLTZMAN: Excuse me. I  
22 want to just try to get some order here. Ms.

1 Wine-Banks hasn't had a chance to ask any  
2 questions, and we want to try go in order.

3 If you've got questions and you've  
4 been skipped over or whatever, could you just  
5 hold them, or if you have further questions, so  
6 we can get through, and then give people a chance  
7 to ask them later?

8 MS. WINE-BANKS: I don't mind waiting,  
9 because the conversation's quite interesting.

10 ACTING CHAIR HOLTZMAN: All right.  
11 Well, if you don't mind then, please, go ahead.

12 COL(R) GRAMMEL: I just thought it  
13 wasn't necessary to put. I actually think  
14 mistake of fact would be a defense, because under  
15 the existing RCM 916, it is. If there's a  
16 concern that people would be confused whether or  
17 not it would be a defense, then I think it could  
18 go in, you know, and it would be inserted in  
19 right after saying consent's a defense.

20 I just don't like -- I would say  
21 mistake of fact as to consent, or any other  
22 essential fact, is a defense. I'll tell you,

1 mistake of fact has confused a lot of people,  
2 because they always use mistake of fact, and they  
3 don't say what fact they're talking about.

4 That's what we were talking about a  
5 little while ago. You could have mistake of fact  
6 as to the force or mistake of fact as to the sex.  
7 And I've seen cases -- well, I've seen people  
8 charged with rape and they were convicted of  
9 assault. And I've seen people charged with rape  
10 and they're convicted under the intermediate  
11 statute with wrongful sexual contact.

12 So I've seen the members come back and  
13 say we think there was consent -- actually, I  
14 think they thought it was mistake of fact, as to  
15 either the force or the sex but not the other,  
16 and I've seen both situations. So I wouldn't  
17 have a problem if it went in right after consent  
18 is a defense, to say mistake of fact as to the  
19 consent or any other essential fact is a defense.  
20 I just didn't think it was necessary.

21 ACTING CHAIR HOLTZMAN: Do you have  
22 any other questions? Ms. Wine-Banks.

1 MS. WINE-BANKS: I'm not really sure  
2 this is within our particular jurisdiction, but  
3 several of you mentioned the training being a  
4 problem, and if it's okay, I'd like to hear a  
5 little more about how you think the training --  
6 and did you mean the training, preventive  
7 training of troops, as to what is appropriate and  
8 not appropriate? Or did you mean training of  
9 advocates, judges as to what the rules are?

10 CDR MAKSYM: Yeah. I can only speak  
11 to the sea Services. I was referencing the  
12 training of judge advocates and jurists. The  
13 reality is that we're dealing with a statute here  
14 that is in many ways more complicated than is  
15 dealt with by civilian prosecutors and civilian  
16 jurists who have a much heavier case load year-  
17 round.

18 The case load in the Navy-Marine Corps  
19 trial judiciary is about 300 trials by general  
20 court-martial a year. So, thankfully, we don't  
21 have thousands of cases in the sea Services. And  
22 a good portion of those happen to be these kind

1 of alleged offenses.

2 The problem, and you're all very  
3 experienced in your own areas, and as many of you  
4 know, the problem in the litigation is, it's kind  
5 of like if golf is your game. If you don't get  
6 out there to the practice tee, you're never going  
7 to be any good. And we find that a lot at the  
8 bench and bar in the Navy-Marine Corps.

9 The more experience, the better you  
10 do. And I'm just concerned that we haven't -- you  
11 know, we've developed, in the sea Services,  
12 especially in the Navy, a litigation career path.  
13 Well, it's great to have something we call a  
14 career path, and we created a simulated one-star  
15 admiral. You know, you get the pay and rank the  
16 day you retire. They haul your flag up and haul  
17 it back down. And so we now have, you know, a  
18 leader in that way, and then we have people that  
19 are designated as litigators.

20 Well, just because I tell some  
21 lieutenant commander who's had six cases that  
22 she's a litigator doesn't make her one. So I

1 think one of the things that we have to do, and  
2 this really gets into a crunch issue, which is,  
3 you know, how do we run this business when you  
4 don't do it enough?

5 It's a crucial issue. And one of the  
6 things I've recommended over the years is  
7 affiliating with the Federal Defender Program,  
8 affiliating with U.S. Attorney's Offices, sending  
9 our skilled litigators, or the ones we think and  
10 presume are skilled, out to live with them for a  
11 couple of years at a time, so they can gnash  
12 their teeth a little bit and come back and be a  
13 little more expert than they otherwise would.

14 LTCOL(R) WARD: In my experience, on  
15 the training issue, there are two things. One  
16 was the topic of consent, and good intentions  
17 don't always lead to good results, and the focus  
18 being, in that training environment, we were  
19 trying to develop a positive culture. It's very  
20 easy to see where these vignettes and these  
21 things about, you know, alcohol and consent and  
22 then you get the takeaway being, stay so far

1 away, one drink equals no consent.

2 And then you get members sitting in  
3 the panel box that refuse to yield from that.  
4 And unfortunately you get trial judges that, you  
5 know, are right there next to the prosecutor, try  
6 to drag them over, you know, to get them  
7 rehabilitated, you know. If they're going to  
8 hold fast to that view then they're not  
9 qualified.

10 That's one big one. The issue of  
11 consent, how it's addressed during the training,  
12 and when it's at odds with what the definition of  
13 consent is in the Manual.

14 And then second one is that sometimes  
15 the sexual assault prevention training will, in a  
16 number of ways, address the topic of what we  
17 usually call counterintuitive behavior.

18 They explain that people that go  
19 through this trauma, there's no set pattern.  
20 There's no right way to respond. Any number of  
21 things can happen, you know, whether it be  
22 delayed reporting. But, you know, that all gets

1 lumped in the category of counterintuitive  
2 behavior.

3 And sometimes that topic is addressed  
4 in this training, and I think you start to see a  
5 little bit of that come out during voir dire. So  
6 these are kind of the issues that come up during  
7 voir dire that are problematic, that result from  
8 training, those two.

9 MS. WINE-BANKS: How would you fix the  
10 training to solve that?

11 LTCOL(R) WARD: I don't necessarily  
12 know that, you know, first of all, I think if  
13 they're going to touch on topics that are legal  
14 topics under the UCMJ, that they need to be  
15 accurate. That's one. So, people have to be  
16 careful to dispel those misconceptions, like any  
17 alcohol at all. That's not what it says. Use  
18 the definition in the Manual to do the training,  
19 number one, would be the easiest way.

20 But then also to be more sensitive  
21 that these two things are going to overlap in a  
22 courtroom, and to make sure -- and that's really

1 just something to emphasize through the jurists,  
2 to make sure they understand to not, you know --  
3 I think there's just -- I don't know if it's just  
4 that little military drive-on, what it is, but I  
5 was guilty of it too. But there's just an innate  
6 tendency, I think, of trial judges, to try and  
7 keep the person on the panel perhaps when they  
8 shouldn't. Unfortunately, there's been a lot of  
9 focus on member disqualification in the last few  
10 years among all the Services, so I think that's  
11 changing. But that's the other way, I think, to  
12 address it, is to be sensitive to it.

13 COL(R) ORR: Yeah. I would say both.  
14 As far as the overall training, commanders are  
15 told to basically, to get a whole lot of people  
16 spun up and trained over a short period of time,  
17 in addition to everything else. So, sometimes  
18 it's just an extra duty that sometimes commanders  
19 feel they don't have.

20 Then when they realize they have to do  
21 it, that sort of comes across as well as "okay,  
22 I'm doing this, but really I need you to get the

1 airplanes flying." So it's kind of mixed in with  
2 the rest of it.

3 The problem with training the  
4 litigators is they have a model in the Air Force  
5 that we -- it takes 12 years to grow a staff  
6 judge advocate, in other words, so you can be in  
7 charge of something else. Because we have so  
8 many disciplines, such as labor, environmental,  
9 claims, torts, hospital, all of those things in  
10 there, you've got to rush some of the folks  
11 through all these disciplines in order to do  
12 that. If you spend six or seven years in the  
13 trial, guess what? You're not going to be a  
14 staff judge advocate and you're going to pretty  
15 much level out.

16 So you have these competing interests,  
17 those folks that want to litigate, which is fine.  
18 But sometimes it comes at a cost. So if you have  
19 enough time, money, and resources, then of course  
20 you can do all of it. But the reality is we  
21 don't. So, just looking at it objectively, folks  
22 are doing the best they can with what they have,

1 but it's not a perfect solution.

2 MS. WINE-BANKS: So you're saying that  
3 it's the commander of a unit that does the  
4 training and not --

5 COL(R) ORR: No, no, no. Just  
6 responsible for making sure that the training is  
7 conducted. So you have folks that this is their  
8 first time on the job, and they provide the  
9 training. And it's good, but it's in conjunction  
10 with a whole lot of other things that you have to  
11 be trained on, and some of it is very general.

12 And when you're trying to apply  
13 specific facts to a specific case, sometimes the  
14 concepts don't merge together, and it's  
15 unfortunate.

16 COL(R) GRAMMEL: Ma'am, I'll talk  
17 about the second part, the training of the  
18 litigators or the experience. What happens in  
19 the military, as Colonel Orr was just talking  
20 about, is there are a lot of different  
21 disciplines that a judge advocate has to do in  
22 all the Services, and they rotate through. For

1 their career, they have to be rotated through.  
2 So they don't get a lot of time in criminal law.  
3 These are very highly qualified young men and  
4 women, good attorneys, and they work hard and  
5 they try hard. But if you don't get the  
6 experience, you don't get there.

7 So, I don't envy the leaders in the  
8 JAG Corps, they have to balance that, and they  
9 understand that if they kept people in more,  
10 they'd have experience, but then that hurts that  
11 person's career if they don't rotate people  
12 through. So it's hard, and the only way, I  
13 think, you know, if Congress wanted to drive it  
14 and say, you know what?

15 And I'll tell you, as someone who's  
16 been in the military justice system for a while,  
17 if there was one way to improve what happens in  
18 the courtroom, it's simply more experience for  
19 everyone.

20 And if Congress wanted to drive that  
21 train and say, "hey, you're going to do this,"  
22 they could put in a qualification for counsel.

1 Not necessarily both of them, but the lead  
2 counsel has to have so many cases or years or  
3 whatever. Then the Services would have to follow  
4 suit, and they'd have to bend to make that  
5 happen.

6 So if someone thought experience is  
7 our -- that is our Achilles' heel, I think the  
8 only way you can do it is just more experience.

9 ACTING CHAIR HOLTZMAN: Can I just  
10 make a suggestion? This is a subject that is way  
11 off our mandate. We've got enough  
12 responsibilities just dealing with this one  
13 statute. I know we'd love to go off the statute  
14 and go off subject, but if you want to talk about  
15 it after hours, if you don't mind, because people  
16 still have questions about this. Yes?

