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
MAY 7, 2015

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The Subcommittee met in the Thurgood Marshall United States Courthouse, Courtroom 506, 40 Centre Street, New York, New York, at 9:10 a.m., Hon. Barbara Jones, Chair, presiding.

PRESENT

Hon. Barbara Jones
Hon. Elizabeth Holtzman
Dean Michelle Anderson
Laurie Rose Kepros
COL(R) Lee Schinasi
Prof. Stephen Schulhofer
BG(R) James Schwenk
Jill Wine-Banks
Maj Gen (R) Margaret Woodward

WITNESSES

MAJ Aimee Bateman
Col(R) Don Christensen
LCDR Richard Federico
Col Mark Jamison
LCDR Stuart Kirkby
MAJ Frank Kostik
Maj Mary Ellen Payne
LTC Alex Pickands
LTCOL Julie Pitvorec
Maj Mark Rosenow
MAJ Thomas Smith
Zachary Spilman
Maj John Stephens
LTCOL Christopher Thielemann
CPT Jihan Walker
John Wilkinson
Col Terri Zimmermann

STAFF:
Lieutenant Colonel Kyle W. Green, U.S. Air Force - Staff Director
Lieutenant Colonel Glen Hines, U.S. Marine Corps - JPP Subcommittee Staff Attorney
William Sprance, Designated Federal Official

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

(9:10 a.m.)

MR. SPRANCE: Good morning. My name is Bill Sprance. I'm the Designated Federal Official, and this meeting of the Judicial Proceedings Panel Subcommittee is now open. I will turn the meeting over to the Chair, the Honorable Barbara Jones.

CHAIR JONES: Good morning, everybody. Welcome to this second meeting of the Subcommittee.

And we are skipping administrative work and comments from the chair, other than what I am saying now, and I would like to welcome Major Aimee Bateman.

We had a little conversation before we started this morning, and I am very much looking forward to getting this training perspective from you, Major. Go ahead.

MAJ BATEMAN: Yes, ma'am. Thank you. I am Aimee Bateman. I am an Associate Professor of Criminal Law at the Judge Advocate General's

School in the U.S. Army.

CHAIR JONES: Can you move that mic a little closer?

MAJ BATEMAN: Sure.

CHAIR JONES: Great.

MAJ BATEMAN: And as an Associate Professor, my portfolio is crimes and defenses, which for the better part of the last three years has mainly been monopolized by teaching Article 120 of the UCMJ. Not surprising since this is -- we generally -- you know, in the field of criminal law, quite often in the past when we would get changes -- this stuff changes at a glacial pace, okay, the law -- and it really has.

In a lot of respects, the punitive articles of the UCMJ have changed very, very little since 1950, and since the first MCM in 1951. This is one of those rare exceptions, so lots of turmoil, lots of change, three versions of a law that are still in some respects active and still on the books based on statute of limitations issues, in that there is an unlimited

statute of limitations. There is no limit for the crime of rape, in accordance with Article 43 of the UCMJ.

So it has been a very interesting --

CHAIR JONES: I am having a little trouble hearing you.

MAJ BATEMAN: Yes, ma'am.

CHAIR JONES: Can you just bring it closer?

MAJ BATEMAN: All right. Hopefully, that's better.

CHAIR JONES: That's much better.

MAJ BATEMAN: Okay. So as far as how I've gone about training, what I have prepared is kind of a condensed slide deck of training aids that I generally use with all of the audiences whom I train.

These audiences range from brand-new, newly commissioned, minted judge advocates who have been in the JAG Corps for approximately -- this is one of the very first classes of instruction they get. They have been in the Army

for about six weeks. They have been judge advocates for about six weeks, and they get to learn about sex crimes from me.

Also, in my audiences have been those who are going to the bench. I just got done teaching our 3rd Military Judge Corps' judge candidates from across all the Services. We are the only DoD school for accrediting our trial judges and appellate judges at the JAG School.

And also, to a lot of judge advocates who are not in any way, shape, or form going to practice, so they are not criminal law practitioners but they are staff judge advocates, they are leaders, they are managers, and teaching them and familiarizing them with the law, so that they can answer those questions that our very junior, inexperienced judge advocates -- because here is what happens here.

I'll teach a lieutenant -- again, they have been in the Army six weeks. I give them their hour of block instruction on Article 120. They go out to Fort Bragg, Fort Drum,

Grafenwoehr, and now they are the subject matter expert on Article 120 for anybody who crosses their path out in the field, which is a little -- it is a little scary.

So, but that has really shaped how I have trained people on this, to try to equip them with kind of a baseline understanding of the law, so that they may be able to practice in a courtroom properly, but also be conversant on the law, because this isn't just talked about within our judge advocate community.

As we all know, this is the topic of the day in command huddles, in -- you know, at the Chief of Staff of the Army level, and all the way down, preventing sexual assault is the number one priority of the Army. So it is absolutely -- it is talked about in all sorts of contexts and all sorts of forums outside the courtroom.

So what I start with when I teach people about the law is -- and we generally -- we focus on the current version of the law, because it is what for any crime that occurs now, after

28 June 2012, this is the law that we use to capture the criminality of the bad acts and to prosecute that case.

So the evolution of the law is that actually, in 2007 when the law changed, that is when the consolidation of all the sex crimes happened, the 2007 version of the law, the 14 sex crimes, subparagraphs (a) through (n), and sort of articulated from worst to least worse, right? But it jumped from rape, rape of a child, then back to aggravated sexual assault, aggravated sexual assault of a child, aggravated sexual contact, and so on.

What changed in 2012 is Article 120 discretely, what I have in the red box there, does not encompass all sex crimes anymore. So Article 120 actually is only four crimes, and I think it is an important distinction because people need to understand, if you have a child victim, you are going to a completely different article and a brand-new article.