17 MS. FRIEL: So I have a question about  
18 the statute, about sexual assault, I guess,  
19 (1)(A), threatening or placing another person in  
20 fear. I have two questions about that. First,  
21 as structured, it doesn't say fear of what. I  
22 mean, it seems to be connected to some kind of

1 wrongful action. And I'm used to a statute up in  
2 New York, our statute was, you put somebody in  
3 fear of being physically injured or kidnaped or  
4 something of that nature or something, or to a  
5 third person. And I always taught the young DAS  
6 that you've got to ask when somebody says "I was  
7 afraid of something," what were they afraid of?

8           If they say, I was afraid I was going  
9 to get hurt, okay, we're there. If they say, I  
10 was afraid I was going to, you know, somebody  
11 wasn't going to like me, I was going to become  
12 unpopular. I mean, you heard all kinds of things  
13 people were afraid of.

14           And I can see, in a military context,  
15 afraid of losing your job or losing your rank.  
16 There are some things that, you know, with  
17 threatened or -- that would matter, and you would  
18 want it to be in here. But this seems to have no  
19 parameters.

20           And then the wrongful conduct thing is  
21 so confusing to me, and I think in one of the  
22 reading materials they brought up a great

1 scenario. So, here's someone who's, let's say,  
2 commander, somebody younger. They've done  
3 something wrong, okay? You have a right to do  
4 something to them. You tell them that if they'll  
5 sleep with you, you won't do that to them. So  
6 you're not threatening wrongful conduct. You're  
7 about to engage in wrongful conduct by not  
8 reporting something, probably. That doesn't seem  
9 to fit in the way the statute's written. How is  
10 this working practically, this section? Because  
11 it seems very confusing to me.

12 CDR MAKSYM: Well, I'll just hit on  
13 the second point. I'm a little concerned about  
14 it. You know, United States v. Ariana, which I  
15 presided over, it just got affirmed by N-MCCA,  
16 and that was a classic case under the middle  
17 statute in new-old where a chief on a submarine  
18 tender essentially used his office to coerce  
19 sexual favors.

20 I agree with you. The question is, is  
21 there a hole there now? Is there kind of a --  
22 you know, under the revision. And I just

1 expressed the concern, I think, that probably is  
2 one of those laser areas that we were talking  
3 about that might need to be visited.

4 LTCOL(R) WARD: I also didn't see that  
5 many cases, so I'm afraid I don't have a lot from  
6 it. It's a good question. I hesitate because,  
7 you know, the lawful action is to probably report  
8 them. To use that in this way, to me, makes it a  
9 wrongful action. I think there's a very good  
10 argument for that. So I'm not -- certainly you  
11 have, I think, identified a potential problem.

12 MS. FRIEL: But you're not seeing it?

13 LTCOL(R) WARD: Well, you know, again,  
14 I haven't had those cases, so I don't think I can  
15 really answer your question.

16 COL(R) ORR: You know, we saw those  
17 primarily in the recruiter/trainee scenarios,  
18 where, I mean, the recruiters or the trainers,  
19 once they're there, before they come in,  
20 basically tell them -- they're not going to hurt  
21 them or anything like that. But they basically  
22 tell them, if you want a job here, if you want to

1       come in the military in this career field, you're  
2       going to do X.

3               So they do X because they were scared  
4       that they weren't going to get a job, or they  
5       weren't going to be allowed to stay in their  
6       career field. So there's a lot of regulations  
7       out there that say, generically, that they're not  
8       there. But those are all communicating a threat  
9       that put them in fear of something.

10              Now, a lot of people would say, so  
11       what if I lose my job? I don't care. I'll just  
12       get another one. That's where the subjective  
13       part comes in, and it sort of does need to be  
14       open-ended and fact-specific.

15              COL(R) GRAMMEL: Ma'am, I think the  
16       areas where the action that's threatened is not  
17       wrongful, I think a vast majority of that would  
18       be covered by, I think, the next round of the  
19       Subcommittee is going to look at the senior-  
20       subordinate relationship and coercive  
21       relationships.

22              I think almost all those would fall

1 under those, and I think that would take care of  
2 it. If we expand it beyond wrongful, I think  
3 it's hard to articulate a way that won't bring in  
4 things we don't want to bring in.

5 I had a lot of drill sergeant sexual  
6 assault cases. In some cases, and this happens,  
7 because I had the young female soldiers testify  
8 in court about it, they go into basic training,  
9 they said, they enter into a bet with their other  
10 trainees about who's going to get drill sergeant  
11 first. And it just happens.

12 It's not fair to the female trainees  
13 who were coerced into relationships to treat them  
14 the same as people like that, that situation. I  
15 think that situation can be handled with the  
16 relationships, the per se prohibition against  
17 relationships. But when someone's coerced, then  
18 we have to treat it this way.

19 But I think if we don't have the  
20 action as wrongful, then I think it's hard to put  
21 a parameter around it, because it's possible that  
22 the other person might have been the first one.

1 Like, she comes in late and says, hey, if you  
2 don't report me, I'll give you a favor or  
3 something.

4 Now, do we count that as non-  
5 consensual? No, but it's still going to be  
6 prohibited. It should be prohibited in some way,  
7 but I don't think under this subsection.

8 ACTING CHAIR HOLTZMAN: Well, I wanted  
9 to ask a couple of questions. First, I guess, as  
10 a former legislator, it pains me to hear that  
11 incoherent statutes don't matter, because I don't  
12 know how to deal with that.

13 (Laughter)

14 ACTING CHAIR HOLTZMAN: Anyway, to be  
15 serious for a moment, I have many questions about  
16 the meaning of this statute, and I just wondered,  
17 you know, laser-like changes, how they can be  
18 accomplished. I don't know the answer to that.  
19 But, I mean, I think the issue of consent is a  
20 really important one that's been raised. And  
21 consent is in here, in the text of 120. But what  
22 does it connect to?

1           It's, like, just hanging out there.  
2       Does it connect any one of these other actual  
3       criminal sections? It's not rape, is not  
4       connected to rape, sexual assault, aberrant  
5       sexual conduct, abusive sexual conduct, et  
6       cetera. So it's just out there. So, somehow,  
7       people thought consent was important, but they  
8       didn't know how to connect it, or the drafters of  
9       this thought it was important enough to put, you  
10      know, ten lines, at least. I'm just eyeballing  
11      it. They're not connected to anything.

12                   DEAN ANDERSON: Well, it's in  
13      120(a)(5).

14                   ACTING CHAIR HOLTZMAN: Yeah.

15                   DEAN ANDERSON: It's in 120(b)(3).

16                   ACTING CHAIR HOLTZMAN: I'm sorry.

17      Then I may stand corrected.

18                   DEAN ANDERSON: So it's a term that's  
19      used sparingly.

20                   (Simultaneous speaking.)

21                   MS. FRIEL: Incapable is sometimes the  
22      same as consent, the way we're defining it.

1           ACTING CHAIR HOLTZMAN: Exactly.

2           DEAN ANDERSON: There's no definition  
3 of incapable that's in there.

4           ACTING CHAIR HOLTZMAN: Right, right.  
5 So I don't consider it to be actually, you know,  
6 whatever. I just think it's kind of unusual for  
7 a statute to spend so much time about something,  
8 and not inherently connect it in some strong way.

9           The other thing that troubles me about  
10 this, and then of course some of the parts of  
11 lack of consent are very troubling to me. I  
12 don't know whether -- how you feel about them.  
13 But the -- for example, let's look at (8)(C), the  
14 second sentence.

15           "All the surrounding circumstances are  
16 to be considered in determining whether a person  
17 gave consent, or whether a person did not resist  
18 or cease to resist, only because of another  
19 person's actions." Well, what does that mean?  
20 Is there a burden on the victim to resist? Does  
21 that imply that?

22           I mean I haven't really parsed it

1 carefully, but just reading this raised that  
2 issue for me. Are we saying to the victim, well  
3 wait a minute. We're going to look at how you  
4 resisted to determine -- or whether you resisted  
5 to determine whether there was consent here.

6 So that's problematic for me. I mean  
7 I just have to have -- feel like I needed more  
8 grounding into what that means. But I started  
9 off reading the statute "A. Rape. Any person  
10 subject to this chapter who commits a sexual act  
11 upon another person by (1) using unlawful force  
12 against that other person."

13 What is unlawful force? Is there a  
14 lawful force that you can use, I mean, to  
15 accomplish sex? Yeah. So, I mean, from the  
16 beginning, what message are we sending to anyone  
17 who's reading the statute? Then if you go, of  
18 course, if you dare, a very courageous person who  
19 turns the page and then tries to understand, you  
20 know, what this means, what unlawful force is, oh  
21 my goodness.

22 It means "an act of force done without

1 legal justification or excuse." Well what's that  
2 bringing into the statute? I mean all of the  
3 sudden we're going into the world of never-never  
4 land. What does that refer to? How do you  
5 interpret that? Where are we going with that? I  
6 mean what's a legal justification or excuse?

7 So I mean to me, just being a former  
8 unreconstructed, unrepentant legislator, I kind  
9 of have a hankering for understandable statutes.  
10 Doesn't mean I always get them, but I do have  
11 that hankering. So I don't know how you deal  
12 with that. Have you had to deal with these  
13 issues?

14 CDR MAKSYM: Well as you know, this  
15 was the mainstay of the problem with the last  
16 version of the statute.

17 ACTING CHAIR HOLTZMAN: Listen, I'm  
18 not blaming you about anything.

19 CDR MAKSYM: No, no. I'm saying --  
20 (Simultaneous speaking.)

21 CDR MAKSYM: No, that was the mainstay  
22 of the problem. That's the battle we've been

1 fighting for years now, is the language that's  
2 chosen, and for whatever reason it was chosen.

3 A lot of the replacement language, or  
4 the language that's been excised, it's almost in  
5 some places that if we keep part of, you know, a  
6 statute we had and then we drop part of it and we  
7 add others. I couldn't agree with you more. I  
8 echo your frustration.

9 ACTING CHAIR HOLTZMAN: Well, I'm just  
10 wondering how you handled it. I mean just, you  
11 know, smart instructions?

12 CDR MAKSYM: Yeah. I mean oftentimes,  
13 in fact I referenced before, I think it was in  
14 answer to Ms. Kepros' question, was you -- I  
15 don't want to say dummy down the language, but  
16 you civilianize the language, and you make it,  
17 you know, discernible to the user. It's  
18 sometimes a very difficult task.