And the same thing with other sort of

sexual misconduct. Where before, you know, right below contact we had, you know, the offense of indecent exposure. That is not the case anymore. They are not talked about within the same statutory construction. They have been completely separated out.

So I think overall it is actually -- it has been easier for me to teach in that regard, and I think that has been a good thing and a shift in the law, and to make those into different kind of discrete pockets of the law.

So the next slide I provided is, again, we are just sticking with Article 120, so -- and most of my classes when I train, I really do, I focus on the adult sex crimes, because that is where you end up seeing most of the cases come out of.

So there are four crimes, and the way that we have chosen to conceptualize this is kind of in a tiered level, right? Rape and sexual assault, those are the worst of the crimes. If you go to the next slide, you'll see they are

punished by -- most severely by life without the possibility of parole, the potential maximum punishment rate, 30 years for sexual assault, and then tiered under that are the contact crimes.

And the reason why I have them kind of stacked on top of each other is because if you look at the actual statutory construction of Article 120, there is only one set of definitions. The only definitions are for rape and sexual assault.

And then if you look -- and then further into the law, it references you back to if a contact occurs and it would have occurred in situations where it would have been a rape, if it would have been a penetration, then it's an aggravated sexual contact. So it's a circular construction. It references back to other definitions of the law, and so that's why I have tried to stack them that way.

And also, there is a very -- there is a discrete line between sexual act and contact. It is a bright-line. That is easy to teach. For

the most part, there are penetrative acts, and then we have the non-penetrative acts.

Now, as far as the line between sexual assault and rape, that is where it is a little more fuzzy, and that is where I don't have a bright-line break.

And the use of force -- now the word "force," I really should have that in quotes, because here is one of the other -- you saw in the last slide in I had "force/circumstances." There is not always present what we would traditionally think of as a manifestation of force or forcing somebody to do something, or something violent or harmful or painful, anything like that. Sometimes it is just a very severe, very bad circumstance that takes it into that other tier of criminality.

So when I say "force," sometimes that -- the force may actually be somebody not laying a hand on that victim in order to make this crime occur prior to the sexual act occurring, but putting saline in their drink. That is at the

extreme end of higher degree of force, as opposed to -- and that saline in the drink causing them to become unconscious and then perform a sexual act of contact on them, as opposed to someone who comes upon an unconscious victim and then performs a sexual act on them.

The act looks the same in the actual -- in the final execution of that crime, but the degree of circumstance or force that it took to get to that point is lower. That would take us back down into the realm of sexual assault.

The place where the line is really fuzzy is where we do -- and that is a bright line, right? So he either put it in the drink or the person became intoxicated on their own. The place where it is fuzzy is when we talk about force versus bodily harm.

This is where the discussions occur, and this is where people have difficulty in charging decisions, difficulty kind of understanding the law, and one of the drills -- especially with the younger officers I teach, to

get them thinking and talking about the law, we give them a set of facts where a victim was pushed and held down and a sexual act occurred, is it sexual assault or rape?

And that discussion goes as long as I let it go. I mean, we always have to cut it off because there are all sorts of ideas and thoughts. And we talk about things such as cultural cognition, we talk about, you know, why would you want to -- maybe you could charge it as rape, maybe you don't want to, maybe that's not a good word to kind of capture the conduct. Do you really want to describe this in a courtroom as a rape when the victim had no visible injuries at all?

You know, so there is a really robust -- no matter what audience that I present those facts to, it is a very interesting discussion, an emotional one, you know, from a lot of people's perspectives.

But that takes me to, you know, one of the -- I think kind of a peculiarity to our law

is the fact that we still use the word "rape." So if you look at -- you know, one of the things that I provided but I won't go over is, you know, the other -- the closely analogous crimes, at least as far as from what we understand when it was -- the most recent version of the law was constructed is really Title 18 in the D.C. Code.

The word "rape" does not appear there. The word "rape" does not appear in most state penal codes anymore. So I think that is an interesting -- and just something to think about. Right? If you are going to charge this as a rape, and you are going to stand up in the courtroom and say, you know, "Accused did, you know, by force rape this person," you know, what are you triggering in the minds of that fact-finder? Especially when we are talking about a lay panel that is making that decision.

So some of the more nuanced stuff that maybe I get to with some of the more advanced audiences is, yes, it is a bright line between sex act and contact when we talk about

penetration, but not quite, because the way that the law -- the definitions are. And so I think I will go to the next slide. We're going to talk about definitions.

Okay. So sexual acts, right, contact between the penis, vulva, and vulva or anus or mouth. Right? And the contact is then subsequently defined in that same paragraph as penetration of a site. Why does, when we are talking about a penis, we use the word "contact," then when we are talking about other things we just straight up use the word "penetration." I mean, what's -- why use two different terms?

So if the penis is involved, the penis could actually be that of the victim if we are talking about -- if we stick with the word "contact" there, it could just -- it could be an unconscious victim, and that unconscious victim's penis penetrating, let's say, the mouth of the perpetrator. That would be a sexual act. That would fit the definition of sexual act.

But when you go to penetration of

using something else besides the penis, right, where the word "penetration" is used, the phrase that I have left out of that slide that is contained in the statute is "penetration of the vulva, penis, or mouth of another."

So this causes -- this is the one discrete -- so this is the other thing about teaching Article 120, since I have no case law, I have no executive order, it gives me the opportunity to come up with some really crazy examples to try to bring this all to life. Right?

I mean, I try to draw examples from the field. I try to bring in real-life cases. But this example I am going to give you actually is a real-life case. So this is a situation where a victim was -- had their hand and fingers taken by a perpetrator, and the perpetrator forced the victim's fingers into his anus. Right? Penetration.

So in my, you know, really strict, you know, easy way of teaching this, that is a

penetration crime. So sexual act, sexual act, penetration of anus. There was an anus penetrated by fingers. Perfect.

Well, when this was pled at trial as a sexual act -- and, unfortunately, it failed to state an offense because the penetration was not of the anus of another. So that charge ended up being dismissed at trial, because it was pled incorrectly, because it was pled as the perpetrator's anus being penetrated by the body part of the victim.

So is that still captured in the law? Yes, it is, so that takes us down to the tier of sexual contact.

So if they would have pled it as sexual contact, the charge would have survived there. So, I mean, this is where I try to teach this as a very basic level and make some really, you know, easy, bright-line distinctions, but that is where I have to be careful, because there is -- there are outlier kind of situations where that doesn't always hold true.

So taking this down to sexual contact, then, we have two different types of contacts depending on what types of the body -- or what parts of the body are being touched. When you have a touching of what we would traditionally think of as erogenous zones of the body -- genitalia, anus, groin, breast, inner thigh, or buttocks -- there is a sexual nature just kind of implicit in that. Right?

So you can see there that the only intent that is listed there is with intent to abuse, humiliate, harass, or degrade, as an additional intent listed there. Whereas, if another part of the body is pled, it will also have to be pled and proved that that part of the body was touched with the intent to gratify the sexual desire of any person.

So an important distinction there, the intent there being, you know, there has to be a sexual intent if you are touching a non-sexual part of the body, if we are going to call this a sexual contact. But, so the expansiveness of

that, though, that -- any body part by any body part, right? So this means, then, somebody who rubs somebody's shoulder, so hands on shoulders. If they make any sort of indication it is with intent to gratify sexual desire, that is a sexual contact.

Similarly, going back up to the sexual act, we also have any body part or object doing the penetration. So this takes us to the expansiveness, right? I know -- I'm pretty sure you have heard this example before where the tongue penetrating the mouth, that's a sexual act. Object, a toothbrush being forcibly forced into the mouth of a person with the intent to humiliate them, sexual act. Right? So this is where you get some of the really kind of -- the breadth of the law comes to life on some of the edges there.

One of the other points of -- well, current points of contention I guess, when we talk about the sexual contact definition, so we have had exactly one case, one appellate case as

1 far as I'm tracking, in any of the Service
2 appellate courts, any of the criminal courts of
3 appeal, that has addressed the language of
4 Article 120. And that is U.S. v. Schloff, which
5 was an unreported case in the U.S. Army that was
6 argued at CAAF last week.
7 The issue there was the sexual contact
8 as pled was performed using a stethoscope. So
9 the physician assistant, the officer would do
10 breast exams that were not warranted using a
11 stethoscope on the breasts. Defense claim, they
12 argued -- and the trial judge agreed -- that,
13 well, I am reading this -- the strict
14 construction of the law there, and the language
15 talks about any body part by any body part.
16 Government appealed. The Army Court
17 of Criminal Appeals says that's absurd, that's
18 preposterous, that can't possibly meet the
19 intent. That's not the intent that Congress was
20 looking at here. And they did an analysis
21 incorporating some of the statutory construction
22 language of Article 120(a) talking about, what

exactly is a bodily harm? How is a bodily harm accomplished?

But the problem is when we -- if we look at the language of Article 120, we see with regards to the language of the definition of sexual act, both words -- we talk about body parts and objects. When we talk about sexual contact, "object" is not in here. It was excluded, and there is actually an additional sentence in the sexual contact language that -- well, it depends from whose perspective you are looking at. Either reemphasizes or is just that -- it may be accomplished by any part of the body when we are talking about a sexual contact, may be accomplished by any part of the body.

Defense says that that's exclusive, that's binding, that means that it cannot be, you know, accomplished by an object, and the government says, "No, that's just -- that's just explaining, you know, it could be any part of the body." And it could be other stuff, too, but it could also be any part of the body.

So that is the current -- as far as the appellate battle that is going on there. And, again, that is the only appellate case that we currently have that has done any sort of deconstruction of the language of Article 120.

So are there any questions as far as the definitions or anything in that regard?

Okay. So the next thing as far as the definitions go is looking at the definitions of the force and circumstances, right? Because -- so this is another point that I make when I train this. That slide about act and contact, that was only half the equation.

And I think this is a problem we have, especially when we have laypeople in the field teaching this, because we have a lot of non-lawyers talking about sex crimes in the Army right now. We have drill sergeants talking about it. We have commanders talking about it. We have people all the way down to, you know, very, very low levels conducting this training talking about if somebody touches you and they touch one

of those parts of your body, it's a crime. You've got to tell somebody.

And, no, it's clearly not because that is protected adult behavior. That happens all over the place every day in bedrooms and homes across America. Right?

So this is an important point that I really -- I pause on and I kind of let sit with them is this is only half the equation. Stop telling people that if anyone ever touches your butt it's a sex crime. That's not constructive here.

So we get to the force and circumstance. This kind of -- this line is over the same way, that as far as the aggravated sexual contact, the right side of that chart, these are the circumstances, the most severe circumstances on the farthest end of the spectrum that will put us in this realm. And it is articulated very clearly five different ways in the law -- one, two, three, four, five -- under Article 120(a).

And so unlawful force versus force, why do we have that articulated twice, one with a modifier, one with not? So unlawful force against that other person, right? So meaning that it's without legal justification or excuse.

When would force be okay? When would it not be without legal justification or excuse? Well, sometimes you have to forcibly touch somebody in a way to examine them or help them or do something like that. Sometimes people like to be touched in a forceful way when engaging in a sexual act or a sexual contact.