19 I wish I had a brilliant answer for  
20 you, but I don't. I mean it's just -- that was  
21 the yeoman's work of being a trial judge,  
22 functioning with the last two statutes, and that

1 was the problem. As we referenced earlier, in  
2 many cases we had to come up with bench  
3 instructions that, you know, overtook the  
4 statute. So the statute without them was  
5 unsavable, so --

6 MAJ GEN(R) WOODWARD: Or you have non-  
7 lawyers on the -- as members, and they don't  
8 parse every word. But sorry.

9 ACTING CHAIR HOLTZMAN: Dr. Anderson.

10 DEAN ANDERSON: I wish I were a  
11 doctor, but I'm not.

12 (Simultaneous speaking.)

13 DEAN ANDERSON: No, no, no. Just  
14 Michelle is fine. You're retired from the  
15 military, which is very interesting in terms of  
16 your ability to speak on these issues, and tell  
17 us about your experience in explicit ways. You  
18 all seem to want to make clear in the statute  
19 that consent is a defense to any of the charges  
20 under 120.

21 But I, as I read the history, it seems  
22 like the removal of consent where one could in

1 the statute was designed to lessen the focus on  
2 the victim's behavior, and the propensity to  
3 blame a victim for a sexual assault.

4 Your position articulated implicitly,  
5 as I interpret it, again and again today has been  
6 that the Services have gone too far in focusing  
7 on sexual assault, that the environment is toxic  
8 and biased against the accused, that there is  
9 one-sided and misguided sexual education, that  
10 there -- at times at least, that there is a --  
11 that commanders have lost their ability to --  
12 well, they're at least more hesitant to make hard  
13 decisions, and that there's this inexorable  
14 movement toward Article 32 hearings, even if the  
15 facts don't warrant it.

16 I'm wondering, it's fascinating for us  
17 to hear this perspective, and please tell me if  
18 I've mischaracterized your perspective. It seems  
19 to me that the military continues to lose the  
20 public battle on sexual assault, in terms of how  
21 folks perceive what's happening in the military,  
22 which is very different than your perspective.

1                   Many well-read people believe that  
2                   their bias runs exactly the opposite way, or  
3                   continues to run exactly the opposite way, in  
4                   terms of how the military looks at these cases.  
5                   So I'm wondering why is there such a disparity  
6                   between how the public still understands the  
7                   military in these cases in your perspective, and  
8                   what does that mean, do you think in terms of how  
9                   we should respond?

10                   I mean the existence of the JPP or the  
11                   existence of the Panel is in response to a public  
12                   outcry, that the military has not done enough and  
13                   failed to respond to bias against -- systemic  
14                   bias by the way, to the experience of victims.

15                   It seems to me that y'all are telling  
16                   a very different story, that the pendulum has  
17                   swung too far the other way. If that's true, and  
18                   if I'm characterizing that accurately, what do  
19                   you think that means in terms of how we should  
20                   respond in our deliberations and our  
21                   recommendations?

22                   CDR MAKSYM: Well, let's just start

1 with the terminology you used, the victim. How  
2 do we know? We don't know until the jury comes  
3 back in and tells us whether she's a victim or  
4 he's a victim, or alas not. I mean it's -- when  
5 you have your venire going to mandatory training.  
6 But this training isn't, oh, this is a bad thing.  
7 This training is some of this nonsense of if you  
8 take one drink, you can't consent to anything.

9           And this has become, you know, we've  
10 come very close to tilting the balance. I mean  
11 you have to put this in context. We're dealing  
12 with a system. Unlike a homeless person in  
13 Washington, D.C., a military volunteer in any of  
14 the Services does not enjoy the right to have a  
15 jury of his or her peers return a unanimous  
16 verdict of guilt.

17           On top of that, you have the exercise  
18 of a statute, which by its terminology and by all  
19 of the training that's going on at the Fleet  
20 level, I'll speak just to the sea Services, is  
21 garnering in a whole lot of potential jurors'  
22 minds a presumption of guilt.

1           Judges have to, at least in the Navy  
2           and Marine Corps, have to face that every day,  
3           where we have to again re-educate, say there's a  
4           presumption of innocence here. I'm sorry.  
5           Please don't take my comments as in any way  
6           negative, but it's just --

7           I mean I sat on the bench longer than  
8           anybody in recent Navy and Marine Corps history,  
9           and I'm here to tell you. When you see jury  
10          after jury after jury coming in and saying, well,  
11          she said he did it. Isn't that the game? I mean  
12          aren't we finished? Can't we move on to  
13          sentencing?

14          You know, there's this -- you see that  
15          more and more as this kind of training has gone  
16          on and on. We used to get members that came in  
17          with completely open minds. Now I am not for a  
18          minute denying some of the horrific instances of  
19          deprecation towards women that have taken place  
20          in the military.

21          But I see the issues as very  
22          different. I don't care if the person, what

1 gender they are, I don't care what race they are,  
2 I don't care whether they're Catholic, Protestant  
3 or Jewish or anything else. I don't care. I  
4 just insist that when they're in my courtroom,  
5 they're going to get a fair group of members, and  
6 they're going to have the government of the  
7 United States, who has deprived this American  
8 uniformed person, citizen volunteer of his  
9 temporary liberty, well, darn it, they're going  
10 to have to prove by legal and competent evidence  
11 beyond any reasonable doubt that he or she is  
12 guilty.

13 With all the things that are happening  
14 on the periphery of the issue, it affects what  
15 happens in the courtroom, and we're seeing that  
16 in manifest ways.

17 ACTING CHAIR HOLTZMAN: Well, we're a  
18 little bit over our timeframe. Does anybody have  
19 any urgent questions they want to ask? Because  
20 now we have deliberations.

21 COL(R) GRAMMEL: Can I respond to  
22 that?

1 (Simultaneous speaking.)

2 MALE PARTICIPANT: Consider yourself  
3 admonished.

4 COL(R) GRAMMEL: Clearly so. I think  
5 the reason is public relations on the part of the  
6 military, and the reason is the military's used  
7 to getting told, hey, this is what you've got to  
8 do and then do it.

9 If any military person comes back and  
10 says, you know what? Our military justice system  
11 isn't broken, they're going to get told, you're  
12 part of the problem. If you don't see it's  
13 broken, you just don't get it, you're part of the  
14 problem.

15 The anecdote I have is I was driving  
16 home a couple of years ago, and I heard on CNN a  
17 story about, you know, what the NCOs are doing in  
18 the Army, and how bad the Army was. What it was  
19 was this NCO had sex with three junior soldiers,  
20 and the Army's not handling it right.

21 Well what happened? I was the judge  
22 for that trial. What happened was some female

1 soldier ended up in a hotel room with an NCO.  
2 She wakes up and she could tell he had sex with  
3 her. She reports it. She had been drinking, but  
4 she reports it. They're off post. They go to  
5 civilian cops. They look at the case and they  
6 say "we're not touching this."

7 You know what? That's normal. I see  
8 that all the time. I see cases where they don't  
9 touch it, comes in. Some of them are acquitted,  
10 some of them are convicted. That one, they  
11 brought in, CID, the investigators researched it.  
12 They seized a phone. When they seized the phone,  
13 they found pictures of her, but pictures of also  
14 four other females.

15 They went to all the places he had  
16 been stationed and found three of those other  
17 females. They gathered all the evidence. He was  
18 convicted and got 30 years in prison. The  
19 civilians didn't want that case. The military  
20 picked it up. They investigated. They did an  
21 outstanding job, they prosecuted and he was  
22 convicted.

1           CNN reports it as the military isn't  
2 handling the soldiers right. I don't see how on  
3 earth that story became a bad story for the Army.  
4 It just doesn't make sense. But that's part of  
5 the reason why. We see it. In the military,  
6 there is a big push to push the cases forward and  
7 people are doing that. They're not making tough  
8 calls.

9           So we talk about the pendulum, and it  
10 goes back and forth, and I think the judges would  
11 probably agree that we've probably gone beyond  
12 where we need to go with the pendulum, and it  
13 probably has to correct itself, and we don't want  
14 to go too far before we have to correct it too  
15 much.

16           I was never known as a milquetoast  
17 judge, and the judges, the most government-  
18 oriented judges are extremely concerned about  
19 what's happening inside the courtrooms, because  
20 they feel morally responsible. So I think as we  
21 go through this, you're going to realize -- we've  
22 got to realize the balance.

1           There's a lot of different issues at  
2 stake, and I think -- I do think that even within  
3 our courtrooms, I don't think we have handled the  
4 victims properly. I think that's the one thing  
5 where I said before, we need to focus on the  
6 culture and we need to focus on the responders.

7           I think the courtroom, the military  
8 justice system, is working fine. I mean one area  
9 where there was a fix was to some extent we did  
10 need to incorporate, handle victims better than  
11 what we were doing. I think we're there, so I  
12 think that's a plus.

13           But overall, the judges right now are  
14 extremely concerned that, in their courtroom,  
15 something might turn out that might not be  
16 justice, and they're disturbed about it, even the  
17 most prosecution-oriented judges. So I think  
18 that's ground truth right now from the bench.

19           MAJ GEN(R) WOODWARD: Well, there's  
20 many cites to this and I'll talk to you, you  
21 know, offline, if you'd like to. But I can show  
22 you OSI reports, for instance, that are so biased

1       against the victim right from the beginning, that  
2       you don't even get a good investigation, and  
3       those you can see case after case after case of  
4       them.

5                       So there's so many aspects of the  
6       system that, you know, you guys see it from one  
7       perspective, that you think it's leaning too far  
8       this way. But it's so far this way on the biases  
9       of everybody involved, from, you know, peers all  
10      the way to commanders, that, you know, balancing  
11      it as an unbelievable issue.

12                     CDR MAKSYM: I would simply say no  
13      matter how we handle --

14                     ACTING CHAIR HOLTZMAN: You had --  
15      sir.

16                     CDR MAKSYM: I'm sorry, go ahead.

17                     ACTING CHAIR HOLTZMAN: I'm just going  
18      to one other person, two others. You haven't  
19      said anything, Colonel Orr, do you have anything?

20                     COL(R) ORR: I was going to basically  
21      say what you, you know, pretty much what she  
22      said, is that it is -- I believe it's a

1 perception problem, I mean, the reality of what's  
2 going on in the military. It will take some time  
3 for the reality to catch up with what I believe  
4 is actually going on.

5 Yes, the military has done a horrible  
6 job for years about how they treated victims, and  
7 how receptive they were to the complaint.  
8 Conversely, when you say they went too far, my  
9 comment was at some point --

10 DEAN ANDERSON: No, I was wondering if  
11 you thought it went too far.

12 COL(R) ORR: Yeah, at the point where  
13 the decisions, the right decisions are ultimately  
14 being made, but they don't have to be made at the  
15 appellate court level. A lot of the cases that  
16 get to us could have been either stopped or  
17 corrected or it's -- to me it's like sometimes a  
18 waste of resources, to bring it all the way up to  
19 us, to say that didn't occur here, when clearly  
20 some commanders are reluctant to just say, very  
21 well. This is the charge. You guys deal with  
22 it, because we're not. That's what I mean by

1 going too far. Not that it wasn't getting to the  
2 right place.