So that is distinguished from the second part where it talks about using force causing or likely to cause death or grievous bodily harm. No modifiers, whether lawful, unlawful. If it's force, and it could do one of those things to you, then that is a circumstance where if a sexual act follows it is rape.

As far as threats go, very discrete set of threats, only threats for death, grievous bodily harm, or kidnapping. The example I gave

earlier about rendering someone unconscious, actually hitting them over the head, administering some sort of drug that will make them unconscious in some sort of way, or that, again, going into number five there, administrating the intoxicant to not necessarily maybe make them unconscious but substantially impairing the ability of that other person to appraise the conduct.

So the lower set of circumstances that takes us into the -- kind of the yellow, less severe category of sex crimes, this is articulated in kind of two different sets. So we have under sexual -- so 120(b)(1), it is by a certain way. So all of the rape crimes, it is all a sexual act by any of those five things.

When we are talking about sexual assault, though, it can be by or when. So the first three that are articulated there, that is by doing something to that person. So if the sexual act occurs by threatening them, by causing them harm, or by making a fraudulent

representation, it's a sexual assault, or the abuse of sexual contact, or when one knows or reasonably should have known the person is asleep, unconscious, unaware, or when that person is incapable of consenting.

So this takes me into the next slides, and the next thing we are going to generally talk about is there are some issues with language. And, again, as we have gotten more and more time away from this law being enacted, and people going out and practicing with this law and seeing the struggles, far and away the most common question I receive from folks in the field who want my expert opinion on what this means is what the heck does "impairment" mean?

I want to craft an instruction. I want to be able to explain to the panel exactly what impairment is. I want the judge to say something to them to help them in this deliberative process.

And, you know, I said, well, I don't -- Congress didn't give us anything there. The

trial judges are not -- they have not put a standard instruction in the Benchbook with regards to that, and you are really left to kind of within the bounds of the evidentiary instructions just argue that -- use your common sense, use your ways of the world, ask the kind of -- the very generic instruction that is given from the evidentiary perspective, from the judges, and it is kind of what our advocates have been stuck with.

So with consent, the issue of consent, in general, you know, this is how we -- again, from a very simplistic point of view, how we started teaching this law when it came out in 2012 is consent has been written out of the law. It is not there. It is not an affirmative defense. There is a definition for it, but consent is not really there.

It is in these couple situations, right, where the -- administering of a drug without their consent, right, because you can hand somebody a drink and they know what they're

drinking, that's not without their consent.

And then the "incapable of consenting" language, right, so consent is still there, and so in those two situations it's still technically an element. But as we go on, the next couple of slides we'll see that it is -- it really never went away. It hasn't gone away. But the fact that Congress tried to make it go away, it actually brought it back in some very interesting forms, which I will try to explain as we go forward.

So the "known or reasonably should have known," so this is an interesting phrase, too, that has changed the -- kind of the calculus on how this is pled. First, I mean, what we would advise folks who are pleading this is plead the "should have known" standard. Why would you just stick with the known standard if you could open it up to what basically is a negligence standard?

So it eliminates any sort of -- not that voluntary intoxication has really ever been

a defense in most of these crimes, but it certainly isn't if it's a "reasonably should have known," a reasonable person standard, sober standard.

So we obviously advise folks who are considering how to plead this to plead it as known or reasonably should have known, and that is the bottom-line effect of that. This is basically a negligence standard when there is somebody in an impaired -- which, again, not really sure what that means, but in an impaired state. So that is the standard that is kind of imparted onto the accused in that regard.

So after, you know, laying out for you all of the definitions, we have all of the -- you know, the lack of definition in some regards, then it is kind of putting it back together with how the law -- so moving on to the statutory construction, it seems pretty easy. You know, when we first got this, I was like, oh, okay, this is very clean, it is very streamlined. We've got two elements, right? We have sex act,

bodily harm; sex act, force. No consent. Very easy, very clean.

Not so much, because there is -- the interesting way this law was put together is different than what we saw in kind of, again, the models for this, Title 18, and the D.C. Code. So if you look at the language, for instance, in 18 U.S.C. 2241, it talks about causes another to engage in a sexual act or causes another to engage.

And the same thing -- it's really similar in the D.C. Code, a little more verbose. It says, "engages in, or causes another person to engage in, or submit to." Our language is very short and sweet. It's the word "by." So sexual assault by administering an intoxicant, sexual assault by bodily harm.

But here is what -- kind of the issues that have evolved out of this, and this is how the trial judiciary has interpreted the statutory construction, and it has essentially added in a third element to all of these offenses, this

causal connection. All right?

So we have two elements. If we go to the next slide, we see it kind of articulated. It could be, for instance, we have -- this is a sexual -- this is a schematic of sexual assault. I mean, you have sexual assault, and then you have -- it could be accomplished by bodily harm.

So this is how the instructions practices now are developed in this regard. What the judges are saying is this is only a crime if that circumstance is the causal connection to that sexual act occurring. Therefore, if anything breaks that causal connection, the government has not proved their case.

So maybe the government proves -- so the government could actually prove both elements. They could prove bodily harm happened. They could prove a sexual act happened. But if evidence is presented that consent is the real reason, the direct causal link, the thing that immediately preceded the sexual act, then the government hasn't proven their case.

So this has resulted in some very interesting instructions practice, and confusing to the point where, again, like I -- I thought at this point, right, we are almost three years removed from the enactment of this law, we have had some case law, we have had a little bit of appellate law, we have had lots of testimony and discussion about it, so now, finally, this is getting easy to teach. Finally I've got something to work with.

When I taught this to our judge course candidates -- our students who came through for a judge course a couple weeks ago, I have never received so much kind of feedback, I'll call it, from my students as I did in trying to teach this. It is probably the fiftieth time I have taught it. It was the most difficult, because the way the instructors -- the whole -- we have gone from -- just sticking with sexual assault as an example, when the law was first enacted, the judge is given no executive order and no other explanatory language to go into court with.

So the judges immediately -- they drop to their trial instructions. It's about six pages long, and I think 10 explanatory notes. Keeping in mind now the law has not changed, it hasn't changed through executive order, it hasn't changed through case law, but the instructions have expanded now to 14 pages of instructions and 18 different evidentiary notes with no change in the law.

So what has changed? It has just been the way that -- when applying the facts of the law, and understanding that consent has never gone away, consent is always relevant, consent evidence, if presented, will always be instructed on, and then the different ways in which that might happen.

So there is -- for a very simple case where, you know, going back to the example, which we tend to go back to, because, again, it is -- the majority of the cases we just factually see present themselves is sexual act occurs and that person -- or there was some sort of bodily harm,

they were pushed, they were held down, not force, not a weapon used, there is not substantial injury or threat of death or grievous bodily harm, but there was bodily harm. There was offensive touching.

Three different instructions generally come up. One of them is the fact that, okay, bodily harm, how is that defined? It's defined as an offensive touching, however slight. That is consistent with the way that it is defined in other parts of our code. Therefore, if evidence is presented that that touching actually wasn't offensive in any way, the government fails to meet their burden of proof in proving that element of the offense.

So there is an instruction that specifically goes to consent evidence regarding failure of proof of the bodily harm. So that's one instruction. Then there is another instruction that talks about consent evidence regarding this causal connection.

So then another set of instructions

given about, well, you know, the defense has presented evidence of consent. Understand that in order for the government to prove their case, they have to prove that it's the bodily harm that caused the sexual act. You know, you must consider this evidence that consent was present, whether to determine the government has met that burden, which again is very awkward and confusing because it is not an element. Right?

And so this is where, you know, I think when we looked initially at the construction of the law we were like, well, we're not going to be -- there is not going to be instruction on consent anymore, because consent is not an element. When you look at RCM 916, when we move on to mistake of fact as a consent, right, that only -- mistake of fact defenses only go to elements of offenses. We certainly won't have that instruction anymore.

Well, now we are back to now the third set of instructions generally are given is a mistake of fact as a consent instruction, because

what the judges have said is essentially even if consent is not pled in there, it is still relevant, and it still potentially -- even from the mistake of facts construct, they will explain that whether consent was there or not, even if the accused had a mistake of fact as to whether their consent was present, that could still cause a failure of proof to -- again, not an element, but that causation between the two elements.

So but a very -- and, again, if we are having trouble explaining this to 50 very smart prescreened -- we want these people to sit on the bench and be trial judges and appellate judges, and they are having trouble kind of conceptualizing and capturing this and feel comfortable, so that was the one thing.

I mean, I think they understood where I was -- I don't think most of them had a warm fuzzy. Let's say they didn't really feel excited about -- like, "Oh, this is perfect. These instructions are great. I'm all set to go. I'm really excited to start hearing these cases."

So I think that's, you know, a little concerning, and then a challenging point to teach and train on.

So the next part of the law that is kind of interesting, as far as the construct where -- so the next slide about the other -- with force, it is all referred -- excuse me, for the crime of rape, it is all sexual and crime.

The crime of sexual assault, there is also this when -- these circumstances of when it might occur. So this is -- the question I always pose here to kind of -- to get students talking and thinking about the law is, in a situation like this, whereas the last situation, consent is always relevant, I'm like, you have six different instructions you can choose from.

Is consent relevant here at all? If the only elements are sexual act and the condition of the victim, maybe the government is not allowed to even talk about consent. Can they bring the victim in to say "I was unconscious when the sexual act occurred"? Yes, of course.

Can they bring the victim in to say that, if it's pled this way, and the day before that when the accused approached me and said, "Would you like to have sex with me?" I said, "No, I hate you. I will never have sex with you." Is that even relevant? I mean, that caused a -- the most recent time teaching this to a senior audience, a huge problem. Of course it's relevant. Well, show me to what, you know, element of the crime that is relevant to.

So I think it's interesting -- here is where this very simple construct of the law I think does kind of constrict a lot of things as far as how the presentation of the evidence might go and whether consent truly is relevant at all in this regard. So I think an interesting aspect.

This is, again, getting into the condition and capacity. I think people are -- from the government side, they are very hesitant to charge it this way because of the issues of the lack of any sort of definitions regarding

impairment and capability of consent.

And this is where I have seen trouble, too, again, folks going out and trying to, you know, do the right thing and train on this and have conversations about this. How do you just -- how do you explain this? Because part of this is prevention. All right. So this is the overall -- again, the priority for the Chief of Staff of the Army and the Secretary of the Army is prevent sexual assault, not prosecute it properly. Right? I mean, we want to prevent it on the front end. So the conversations are toward that end of this.

So when can I have sex with someone then, or when can I approach somebody else to have sex and not be charged with a crime for it? So how do we explain that? And this is where I have heard people say everything from, well, you know, could you buy a car, or were you with him enough to get a tattoo, or, you know, even to the extent of the way they like to teach it in the field, the way commanders like to teach it, if

you have one drink, you can't do anything, don't touch anybody. Right? That's clearly not a legal definition in any sense.

Even lawyers, though, I have heard teach this as if you're too drunk to drive, you are too drunk to consent. You know, that in no way is -- we are not imparting any sort of definitions from -- in that. So I think it is very difficult to come up with any sort of legal definition as to what it means to consent or what it means to have capacity. And I don't think it would be correct to do so, to put something like that in this law.