3 ACTING CHAIR HOLTZMAN: Okay. Well  
4 let me just say thank you very much to the panel.  
5 We have to start deliberations, which we're 15  
6 minutes late for, and we'll take a little break.  
7 Let's take a little break now. So thank you very  
8 much.

9 (Simultaneous speaking.)

10 ACTING CHAIR HOLTZMAN: And we really  
11 appreciate you helping us think this out.

12 (Whereupon, the above-entitled matter  
13 went off the record at 3:43 p.m. and resumed at  
14 3:59 p.m.)

15 ACTING CHAIR HOLTZMAN: Can we get  
16 started deliberating, so we can end our  
17 deliberating because you have all these other  
18 wonderful conversations? Colonel Hines, do you  
19 want to tell us what we need to be focused on  
20 right now?

21 LT COL HINES: Yes. Rather than  
22 strict deliberations, as we discussed, it's

1 probably way too early in the process to  
2 deliberate. What I envision more for this last  
3 30 minutes or however long this goes is a  
4 discussion between subcommittee of, touch again  
5 on the preliminary plan we have for the way  
6 forward; talk about what our plan, the Staff's  
7 plan, for the presenters in the May meeting, if  
8 that plan sounds acceptable to all the  
9 Subcommittee Members; if there are issues that  
10 come up today, for instance, that the  
11 Subcommittee Members would like to hear about,  
12 whether that's materials that the Staff needs to  
13 go out and get or maybe some other presenters  
14 that you would like to hear from. You know,  
15 those types of things, just sort of a  
16 brainstorming session for the way ahead.

17 MAJ GEN(R) WOODWARD: That case that  
18 he brought up, I didn't write down the --

19 LT COL HINES: Commander Maksym,  
20 ma'am?

21 MAJ GEN(R) WOODWARD: Is that what he  
22 said?

1           LT COL HINES: He mentioned several  
2 cases.

3           MAJ GEN(R) WOODWARD: He said one that  
4 we would specifically look at.

5           LT COL HINES: He mentioned, I believe  
6 it's called Edmonds.

7           MAJ GEN(R) WOODWARD: Edmonds, yes.

8           LT COL HINES: Okay. So we have U.S.  
9 v. Edmonds, and we can track that down. I'm not  
10 sure where that is in the system, if it's at the  
11 Navy court or if it's on appeal at CAAF, but we  
12 can, we'll go out and find that.

13           MAJ GEN(R) WOODWARD: If it's on  
14 appeal, can we look at it, though, or are there  
15 going to be constraints?

16           LT COL HINES: If it's at the Navy  
17 court, we can probably get the briefs that were  
18 filed to see what was raised by the defense or  
19 what the government said. If it was decided,  
20 obviously, by the Navy court, there should be an  
21 opinion that we can go out and get. And if it's  
22 on petition to CAAF, we can get the CAAF petition

1 and those documents, as well. So we'll go out  
2 and get as much as that material for Edmonds as  
3 we can.

4 ACTING CHAIR HOLTZMAN: I think one of  
5 the things that would be helpful, at least to me,  
6 and I don't know if anybody else feels the same  
7 way, but I think it would be real helpful for  
8 someone to go through the statute and kind of  
9 raise all the problems, the drafting problems,  
10 that there are, whether it's problems that  
11 pointed out. I'm not sure that my initial  
12 comment was correct that the consent may raise  
13 issues of blame the victim but, you know, someone  
14 just to go through it, the Staff, if they could  
15 just go through and pull out all the problematic  
16 parts or things that could be problematic in the  
17 statute, I think that would be helpful, at least  
18 to me. I guess that's a lazy person's way out  
19 but --

20 LT COL HINES: Would you like the  
21 Staff to do that, ma'am, or --

22 ACTING CHAIR HOLTZMAN: Does anyone

1 else think that would be helpful?

2 MAJ GEN(R) WOODWARD: Or if anybody,  
3 I mean, I think we've all, I can see everybody  
4 wrote notes and things like this. Maybe we could  
5 send an email to Colonel Hines that some of us  
6 see those things, just a list, and you could  
7 compile them altogether.

8 LT COL HINES: I think that's a great  
9 idea, ma'am. Anything that anyone has noticed,  
10 either from looking at the read-ahead materials  
11 or what you've spotted today, if you want to just  
12 shoot me an email on it and, obviously, I'll copy  
13 Kyle and Kelly and everyone. The more sets of  
14 eyes that are looking at it, the less likely you  
15 are to miss something. We could put together  
16 something on that.

17 ACTING CHAIR HOLTZMAN: Do you have a  
18 list of who's going to be presenting at the next  
19 session, so if we have any other suggestions  
20 about --

21 LT COL HINES: I have a preliminary  
22 list, ma'am. We sent out the official request.

1 I don't know that they've responded with an  
2 official, so we don't have a green light on  
3 specific names yet. We've sent the requests out.  
4 But, generally, it's going to be about three to  
5 four seasoned prosecutors, so not, you know, your  
6 first-tour captain in the Marine Corps, but  
7 someone who, hopefully, is of my rank who's a  
8 prosecutor in a senior prosecution position.

9           The same with the group of defense  
10 counsel who are of similar experience, a group of  
11 appellate counsel from the appellate government  
12 and the appellate defense divisions who -- the  
13 appellate defense counsel who are defending  
14 Marines and sailors, soldiers, and airmen who  
15 have now been convicted and now they're appealing  
16 their convictions, what kind of issues are they  
17 raising in their briefs to the court and what's  
18 the government seeing, as well. And then in the  
19 afternoon, a group of civilian counsel.

20           So some of the people we've requested  
21 have already spoken to the Panel before. There  
22 are some other people who haven't. So that's how

1 I envision maybe stacking the May meeting --  
2 seasoned prosecutors, seasoned defense counsel,  
3 appellate counsel, and then civilian  
4 practitioners because, as you know, the civilian  
5 practitioners have oftentimes varying or views  
6 that vary a lot from the uniformed practitioners.

7 ACTING CHAIR HOLTZMAN: Civilian  
8 practitioners who practice in the civilian world  
9 or civilians who practice in the military world?  
10 What are we talking about? I mean, are you  
11 talking about --

12 LT COL HINES: Most of the civilian  
13 practitioners that I have thought about are  
14 people who have practiced in the military justice  
15 system.

16 MS. FRIED: As defense counsel then?

17 LT COL HINES: Well, as both while  
18 they were in uniform, but now they're out. For  
19 instance, there are, the majority of those people  
20 are going to be defense counsel because they're  
21 now civilians. But I was also thinking about  
22 calling some people from some of the victims

1 advocacy organizations who have been  
2 practitioners, as well, like maybe Don  
3 Christensen --

4 MAJ GEN(R) WOODWARD: What about  
5 victims --

6 LT COL HINES: -- he's been requested  
7 and I think he said he's available.

8 COL(R) SCHINASI: I mean, is there any  
9 value to having representatives from CID or OSI  
10 come in and talk about what they do and how  
11 they're doing it?

12 ACTING CHAIR HOLTZMAN: Why? That's  
13 really not analyzing the statute. I think our  
14 real focus from the JPP was to decide whether the  
15 statute needs to be changed and, if so, how.

16 COL(R) SCHINASI: Well, I was  
17 thinking, from the police's point of view, they  
18 would have some sense of their efficiency  
19 connected with implementing the law and how good  
20 the law is. They might have some insight into  
21 what we could do with respect to it, too.

22 COL(R) SCHENCK: Because they make the

1 first decision regarding substantiated or  
2 unsubstantiated and, at least in the Army, they  
3 still, what we call, title people. So they'll do  
4 a report of investigation that has to go to that  
5 O-6 commander, and if they determine that their  
6 level falls into one of these categories in the  
7 statute, it kind of sets the way of where the  
8 case might go.

9 ACTING CHAIR HOLTZMAN: Okay. Well,  
10 if it's going to affect, if it's related to the  
11 statute, then, sure, I think it would be -- I  
12 mean, personally, you have to talk to Judge Jones  
13 about that.

14 COL(R) SCHINASI: The other thought I  
15 had, and this may be too delicate or also beyond  
16 the panel, but I think it would be very  
17 interesting to talk to a general court-martial  
18 convening authority, someone who has actually had  
19 to do this and do it in near time and listen to  
20 his or her concerns with respect to the law and  
21 the process of how it works. And so that would  
22 give us a much broader sense of what really

1 happens, and I think it would be very  
2 illuminating.

3 MAJ GEN(R) WOODWARD: I can do that  
4 for the court cases I've had, if you want. But,  
5 you know, I'll be honest with you, only one came  
6 in front of me. All the 18th Air Force ones that  
7 I saw come through, I guess I could talk to some  
8 --

9 COL(R) SCHINASI: I was thinking  
10 about, you know, a line commander, a division  
11 commander. In the Army, that's where most of the  
12 cases are going to come from, the divisions. And  
13 so someone who is seeing a lot of cases or is  
14 prosecuting a lot of cases, it would be  
15 interesting to hear their relationship with their  
16 staff judge advocate and how will all this  
17 actually work out.

18 ACTING CHAIR HOLTZMAN: But how is  
19 this related to the statute? I think if it  
20 doesn't relate to the statute, it's not --

21 COL(R) SCHINASI: Because these are  
22 the people who are responsible for implementing

1 the statute.

2 ACTING CHAIR HOLTZMAN: Yes, I think  
3 you'd have to -- right.

4 MS. WINE-BANKS: But I would say that,  
5 if you're going to speak to prosecuting attorneys  
6 and defense attorneys, we probably want to speak  
7 to victim attorneys, as well.

8 DEAN ANDERSON: Didn't you say that --

9 MS. WINE-BANKS: That's different than  
10 victim advocates, although perhaps I have my  
11 terminology wrong because sometimes that happens.  
12 But as I understand it, there are -- I'm not  
13 talking about who advocate for victims and are  
14 non-attorneys. I'm talking for people who are --

15 ACTING CHAIR HOLTZMAN: Special  
16 Victims' Counsel.

17 MS. WINE-BANKS: Yes, exactly. And to  
18 the extent that there are any, at this point in  
19 time, who have some experience with that work,  
20 they would be useful, I think, in terms of  
21 understanding the statute.