And that is certainly -- honestly, when I have been teaching, I have not been offering any sort of definition. I started -- I have had those conversations, because I don't want them to go out there and create their own definitions, but I make it very clear there is not a legal definition and you should not purport to know what that is or share that with others in a legal sense.

So the last issue I want to address as far as the statutory construction of the language that is used is what are the other -- to go into the next slide about bodily harm is this is an interesting definition, right?

It has the definition that we see in Article 128 about offensive touching of another. But then Congress went on to add "including any nonconsensual sexual act or nonconsensual sexual contact." So this is where -- this is the third point in the law where actually the element of consent could come back in.

So if it is pled -- if the bodily harm is pled as something else, then it is something else. It is not that consensual. It is not the sexual act or contact as in the first example. Right? So if that's the case, the government would have to prove beyond a reasonable doubt that the victim was pushed down, held down, the bodily harm, and that the sexual act occurred. Right? So those are the two elements.

However, the law allows, and someone

might plead, no other bodily harm other than the sexual act, because the way I explained it is, what is more offensive? Is there a more offensive touching that you could possibly come up with if you didn't want somebody's penis penetrating your vulva or anus or mouth? Right? It is, on its face, offensive.

So there is no -- I agree there is no need to plead anything else. But the problem being, it isn't only offensive, it's nonconsensual. So that is where we get the third element of where consent actually comes back into this.

As far as teaching folks on how to plead this, or maybe what is the right way, the easier way, the more fair, just way to plead it, we generally in the past -- you know, this is how we could plead it in our mockup cases at trials, the first way. Right? Plead something else. Why would you want to focus -- again, you are bringing the focus back on consent, about what happened surrounding that sexual act and not the

harm or how we got to the sexual act in general.

So we have had a recent shift, though, of kind of how we have thought about this because of the recent changes to MRE 404 with regards -- 404(a) with regards to good military character and evidence of that. So what Congress has told us there is it will not be allowed anymore for sexual assault. Not a surprise to anybody that that is kind of the evolution of this.

However, Article 128 has not been excluded as a crime that -- where good military character evidence could potentially be presented.

So the second pleading there, number two, is assault consummated by a battery in Article 128, is that a lesser-included offense? Probably not, because there is only one way to commit that. It only involves the sexual act.

If it were pled the first way, though, I think very clearly stated there is lesser-included offense there of assault consummated by a battery. So I would suggest that most likely

if the government chooses the first pleading, which, again, we have been suggesting like this is probably the right, the fair, the just way to do it, that I believe opens the door to the defense probably still being able to have some sort of presentation regarding good military character because it is still relevant and still potentially relevant, not always. It is at least not excluded for crimes charged under Article 128. And I think that, in the pleading, potentially contains --

HON. HOLTZMAN: Excuse me. Did you just say 128 or 120(a)?

MAJ BATEMAN: 128, ma'am, yes, for assault consummated by a battery. I think that is the lesser-included offense that is articulated in the very first pleading.

So the last things that -- I generally always teach it, even when I am, you know, constricting or just making my teaching very narrow to the crime of Article 120, and adult sex crimes, I almost always talk about Article 125.

So the last couple of slides that I have included for you are regarding Article 125. And there's two general issues that I like to at least point out to the students.

One, there is a redundancy in the law in that a sexual act that occurs when the penetration is of the mouth or anus also fits the definition of unnatural carnal copulation. So penetration of the anus or mouth may potentially be charged under two different articles of the UCMJ.

So why do we still have Article 125? The most -- I guess the simple explanation, as far as why it was routine back in 2012, is because of the bestiality issue. So this is the most recent form of the law as it -- so it was changed in 2014 to get rid of non-forcible sodomy, and it was then changed again in 2015 to add the word "unlawful" for force. So this is the current version of Article 125.

So, 2012, the definition of "sexual act" was expanded because before, even up to

2007, you could not have a male victim of a sexual assault. They could only be the victim of a forcible sodomy. So there is redundancy, and my humble opinion is it should go away. I mean, I am not sure why, but the fact that Congress has had an opportunity and they have not only not repealed it, they have actually repealed parts of it, and then they have added parts of it, so they have taken all sorts of action on Article 125, but they haven't eliminated it, which I think is confusing and, getting on to the next slide, is patently unfair and unjust, because here is the loophole that exists as well.

So I put a red box around that because that's it. That is the black letter law. That is the complete law of sodomy, forcible sodomy now, under Article 125. And, of course, now there is a 125(b) that parses out bestiality as a separate offense.

But Article 120B -- so, again, in 2012, child crimes were moved to Article 120B, and part of that black letter law -- I mean, this

is from Congress, in subparagraph (d) of 120B, it explicitly talks about a defense. Defense regarding the age of the victim.

So if the accused had a reasonable belief that the child had attained the age of 16, it is a defense. Again, look inside that red block. It does not appear in 125. Is it implicit? Should it be there? Can we just assume that it's part of it at this point in the way that the law has progressed and changed over the years? Our appellate courts say no.

Again, going back to what I just said about Congress has changed this law, they have amended it, they have reamended it. They have put their hands on Article 125 several times over the last few years, so when this issue went to CAAF in 2008, they said, "Listen, defense mistake of fact as to the age of the child is not a defense under 125."

And then when this same issue went to the Army Criminal Court of Appeals last year, they said, "Wilson still stands."

And so the facts of Hernandez were -- two different crimes were charged because two different types of acts were performed on the child, who I believe was 15 years old at the time. There was penetration of the vulva, and then I believe penetration of the mouth. Acquitted on the charge under Article 120 ---- or 120B precisely because of this defense that is in the law.

The judge at the trial court decided to dismiss the Article 125 pleading, but gave -- was very explicit in his findings at the trial. He said, "Government, you should probably want to appeal this because" -- you know, "it's not -- the defense is not in there, but just kind of on the principles of justice and fairness, I am dismissing this."