22 LT COL MCGOVERN: I think we can

1 provide a lot of the things we're looking for  
2 through previous transcripts. We didn't want to  
3 overwhelm the Subcommittee with reading  
4 materials, but, between the RSP and the JPP, we  
5 have received a lot of this testimony. So if  
6 you're particularly interested in MCIOs, we can  
7 provide that to everybody and point it out to  
8 you. But certainly the commanders and for the  
9 JPP, we pulled in the Special Victims' Counsel to  
10 say what issues are you seeing with Article 120  
11 and trial counsel and defense counsel. And from  
12 that, Colonel Hines identified some of those  
13 trial counsel, defense counsel who could probably  
14 go deeper, and then appellate counsel, what was  
15 coming up on appeal.

16 So maybe, not to bombard you with  
17 reading materials, but we may have some of the  
18 testimony for you already.

19 MS. FRIED: Just to follow-up on  
20 Colonel McGovern's answer, I believe the RSP had  
21 testimony from convening authorities and the  
22 staff judge advocates describing their

1 relationship. So maybe if we can't bring them  
2 here, that may be something we can all --

3 COL(R) SCHINASI: That would be great.

4 MS. FRIED: We'd at least have that  
5 and that's pretty recent, so.

6 COL(R) SCHINASI: You know, current  
7 numbers, what the reported cases are, how many  
8 cases, what percentage of a docket is this, so we  
9 get some kind of objective measures to what it's  
10 like because it's only --

11 MAJ GEN(R) WOODWARD: Well, it depends  
12 on which command.

13 COL(R) SCHINASI: Well, that's right.  
14 And which Service.

15 LT COL HINES: Well, and to follow up  
16 on Ms. Holtzman's, you know, comment, which she  
17 continues to reiterate, the Panel has looked at  
18 this issue writ large. And as Kelly said, we  
19 heard or the Panel heard from several Special  
20 Victims' Counsel in the fall about the SVC  
21 programs, VLC programs, how that has operated so  
22 far since those programs have been stood up. We

1 heard from some of the law enforcement  
2 individuals.

3 And so I think what I try to do here,  
4 when we were narrowing down on the 17 issues that  
5 the Panel sent to the Subcommittee, which is to  
6 sort of stack our witnesses with people who are  
7 working everyday with the statute. Not to say  
8 that investigators aren't working with the  
9 statute or victims' counsel are, but the people  
10 who are having to deal with 120 prosecutions  
11 everyday are people like judges, prosecutors,  
12 defense counsel, the appellate counsel. Not to  
13 say that investigators or victims' counsel don't  
14 have -- might not have something relevant to say  
15 about 120, I'm just trying to -- I'm just  
16 suggesting that this is a better way for us to  
17 maybe narrow the focus down to the 17 issues that  
18 the Subcommittee has to address at this time.

19 Kyle?

20 LT. COL GREEN: And I think the  
21 Staff's perspective, having gone through this  
22 through the RSP and then through the JPP,

1 obviously the panels we bring to you, the four  
2 you heard from today create an anecdotal body of  
3 evidence for you to consider cases and individual  
4 perspectives and individual opinions and trying  
5 to rectify that between your valuable time,  
6 limited time, and where does that create value  
7 versus where does it, you know, where does it  
8 just not necessarily create a lot of value added  
9 for you. So any of those groups that you want to  
10 hear from, I mean, I would encourage that  
11 perspective.

12 One of the things this morning, I  
13 mean, the perspectives that you bring to this on  
14 your own is so varied and so, I mean it's a  
15 wealth of information.

16 So one of the things the Staff is  
17 aware of is, I mean, frankly, we could probably  
18 close the room off and you all could decide a lot  
19 of these things on your own just from your  
20 backgrounds and perspectives. Where you want  
21 those anecdotal evidence to bring to your  
22 perspectives, that's really where we want to

1 focus our attention and bring that to you.

2 MAJ GEN(R) WOODWARD: It makes me  
3 think, especially when I listen to the people in  
4 this room and how brilliant they are, it seems  
5 like reading in advance what's already been done  
6 by the JPP and then spending a majority of our  
7 time when we're together discussing those issues,  
8 it seems almost more valuable than too many  
9 witnesses.

10 ACTING CHAIR HOLTZMAN: Well if the  
11 witnesses have some perspective on 120 that the  
12 JPP hasn't heard, that would be helpful.

13 MAJ GEN(R) WOODWARD: Right, okay.

14 ACTING CHAIR HOLTZMAN: But if the JPP  
15 has already heard this, then --

16 MAJ GEN(R) WOODWARD: We just need to  
17 read that portion.

18 ACTING CHAIR HOLTZMAN: Yes, right,  
19 because --

20 LT. COL GREEN: Or it could get drawn  
21 out. If there were specific issues -- one of the  
22 things I told Colonel Grammel today, he spoke to

1 the JPP in August, and, at that point, it was  
2 pretty much a blank slate of what do you think  
3 about Article 120, versus now where the JPP has  
4 provided very specific issues that it believes,  
5 identified over the course of its meetings,  
6 really warrant the Subcommittee's attention, so  
7 he's able to focus his views and we can get views  
8 from individual presenters. And we can solicit  
9 views either through testimony or written views  
10 specifically from people. That may be helpful --

11 DEAN ANDERSON: I just think there's  
12 a lot of value to the colloquy and the  
13 opportunity to hear live testimony and to  
14 interact with it and to come up with questions  
15 that are specific to our charge, which are, just  
16 of the nature of the JPP, are going to be much  
17 more pointed from our perspective because we have  
18 a narrower charge.

19 So I wouldn't want to -- I guess  
20 that's my way of saying I wouldn't want to  
21 eliminate the possibility of interacting live  
22 because I think it's just so valuable. And you

1 get a really different feel for what's going on  
2 when you can interact with people live than you  
3 do by reading testimony.

4 MS. WINE-BANKS: I agree with that.  
5 I wonder, in the past, have you heard from any  
6 defendants or any victims -- although I thought  
7 it was interesting how the word "victim" may  
8 change. The plaintiff, I know it's not a  
9 plaintiff, but I don't know what else to call the  
10 victim. Complaining witness, complaining  
11 witness. As to how they interpreted it? I mean,  
12 for example, how does a defendant know what not  
13 to do or what he or she can do for their  
14 interpretation of 120 and any complexities?

15 PROF. SCHULHOFER: I had a couple of  
16 areas that I just want to put out to you whether  
17 people think they're worth exploring. One was we  
18 got a clear sentiment from this panel that, in  
19 their view, we shouldn't rock the boat, we should  
20 try to limit ourselves to laser-like changes.

21 Personally, when I think about this in  
22 comparison to things I know from the civilian

1 world, like the U.S. Sentencing Commission which  
2 has about 400 amendments, each of them  
3 prospective only, the fact that there are three  
4 statutes in play doesn't impress me. But that is  
5 a sentiment, and I would like to hear from them  
6 what sorts of laser-like changes they think would  
7 be adequate.

8           And I'm thinking of that for two  
9 reasons. One is they might convince me or others  
10 that problems can be solved by laser-like  
11 changes. If not, I think I'd like us to be able  
12 to say in our report that this sentiment was  
13 expressed, that we explored it, and we got these  
14 reactions and we concluded that they wouldn't fix  
15 the problem because they kept referring to laser-  
16 like changes. But I think we want to come down  
17 one way or another on that issue, which is sure  
18 to be important to DoD. I think it would be good  
19 to have kind of a record from which to proceed on  
20 that. That would be one.

21           The second is on these anecdotal  
22 impressions, which I think are helpful, but I

1 wonder, I don't know if it's part of the process  
2 here, some of these issues lend themselves not  
3 only to live testimony on which I agree with  
4 Michelle, but the possibility of a questionnaire.  
5 I don't have questions formulated yet, but  
6 perhaps with Staff or the rest of us by  
7 deliberation -- we have a year or we have many  
8 months -- perhaps we could formulate some  
9 questions that we could distribute to any of  
10 these constituencies and including even active --  
11 I don't know if active judges would answer  
12 questions about, you know, the kinds of things  
13 we've been talking about, like give us something  
14 more than anecdotal impressions.

15           The third thing, the last thing I  
16 would suggest is -- this is where I may be  
17 outside the terms of reference, but I'm having  
18 trouble breaching the two of them. I'm concerned  
19 that this question about whether 120 works is too  
20 narrow because most things work. The world  
21 doesn't come to an end, things don't stop. And  
22 generally speaking, people get along with what

1 they have. And I'm a little worried that that  
2 may be an overly narrow perspective on what we  
3 might think a revision of 120 should be focused  
4 on.

5 So this is where it gets to the  
6 question of training, not of lawyers but training  
7 of the 1.8 million active duty individuals. I  
8 know that's outside our terms of reference, but  
9 I'd be interested if there's some way to get a  
10 sense of how the people who do this training, how  
11 the commanding officers and how the, I suppose  
12 there are consultants who are brought in to  
13 actually do the training, how do they use Article  
14 120? Do they take it into account when they  
15 teach? Are they really telling people that one  
16 drink makes you --

17 MAJ GEN(R) WOODWARD: Right. Because  
18 it's so confusing. You know, that's a good  
19 example. When I did the focus groups across the  
20 Air Force when I first got in to find out, okay,  
21 where are we starting with and what are our  
22 issues, every SARC who does the training at each

1 of the wings had a different answer to the  
2 question. So then when I would turn to my lawyer  
3 and say, okay, answer the question, he would take  
4 ten minutes to answer the question and everybody,  
5 you know, sat there and turned upside down and  
6 still didn't understand it after he was done. So  
7 if it's that confusing when a lawyer answers the  
8 question, that's problematic when you're talking  
9 about an 18-year-old airman.

10 So I don't know if it's easier to  
11 figure out a better way to explain what is, you  
12 know, competent, what, you know, is incapable of  
13 consent. But, you know, it's obviously  
14 problematic.

15 PROF. SCHULHOFER: Exactly. I know  
16 that training in itself is not part of our  
17 mission, but I think the way that 120 is used in  
18 or affects the training, I think that would be  
19 very relevant.

20 ACTING CHAIR HOLTZMAN: One of the  
21 points that prompted me, and I think I've said  
22 that to a few people here, as a member of the JPP

1 panel to think about viewing 120, even though  
2 it's been changed so many times in such a short  
3 period of time, is that we heard some testimony  
4 -- isn't that correct, Kyle?

5 LT. COL. GREEN: It is.

6 ACTING CHAIR HOLTZMAN: That the  
7 statute itself was being used as a training tool,  
8 right? For the recruits.

9 DEAN ANDERSON: That's kind of opaque.

10 ACTING CHAIR HOLTZMAN: That's a good  
11 way to put it. That's a very diplomatic way to  
12 put it. I appreciate the diplomacy.

13 So I think the impact that the statute  
14 is having on people's perception of what behavior  
15 is acceptable could be very important. I don't  
16 know how we get at that, though.

17 MS. KEPROS: Is there a way to survey  
18 members who've sat on panels? Is there an  
19 identifiable pool that we could even do like a  
20 survey linking --

21 PROF. SCHULHOFER: I think that's kind  
22 of a no-go area, isn't it?

1           LT COL HINES:  Yes, there's a rule.  
2           The rule in the military justice system is  
3           similar to what it is in state and federal court  
4           that, you know, no member can reveal how they or  
5           any other member voted in a case.  We actually  
6           tried to do this one time.  I've been a judge  
7           twice, and we actually, the Air Force JAG School  
8           tried to bring in eight former jury members to  
9           talk about, you know, this is what went on in the  
10          deliberation room to sort of ferret out these  
11          issues, and the presentation got shut down within  
12          the first ten minutes because there was a judge  
13          in the audience who said we can't do this, you  
14          know, this is illegal.

15                 So I think it would be invaluable,  
16          just like it is when you're a prosecutor or a  
17          defense counsel to talk to your juror after  
18          trial, but I don't see a way that we're going to  
19          be able to --

20                 MS. KEPROS:  We can do that in my  
21          state.  We routinely talk to jurors, and it's a  
22          big source of information.  So --

1 COL(R) SCHENCK: We can't talk about  
2 the deliberative process. The problem is if we  
3 invite them here they're going to start talking  
4 about --

5 MS. KEPROS: I understand. I  
6 understand. Well, so anyway, that was one  
7 question I had because, obviously, they don't  
8 have the training to, they could speak directly  
9 to was there a conflict in what they were  
10 hearing, but that may not be an option.

11 The other thing I guess I'm struggling  
12 with is what I found most helpful in the  
13 conversation today was when the questions were  
14 very specific and when these judges all spoke to  
15 what they thought a statute meant or how they  
16 actually tried to apply it. And I would find,  
17 frankly, it very useful just to hear what you  
18 guys all think, even aside from having additional  
19 witnesses, just because I think we're all  
20 bringing different experiences to the table here.

21 But, I mean, I would just as soon have  
22 a panel that works through different vignettes

1 or, you know, what do you do if this is the fact  
2 pattern or if this is the evidence, what crime is  
3 this, and just seeing where are people getting  
4 stuck, right? Because that's how you know if  
5 it's workable, right? If there is consensus  
6 about, hey, when this happens, this is how you  
7 charge it, this is a fair or unfair way that it  
8 gets sorted out. Here's where maybe there could  
9 be an exceptional circumstance because I know the  
10 thing I found myself doing, and that's why I  
11 brought up the BDSM situation.

12 When I'm working through the statute  
13 is say, well, wait a minute, then would it be a  
14 crime if such-and-such happened? What if you  
15 have somebody who's drunk but they're up and  
16 walking around and interacting with everybody?  
17 Should that be a crime, and why is it or isn't  
18 it, given the way the statute is drafted?

19 So, I mean, I guess I would welcome  
20 that kind of information or feedback on how would  
21 you apply something or to what scenario do you  
22 think this should apply, what are you thinking

1 about? You know, we can't think of everything,  
2 but I think we can come up with some things that  
3 we might recognize aren't fitting very well with  
4 the current statute.

5 BGEN(R) SCHWENK: I think, following  
6 up on that comment, it seems to me the more they  
7 are focused, our witnesses are focused on the 11  
8 issues that we're supposed to be looking at and  
9 they come in here ready to talk about issue one,  
10 here's what I think, here's what I think, here's  
11 what I think, here's what I think. We ask our  
12 questions about one, and we go to two, we go to  
13 three. And the ones they don't have a problem  
14 with, fine, that panel doesn't have a problem  
15 with it. But we can move through it, and it  
16 helps us stay on our task and it helps us better  
17 understand where they're at.

18 And in the interest of time, you know,  
19 if we took a morning to do that and if the three  
20 panels to start off with the next time or the  
21 defense dudes, you know, trial and appellate, the  
22 prosecution guys, trial and appellate, and the

1 Special Victims' Counsel, and we went through all  
2 that, then in the afternoon we can sit down and  
3 go through it ourselves and start figuring out  
4 where we're going.

5 It seems to me the tasking that we  
6 have is to actually recommend changes and toss  
7 the language in the direction of the JPP. It's  
8 not too soon for us to really talking about where  
9 are we at, and I see us going down the path of  
10 two things. One is, in deference to what  
11 everybody's concern, you know, the TJAG's concern  
12 and others about don't screw the statute up, you  
13 know, we've been through enough, is the laser-  
14 like how would we fix 11 things or whatever  
15 number of those we think need to be fixed as  
16 best we can do laser-like.

17 And the other one is this statute is  
18 a mess. If we were rewriting the statute, what  
19 would we do? How would we rewrite it? So we  
20 have two products eventually to give them: our  
21 best effort at a rewrite and our best effort at a  
22 laser-like. And then if we wanted to have fun

1 and giggles, we could vote and let them know what  
2 our vote is. Not that they would care, but we  
3 could vote and feel good about it, and then they  
4 could decide what to do and what to send forward  
5 and what not.

6 But I guess my experience with these  
7 things is the sooner we get narrowly focused and  
8 start focusing on our product, whatever the heck  
9 it ends up, the better we come to grips with  
10 things. And then we ferret out other issues  
11 where we might we better get those guys back and  
12 ask about this or we better, you know, something  
13 else. Those are my thoughts. I won't talk  
14 anymore.

15 MAJ GEN(R) WOODWARD: I second  
16 everything he just said. I think getting the  
17 speakers to come in, having them focus maybe even  
18 to the point where we don't even ask questions  
19 until all of them go through their piece and then  
20 we can only ask questions for the amount of time  
21 that's left and keep us on schedule, and then  
22 keeping us in the afternoon where we can have the

1 discussion --

2 LT COL HINES: Well, we'll certainly  
3 go back. Our typical practice is any of the  
4 presenters are at liberty to come back after the  
5 fact based on questions they were asked to submit  
6 written materials. We've had them do it in  
7 email. We've had them prepare written materials  
8 that -- and I plan on doing that with a judge  
9 because I know some of them pulled me aside and  
10 said, hey, I'd really like to, we ran out of  
11 time, but I would like to submit something on --

12 BGEN(R) SCHWENK: Well, that's why I'd  
13 ask them to come back on all 11 things.

14 MAJ GEN(R) WOODWARD: And I think if  
15 we're more clear up-front, then it will save  
16 time, right? You don't have to come back --

17 BGEN(R) SCHWENK: Well, then we can  
18 focus on it and know they were knocked up on the  
19 side of the head in the invitation this is what  
20 we're going to talk about. And then they're free  
21 to add three things at the end. I mean, we'll  
22 always give them some time to add their own.

1 COL(R) SCHENCK: And then they can  
2 come prepared.

3 BGEN(R) SCHWENK: Right. But then  
4 they're prepared, they're focused, and, you know,  
5 it's a better use of our time.

6 MAJ GEN(R) WOODWARD: I remember when  
7 I took it back to the RSP, they told me you're  
8 not even going to talk, all you're going to do is  
9 answer questions. And then they start off with  
10 saying, okay, you've got five minutes to talk,  
11 you know. So as a witness, I mean, it really  
12 helps if you're very clear and say we want you to  
13 address this and here's how much time we have.

14 ACTING CHAIR HOLTZMAN: Yes. I think  
15 it was a mistake for anybody to come in here and  
16 say, I'm just ready to answer questions. I mean,  
17 we tried to put an end to that at RSP. So people  
18 come and they're prepared to say, summarize their  
19 statements in five minutes, their points in five  
20 minutes, and then we can just move on.

21 DEAN ANDERSON: So this list of 11  
22 issues we need to tackle, where is that list of

1 11 issues? Is it in -- sorry, sorry, just to  
2 clarify.

3 LT COL HINES: Tab 17, ma'am.

4 DEAN ANDERSON: Got it. Yes, I  
5 remember this.

6 LT COL HINES: And there's the report  
7 from the Panel that was issued in February.

8 MS. WINE-BANKS: I have a question.  
9 You said 17 and 17, but there's actually only 11.

10 LT COL HINES: Well, and the reason --  
11 that's a good question. Thanks, ma'am. Because  
12 my outline, because we had decided we were going  
13 to bifurcate, the plan was, if we tried to dig  
14 into all 17 issues, the last six of which deal  
15 with coercive and abuse of authority, that would  
16 be too ambitious.

17 MS. WINE-BANKS: So just the first 11?

18 LT COL HINES: Yes, ma'am. So that  
19 outline just contains the first 11. I've got  
20 another outline on what witnesses came and talked  
21 about the other. I just didn't want to, as Kelly  
22 said, I didn't want to give you the fire hose

1 right at the starting line.

2 But, anyway, to answer your question,  
3 ma'am, the panels, where they refer those issues  
4 to the Subcommittee is in the report. I think  
5 they just -- 36 to 37 are the first 11 issues and  
6 43 for the 6 issues. So that's what my outline  
7 was built --

8 DEAN ANDERSON: Got it. It was very  
9 helpful, extremely helpful.

10 LT COL HINES: Thank you.

11 DEAN ANDERSON: Thank you.

12 LT COL MCGOVERN: Just to recap what  
13 the due-outs are from the Staff so far that I've  
14 heard, first you would like us to go through the  
15 current Article 120, Rep. Holtzman, and point out  
16 issues that have been identified by the Staff or  
17 previous presenters, circulate it to the  
18 Subcommittee Members. You guys do bubble  
19 comments and send it back to us. We can combine  
20 that for you all before you meet next time so  
21 everybody -- is that the type of document you're  
22 looking for?

1 DEAN ANDERSON: Could I just ask a  
2 question on that? Is that independent of the 11  
3 issues? Is that in addition to the 11 --

4 LT COL MCGOVERN: That is the 11.

5 DEAN ANDERSON: That is the 11 issues.

6 LT COL MCGOVERN: The 11 issues would  
7 be incorporated into --

8 DEAN ANDERSON: But we're not trying  
9 to expand 11, are we?

10 BGEN(R) SCHWENK: I think we may be.  
11 I think that if what I suggested is where we end  
12 up, which it may not be, which is answer the 11  
13 laser-like precision, maybe a couple more that we  
14 find, and also rewrite something. On the rewrite  
15 something, we're looking at all the issues.

16 And so I think, and I think earlier  
17 when we were talking, I was under the impression  
18 that, you know, Kelly or Glen or somebody was  
19 going to shoot us out an email and say here's the  
20 11 issues and here's others that people have  
21 mentioned about the language in 120. And then we  
22 come back with, and here's some more that I think

1 in 120, so they get a master list of our current  
2 concerns or potential concerns with 120 and then  
3 go from there.