They appealed it. It went up to ACCA, and ACCA said, you know, you -- this is still not a defense. It is not a defense. It went back down to the trial court and the government decided not to proceed, which probably -- so

eventually justice and fairness caught up with the process.

But as it stands right now, a person who absolutely had a reasonable belief ---- they meet a person in a bar, they see the person order drinks, that person drives them home, they have some sort of unnatural carnal copulation or sexual act with that person, and then later they find out that person is 15, strict liability, absolutely no defense available.

So again, not really -- again, we're looking at 120, but I think it's important to give some context. If we are going to talk about what we, you know, like to say is this is the complete manifestation of sex crimes under the UCMJ is Article 120. Well, no, it's not really. There is other places where it appears, and it's important to understand the interplay.

So with that, if there is any questions with regards to any of that, or anything else, I am happy to answer.

CHAIR JONES: I guess the big question

for us is -- and thank you very much. That's very helpful. This is complicated, and you have a terrific way of making things easier to understand.

So what would be your suggestions with respect to Article 120? That is the question that everyone that comes before this panel should expect to be asked, because we are looking for help, especially from people who have to use the statute.

MAJ BATEMAN: Yes, ma'am. I think with regards to the definition for sexual act -- again, this is where I think the law would be better served to reflect the way that is defined in -- for instance, in Title 18 in the D.C. Code, to where -- with regards to the penetration of the mouth, right?

Those examples I gave -- I think there's a very easy way to get rid of kind of the absurd examples of a French kiss could be a sexual act, or the penetration of the mouth using a toothbrush could be a sexual act.

If you look at the definition of "sexual act" under Title 18 of the D.C. Code, it's contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus. And it's the same way in both 18 and D.C. Code 3001.

So I think it's a very -- very small change. It would not dramatically affect the practice in any way, but just bring a little balance back to that.

And then, with regards to the definition of sexual contact, that needs to be cleaned up to avoid the situation that we have seen play out in the case of U.S. v. First Lieutenant Schloff. You know, what is the intent of explicitly reiterating a couple of times in the definition of sexual contact, "with any body part by any body part," and excluding the word "object." So --

CHAIR JONES: So that is an issue that has been before us a couple of times, and I guess the simple fix ---- if it makes sense to try to

do fixes, would just be to add the words "or object." Is that what you are talking about or suggesting?

MAJ BATEMAN: I think so, ma'am. I think ---- to make it clear so that we're not searching to Article 128, because it is very different.

And I think the example that was given in the oral arguments before CAAF on this issue was the example of, you know, throwing a dodgeball at someone's genitals. Totally for the intent to abuse, humiliate, degrade, right? So making it clear that also not just for the object but an object maybe as an extension of the body, like actually used -- so, I mean, it makes it tough to not make it too overbroad, but maybe making it very clear in some way to impart the -- it has to be some sort of sexual intent as well, if an object is being used.

I would suggest possibly not being -- the intent maybe being limited to it would have to be in that -- if an object is being used, it

absolutely has to be with the intent to gratify the sexual desires of a person, of any person, and eliminating that intent to abuse, humiliate, degrade, if it's -- if there is an object present.

CHAIR JONES: Any other suggestions? Do you think there should be a definition of "incapacity"? There is a handy one I am looking at, but --

MAJ BATEMAN: That's --

CHAIR JONES: Can we do without it, I guess? That's what you're trying to figure out.

MAJ BATEMAN: Yes. I mean, that is the -- there should be something to explain potentially -- this is the tough part.

I mean, we talk about this because when we talk about how we -- how do you present evidence on this? Like what -- will you present evidence of external fact witnesses of, what did that person look like? How did they present? I think it is very hard though to capture that in a very clean, discrete, universally applicable way,

because that can -- there are so many different facts that -- there are so many different ways in which that looks.

Do we start adding language about, you know, vomiting and falling down and urinating? These are the types of -- this is what the evidence looks like that --

CHAIR JONES: Let me just suggest this to you, and tell me what you think while we are throwing out previous suggestions here.

"The term 'incapable of consenting' means unable to appraise the nature of the sexual conduct at issue, physically decline participation in the sexual conduct at issue, or physically communicate unwillingness to engage."

I mean, if you are sitting there just listening to this verbally, I'm not sure that I would grasp it. But that's one suggestion. And, I mean, things like vomiting, urinating, I mean, those are the kinds of things that I would think a judge might say you can consider those when you are trying to consider "incapable of consenting,"

but in the actual charge to the jury -- the black letter law, do you think that helps, or it doesn't do it?

MAJ BATEMAN: I think it -- this is where I think we are lacking. The judges are very hesitant to give any evidentiary instruction, and that's where I think it is really appropriate, is if there is some sort of --- they really should feel comfortable to -- just as they are drawing attention to consent evidence.

There are multiple options and different types of instructions offered to the judges to highlight evidence of consent, to say you heard evidence that this, you know, one, two, three, are the ways the victim consented. Yet I think there is a little bit of a parity that -- the fact that they're not offering examples of how that person may or may not have been incapacitated.

And so I think -- I mean, the evolution of the law -- to go back to that

definition, it brings back in some of the issues of the manifestation of nonconsent, which I think is -- you know, it backslides from at least the way the construct of the law has been moving.

So, I think that -- I understand the definition, and I -- and that's how I was used to it when I was practicing. It was under the old version of the law, and that's what I was used to hearing and communicating and explaining to a panel.

CHAIR JONES: Well, maybe juries can figure it out for themselves what, "incapable of consenting is," without us trying to draft something that is too suggestive of, you know, the whole issue with bringing consent in. I don't know. I don't know the answer to that.