4 MAJ GEN(R) WOODWARD: Well, has  
5 anybody articulated clearly, if we didn't do the  
6 laser issue, you know, what are we addressing if  
7 we completely rewrite it? I mean, are we just  
8 correcting those issues, or are we addressing  
9 something more conceptual, and what is that  
10 broader conceptual thing that we're addressing if  
11 we completely do a rewrite?

12 LT COL MCGOVERN: The only thing that  
13 the JPP has received was from Professor  
14 Schulhofer who said, I believe he said we should  
15 start from scratch, and he used the Model Penal  
16 Code as an example possibly. But, otherwise,  
17 most people have recommended laser-like --

18 PROF. SCHULHOFER: If I could just  
19 amend that a little bit, I did suggest and I  
20 think it's still my feeling, tentatively, that we  
21 should start from scratch. Whether you use the  
22 Model Penal Code as a model or not I think is

1 anybody's guess. I don't feel committed to that.  
2 I suggested one possible example of a way you  
3 could make a clean start and come up with  
4 something that's coherent.

5 ACTING CHAIR HOLTZMAN: So other state  
6 statutes that I asked the Staff to distribute,  
7 which might be also vehicles that one could look  
8 at, not to mention the federal statute, but I  
9 think it would be extremely helpful, whether  
10 we're doing a laser approach or whether we're  
11 ultimately going to rewrite the statute, is to  
12 get in one place, to the extent we possibly can,  
13 the list of the problems in the statute so that  
14 we can -- I mean, even if we want to rewrite it,  
15 we need to know what are the issues that we find.  
16 So I think that that would be a very useful  
17 exercise to go through. And, you know, maybe if  
18 you do enough lasers, you have a whole new set.

19 LT COL MCGOVERN: The second due-out  
20 I had was pulling additional transcripts where  
21 they have the RSP or JPP spoken to Article 120,  
22 to get those to you so you can identify if you

1 need more information. And then, three, there's  
2 the concern about training, and we could ask the  
3 SAPR folks for at least their training packets or  
4 what are they training on, what's the  
5 standardized packet, and you'll at least have  
6 that.

7 ACTING CHAIR HOLTZMAN: Or maybe you  
8 can ask them, Kelly, specifically -- sorry.  
9 Could you ask them specifically how they use 120  
10 in their training? If they do, how they use it,  
11 when they use it, any examples of that would be  
12 very helpful.

13 LT COL MCGOVERN: The example of  
14 having one drink being used in training has been  
15 around for a few years, so you would think --

16 DEAN ANDERSON: Is it apocryphal, or  
17 is it -- I mean, it would be good to see if it  
18 shows up anywhere in the literature they actually  
19 distribute or if that is something that is an  
20 interpretation or a take-away based on sort of  
21 high-end concern.

22 MAJ GEN(R) WOODWARD: I can tell you,

1 for the Air Force, when I came in and we heard  
2 that when we were doing the focus groups when I  
3 first came in, and this was the summer of 2013,  
4 and we did everything we could to find out who  
5 was saying that, to cut them off and give them  
6 verbiage that we thought was reasonable for them  
7 to teach. The big problem is the verbiage we  
8 give them to teach is so difficult, you know.  
9 And so I don't know if it falls within our  
10 purview, but just interpreting 120 and giving  
11 them an interpretation of what we think 120 is  
12 may be a viable thing, you know. Something  
13 that's reasonable to say this is effective to  
14 pass on to an 18-year-old and have them  
15 understand it would be nice if we could that.

16 MS. FRIEL: The same problem is going  
17 on on college campuses all across the country.  
18 The policies we talk about being capable of  
19 consent from intoxication and, yet, the word on  
20 campus is if you've been drinking at all, and  
21 administrations are all trying to do exactly what  
22 you described --

1           DEAN ANDERSON: Or they're worried  
2 about the word on campus, so you don't actually  
3 know what's actually being communicated because  
4 the materials that are communicated --

5           MS. FRIEL: All I can tell you is that  
6 we were doing markup at Dartmouth, which is my  
7 alma mater, and we had rooms for kids who were on  
8 the judiciary panels before they changed their  
9 whole method, and we talked their policy, your  
10 statute Article 120, and almost every kid in the  
11 room said, "Well, that's not what we were told on  
12 campus. We were told "no" if you're drinking at  
13 all." Every single one. It was amazing.

14           How can that be? I mean, you come in  
15 at orientation and we say this, and somehow it  
16 changes over time.

17           Now, that's a couple of years ago.  
18 Now maybe we're getting somewhere. But --

19           MAJ GEN(R) WOODWARD: This is what we  
20 had with SARCs and commanders. They would say,  
21 okay, here's what the law is, if you will; here's  
22 what I say, you know. If you have a drink you're

1 making yourself vulnerable or if you had sex with  
2 somebody who just had a drink you're vulnerable.

3 MS. FRIEL: Right. It's not illegal.  
4 It's just --

5 BGEN(R) SCHWENK: I think they're  
6 trying to tell 18 and 18-year-olds you're putting  
7 yourself at risk if, and one of them is the  
8 person you're going to have sex with has been  
9 drinking, you know. And then they can go on, and  
10 then that reduces down to one drink.

11 LT COL MCGOVERN: I would like to  
12 propose that when Glen does bring in the trial  
13 counsel and defense counsel, since you don't have  
14 the actual panel members to ask, you may want to  
15 ask the counsel how hard is it for you to sit a  
16 panel because of the training they received, and  
17 that's really where you're going to hear the  
18 trickle-down effect of the difficulties they're  
19 facing and what is still being heard out there in  
20 their most recent cases.

21 DEAN ANDERSON: Yes, that's correct.

22 PROF. SCHULHOFER: But is that in lieu

1 of the notion of trying to get direct information  
2 about how --

3 LT COL MCGOVERN: Oh, no, sir. No,  
4 sir. I just think it's a supplemental question.  
5 As Ms. Friel said, you can always get the policy  
6 and training packet if you want to see how it's  
7 affecting the judicial proceeding. I would ask  
8 how difficult is it right now to seat the panel  
9 based on the training they're receiving because  
10 I'm pretty sure there's a standard defense  
11 counsel question. Have they been trained that  
12 one drink equals that they can't consent? If  
13 yes, okay, thank you.

14 LT COL HINES: That's become  
15 boilerplate for the judges' preliminary questions  
16 is you start asking because all of this, as a  
17 judge now, before you even let the prosecution or  
18 the defense talk to them, you admonish them and  
19 tell them how many of you have received training  
20 and all the arms go up. Do you understand that  
21 that has nothing to do with the legal  
22 instructions that you're going to get in this

1 case, and, of course, they all say, yes, we  
2 understand that. But you still see, as the trial  
3 goes along, either through questions, because in  
4 our system they can actually ask questions of the  
5 witnesses, you'll still see that, you know,  
6 well, did you just have one drink. So despite  
7 what the judge has told them, they're still  
8 thinking about what they've been trained to do.

9 I was going to ask, Ms. Holtzman, to  
10 go back to your point, about connecting up the  
11 issues or going through the statute. Would it be  
12 helpful to everyone if I went through, I thought  
13 what I might do is go through the statute, to the  
14 extent that I can, because the issues are sort of  
15 interwoven here in the statute. And what I'll be  
16 happy to do is -- for instance, the first,  
17 120(a), unlawful force. That issue has come up.  
18 I've heard everyone talking about what does  
19 unlawful force mean or bodily harm. That's one  
20 of the issues that the JPP referred to the  
21 Subcommittee: is the term bodily harm ambiguous  
22 or not? I'll be happy to go through and pick

1 with, hopefully, laser precision, to Judge  
2 Maksym's description, but to sort of go through  
3 here and highlight, here is a definition or  
4 terminology that's part of issue three, and these  
5 are the witnesses who have spoken. Some of this  
6 is in my outline, what they said, but I can go  
7 through and say, here are what some of the  
8 witnesses have said about bodily harm, we need a  
9 fix. These three or four witnesses said we need  
10 a fix. I think that may quicken as you go  
11 through all of this. You don't have to go  
12 through the issues and then the statute and go,  
13 wait a minute, what are these? It might help you  
14 to connect up, okay, well, that's issue four,  
15 bodily harm is issue four for us to resolve and  
16 these are the people who have spoken to it.  
17 Would that be helpful?

18 ACTING CHAIR HOLTZMAN: It's up to  
19 you.

20 PROF. SCHULHOFER: Is there an issue,  
21 like what you did at Tab 17?

22 LT COL HINES: Right, right, but with

1 a little more specificity.

2 COL(R) SCHINASI: With respect to what  
3 should be in the statute and what is in the  
4 Judges' Benchbook?

5 LT COL HINES: I'm sorry, sir?

6 COL(R) SCHINASI: Lots of times, the  
7 terms that we're struggling with are identified  
8 and explained in the Judges' Benchbook. So as  
9 the judge instructs the jury, he's explaining all  
10 of these terms. And so the question would be how  
11 much do you want to load up the statute with all  
12 of this information and you make the statute --

13 BGEN(R) SCHWENK: Yes, and that will  
14 be something we'll have to grapple with as we go  
15 through it. You're absolutely right. The same  
16 thing with the Manual. You know, which ones --

17 LT COL HINES: In the Benchbook, to  
18 answer your question, sir, sometimes the  
19 Benchbook does help judges. For instance, for  
20 that issue of consent, there's a great  
21 explanation in there. But then the instruction  
22 you give to the panel members is not as good as

1 what you're reading as the judge.

2 But then there are other places you  
3 have the same definition in the Benchbook that's  
4 in the statute, and the members will come back  
5 and say, "Judge, can you give us some more  
6 explanation of what bodily harm means?" and you  
7 say, "I'll re-read you the definition that I read  
8 you an hour ago," because, you know, your loathe  
9 as a trial judge to give a novel instruction and  
10 possibly get reversed. And so they look at you  
11 like, well, that wasn't very helpful.

12 So to answer your question, some  
13 places in the Benchbook are helpful and some are  
14 not. And so that's probably something -- that's  
15 one of the reasons we supplied it to the  
16 Subcommittee is maybe the Benchbook needs to be  
17 fixed, too.

18 PROF. SCHULHOFER: I had a question  
19 about our terms of reference and the 11 issues.  
20 Many of them, most of them, I think, focus on the  
21 question of whether, is the current definition of  
22 consent unclear or ambiguous? Most of these

1 issues focus on whether particular terms are  
2 ambiguous, confusing, or are they clear enough?  
3 You could perfectly well imagine a statute that's  
4 crystal clear but far too restrictive or far too  
5 expansive, and it seems like that's rather de-  
6 emphasized in our charge.

7 One place where I saw it is on page,  
8 issue eight: is the definition of force too  
9 narrow? That's a very different kind of issue,  
10 and it's certainly something that's been a  
11 preoccupation for me and for Michelle and in our  
12 work. Our issue with the Model Penal Code isn't  
13 whether it's unclear. It's all too clear that  
14 it's very narrow. And if it's not within our  
15 charge, you know, that's fine. We're spending  
16 plenty of time on the issue anyway, so we don't  
17 need to talk more about it. But I would have  
18 thought that it was an important issue for the  
19 military to think about not only clarifying but  
20 also making a decision about whether the concepts  
21 on which 120 is grounded are too restrictive.

22 BGEN(R) SCHWENK: I think that's a

1 great point. And I think when you look at -- I  
2 think Maggie asked the question, you know, if we  
3 end up with a laser-like answer the 11 questions  
4 and anything else we think needs to be answered,  
5 and then we go to the other one, your thought was  
6 what's the concept, which dovetails exactly with  
7 what you just said.

8           And so, individually, we all have to  
9 be thinking, if I were doing a statute, a 120,  
10 what would my fundamental premise be for basing  
11 that statute? Would it be a consent statute?  
12 Would it be a force statute? Would it be a force  
13 and consent? We need to be thinking about that  
14 because, if we do that second half of our  
15 project, we're going to have to come to some  
16 conclusion. And it would make life easier on the  
17 Staff if we can get one conclusion. It would be  
18 better than if we had three subsets. But we are  
19 going to have to come to some -- I think that's  
20 just inherent.

21           But in the meantime, the shorter-term  
22 thing is, being a Marine, is answer the mail.

1 You've got 11 questions, give them 11 answers,  
2 and then we can go on.

3 ACTING CHAIR HOLTZMAN: Well, you also  
4 don't have to read the word "clear" in a narrow  
5 way, an ambiguously narrow way. Yes, the statute  
6 could mean this, it could mean that, or should it  
7 mean this, or should it mean that? You cant look  
8 at that, I think.

9 My sense is they want to get a good  
10 idea of the infallibilities in the statute, the  
11 flaws, the defects, you know, what's most  
12 serious, and how they can be corrected. Can they  
13 be corrected, you know, just a couple of word  
14 changes here, or do they have to require a  
15 wholesale rewriting? And then, of course, all  
16 those fundamental issues: define force, consent,  
17 all that stuff.

18 MS. KEPROS: Just to be clear, I  
19 understand the JPP identified specific statutory  
20 terms and that's where the 11 came from. But,  
21 you know, there are, within these materials, a  
22 lot of other issues that were raised by

1 commentators. I mean, is that going to be  
2 included in this sort of master working list of  
3 possible issues?

4 MS. FRIEL: About the statute or about  
5 --

6 MS. KEPROS: Yes. There were other  
7 problems with the statute identified by other  
8 commentators.

9 MS. FRIED: We get our direction from  
10 the JPP parent committee. So to the extent that  
11 they wanted that to be considered, we have to get  
12 some direction from the JPP --

13 MS. KEPROS: Okay. I guess I'm just  
14 wondering because, you know, I certainly can make  
15 you my own list. My statute is a little marked  
16 up myself. But I don't want to waste my time  
17 doing that if it's outside the purview of what  
18 we're supposed to be working on.

19 LT COL MCGOVERN: Well, Ms. Kepros,  
20 the 11 issues were designed to be as topical as  
21 possible. So, hopefully, some of those things  
22 you have identified are actually sub-issues to --

1 MS. KEPROS: Absolutely, absolutely.

2 LT COL MCGOVERN: You know, so,  
3 hopefully, it all will work out if you read the  
4 question broadly.

5 LT. COL GREEN: But the terms of  
6 reference should also allow for -- I mean, and,  
7 obviously, I think the panel would benefit if the  
8 subcommittee, through its more detailed work,  
9 identifies additional issues that the  
10 subcommittee agrees are issues. I mean,  
11 certainly, in the course of your discussion,  
12 that's something that can be raised and we should  
13 incorporate a list of anything that the  
14 subcommittee feels may warrant detention. But  
15 you do have the parameters to identify other  
16 issues to the panel.

17 DEAN ANDERSON: So I guess I'll just  
18 throw out that I'm not convinced that we should  
19 touch the statute after this presentation today.  
20 I understand that that sounds like it might be a  
21 minority view. And it's tentative. You know, I  
22 could be convinced otherwise. It sounds like

1 there's a real impulse to let things work  
2 themselves out through case law and don't  
3 undermine the development of case law by  
4 introducing yet again new statutory language.

5 So that's at least part of the  
6 calculus for me, so, although this is going to  
7 involve tremendous staff work, I don't want that  
8 work to presuppose an outcome. It seems to me  
9 that it's still part of our analysis about what  
10 to do with the statute, if anything, and how to  
11 -- particularly given that the White House has  
12 not moved forward with interpretations of the  
13 statute, so that's still possibly, I think, an  
14 opportunity to -- actually, I don't know  
15 procedurally what that provides as an opportunity  
16 to clarify the statute, but that was at least  
17 raised by the panel today.

18 So a lot of work forward, but I would  
19 want to hold out still a question in our minds  
20 about whether or not this is the right direction  
21 to go, given the repeated revisions of the  
22 statute.

1           PROF. SCHULHOFER: One of the concerns  
2 about that is that, insofar as the White House  
3 tried to do anything to make this statute more  
4 victim-protective than it already is, it would  
5 bump up against Hamdan, which denies the  
6 president the authority to enact rules of  
7 decision that are inconsistent with congressional  
8 statute.

9           So that would be a one-way ratchet if  
10 we did that. In other words, one way the White  
11 House presumably could introduce provisions that  
12 are more friendly to the defendant but can't go  
13 any other direction. At least, unarguably, it  
14 would raise an issue under Hamdan.

15           BGEN(R) SCHWENK: I think the Dean is  
16 right because I think the charter is we'll answer  
17 these 11 questions and then sit down and see what  
18 your answers are and decide whether it's worth it  
19 or not. We still have to do the third thing,  
20 which is we found the problem, we've got  
21 solutions, now what are the problems with the  
22 solutions and we've just introduced a net

1 negative and, therefore, leave it the way it is.

2 DEAN ANDERSON: Maybe it's being a law  
3 professor and teaching criminal statutes, I just  
4 think we could go through with a fine-tooth comb  
5 in any one of these groups and dismantle any  
6 criminal statute in front of us and come up with  
7 dozens upon dozens of problems, interpretative  
8 potential problems and actual problems. It  
9 doesn't mean that they aren't real and that we  
10 don't end up deciding to address them by  
11 rewriting the statute wholesale or with some  
12 laser-like focus. But I think it's still a  
13 question mark.

14 LT COL MCGOVERN: That's exactly what  
15 happened in 2004 when the JSC looked at revising  
16 Article 120 and they came up with an 800-page  
17 report with six options, but their overall  
18 recommendation was no change. So it's absolutely  
19 --

20 MAJ GEN(R) WOODWARD: And I think it's  
21 interesting to me that there doesn't seem to be a  
22 big undercurrent from the folks who are operating

1 in the field to change it. I mean, when I read  
2 everybody's inputs, in addition to what we heard  
3 here, it doesn't seem like there's a big  
4 overwhelming, this is a real problem and we need  
5 to fix it. I was surprised by that, actually,  
6 but --

7 COL(R) SCHENCK: These guys have sat  
8 on the bench with three different versions, you  
9 know. So the laser-like is, I think, from the  
10 trial judge perspective, the best way to go and  
11 something that, they've already got the Benchbook  
12 instructions and they can work with those little  
13 pieces.

14 I think someone suggested court-  
15 martial changes, which we were just mentioning as  
16 an aside, the Court of Appeals for the Armed  
17 Forces which reviews, of course, our military  
18 cases doesn't really put weight, credibility in  
19 the president's changes as they do congressional  
20 changes. So we can never be sure about what will  
21 happen next, so the president said let's unglue  
22 the fences, they don't have to be listed. And

1 the Court of Appeals for the Armed Forces says,  
2 oh, yes, they do. You name it, those Article 134  
3 offenses by the president, Court of Appeals for  
4 the Armed Forces says the pleadings have to say  
5 and the president said they don't.

6 So I just throw that out to you  
7 because that might be a good way. It wouldn't  
8 cause a lot of trouble but --

9 BGEN(R) SCHWENK: But I think it was  
10 interesting when we asked Dwight about the  
11 Manual, the pending Manual changes and did they  
12 address these issues. It was sort of like --  
13 which indicates it's not a burning issue, at  
14 least thus far in practice, because, if it were,  
15 on the JSC list of 111 million pending actions,  
16 fixing some definitions would be pretty high and  
17 --

18 COL(R) SCHENCK: Oh, I'd like to add  
19 to the Joint Service Committee and how it works.  
20 When I was a major, I was on the working group.  
21 So the Services each had a criminal lawyer as a  
22 voting member and as a minion, you know, doing

1 the work on the working group. And as part of  
2 the Code Committee, I always see the briefing  
3 from the Joint Service Committee, and I think  
4 their perspective, at least from the Joint  
5 Service Committee perspective, is all these  
6 panels are doing work on the Code, they're on the  
7 receiving end of the Response Systems Panel's  
8 suggested legislative change. It's now their job  
9 to figure it out and put it in an executive  
10 order.

11 And they, first of all, don't have a  
12 staff. They just have the one major and the  
13 colonel who votes because I specifically asked  
14 that question. So they don't have a staff. They  
15 don't have an office. They're all in their  
16 different Service office. They have a monthly  
17 meeting, and they're having all this work going  
18 on. So the Military Justice Review Group, which  
19 is in this building, provided their report, not  
20 on 120 apparently.

21 So they're just waiting and working  
22 and trying to get those executive orders through

1 the process. I'm glad I'm not on that working  
2 group anymore.

3 ACTING CHAIR HOLTZMAN: Well, do we  
4 have enough, does Staff have enough information  
5 for the next meeting?

6 LT COL HINES: Yes, ma'am.

7 ACTING CHAIR HOLTZMAN: Okay. So some  
8 of these issues probably will be ironed out by  
9 the next meeting. Thank you very much, everyone.

10 LT COL HINES: JPP meeting will start  
11 at 8:30 tomorrow morning.

12 ACTING CHAIR HOLTZMAN: Eight thirty?  
13 Okay. Well, thanks very much everyone. Have a  
14 nice evening.

15 (Whereupon, the above-referred to  
16 matter went off the record at 4:53 p.m.)  
17  
18  
19  
20  
21  
22

## A

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In the matter of: Judicial Proceedings Subcommittee

Before: DOHA

Date: 04-09-2015

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