MAJ BATEMAN: I think that -- I think, honestly, the best way to handle it is through executive order and through discussion of the law. I don't know if it necessarily is appropriate for a codified change to the law.

I think that it should be addressed

through the executive order, it should be addressed through the discussion, and it should be addressed through evidentiary instructions. Drawing attention to certain types of evidence which might help the fact-finder to make a determination on that issue of capacity.

CHAIR JONES: What would an executive order -- how would that work? What would that say? Executive orders are for what? I really need to understand this. I know they're for evidentiary issues and procedural issues, right?

MAJ BATEMAN: Yes, ma'am. I mean, and sometimes -- in an executive order, there will be a discussion that will help kind of draw some discrete limits. It is -- it is persuasive to the courts. It is not binding on the courts.

I think that is -- the reason why I think it would be -- what I think it would help accomplish is letting the trial judiciary know through that persuasive, you know, force of -- not law, but policy. It is okay to instruct on this, it is okay to broaden their instructions,

like this stuff is -- it is relevant. It's important for the fact-finder to understand and know, and I -- so I think that is why the -- I think there is ample room to handle this at the trial level through the evidentiary instruction. I'm not sure why the judges are hesitant to do so.

So I think that's why, from a -- because it is from a policy perspective. I think that's where the EO would help shape the policy on this and just --

CHAIR JONES: so that could be a green light or an encouragement for the judges to do this. Is there a problem with them, in your review, because there isn't a definition with -- are they hesitant to -- I guess they must be hesitant to instruct. I would be --

MAJ BATEMAN: Right.

CHAIR JONES: -- would have been.

MAJ BATEMAN: From what I understand, ma'am, yes. From what the trial advocates who are talking about this say is they are lucky if

they just can get something from the judge to say use your common knowledge in ways of the world and determine whether they were impaired. And that's the extent of it, that's the limit of it, and that's all that they get.

CHAIR JONES: All right. Well, I don't want to take all of the time. I think I already have, but we are going to keep you anyway.

MAJ BATEMAN: Okay.

CHAIR JONES: Are there other questions? Comments? Michelle?

DEAN ANDERSON: Let's see if this is on. Is this on? Great. Sorry.

Extremely helpful, Major. Thank you so much for your time and insight and for the work you are trying to do in the field, which is just crucial right now, and darn near impossible as well. So thank you for your hard work.

I want to understand the two suggestions you have already made, and I don't. I am looking at the definition of sexual act, and

you said that there might be an easy fix to change "penetration of the mouth," and you gave the toothbrush example or the forcible kissing where there is penetration by a tongue.

What is the easy fix in the statute you are suggesting?

MAJ BATEMAN: Yes, ma'am. It is to mirror the language that is in -- so I think in the other kind of handout I provided, it is on the fourth page of the chart that kind of lays out the different definitions from the different versions of Article 120, and also Title 18 in the D.C. Code.

If you look at the definition of sexual act, in those other laws, in Title 18 of the D.C. Code, it is defined as contact --

DEAN ANDERSON: So can you slow down one second --

MAJ BATEMAN: Yes, ma'am.

DEAN ANDERSON: -- and I just found the chart.

MAJ BATEMAN: Yes, ma'am.

DEAN ANDERSON: And now you're on page 4.

MAJ BATEMAN: The fourth page.

DEAN ANDERSON: And you're comparing what to what?

MAJ BATEMAN: So if you look at -- the current version of Article 120 is on the far right.

DEAN ANDERSON: Right.

MAJ BATEMAN: So those are the definitions, and you see this -- you know, at the bottom of that chart there, in the bottom right corner, "Penetration, however slight, of the vulva, anus, and mouth, by any body part, by any object," that is what would include the tongue in the mouth or an object in the mouth.

DEAN ANDERSON: Provided it's forcible.

MAJ BATEMAN: Yes. It's like holding somebody down and like forcibly brushing their teeth because you want to embarrass them because their breath stinks. That would be an example

that I think meets the legal definition of a sexual act.

DEAN ANDERSON: Right.

MAJ BATEMAN: If you look at the far left of the chart, you will see the definitions for 18 U.S.C. 2241 and D.C. Code 3001. Here it is limited to mouth and penis, mouth and vulva, and mouth and anus, or penetration by the hand or finger.

DEAN ANDERSON: Or another -- or by any object. Does that language create the loophole that is in --

MAJ BATEMAN: That, ma'am, is for -- but just for anus and vulva.

DEAN ANDERSON: Yes.

MAJ BATEMAN: So that's where it would get rid of the mouth examples.

DEAN ANDERSON: Okay. Super helpful. The next suggestion you make is under sexual contact, and I think you were suggesting a requirement of sexual intent rather than the "with intent to abuse, humiliate, or harass." Am

I understanding that correctly?

MAJ BATEMAN: Ma'am, if we were to expand the definition to include touching by an object.

DEAN ANDERSON: So this is just about the lascivious doctor who uses a stethoscope inappropriately.

MAJ BATEMAN: Yes, ma'am.

DEAN ANDERSON: Okay, and you are making a recommendation that that should or should not count as sexual contact?

MAJ BATEMAN: If there is the sexual intent, yes. But right now as the way the law is written, I don't agree that it does.

DEAN ANDERSON: You don't agree that the law covers the doctor.

MAJ BATEMAN: Yes, ma'am. Because of the emphasis of "may be accomplished by any body" -- "with any body part or by any body part."

DEAN ANDERSON: Okay. So it's a limitation to a body part touching that is part of the problem.

MAJ BATEMAN: Yes, ma'am.

DEAN ANDERSON: Right. So --

MAJ BATEMAN: And the lack of the word "object." So -- and the fact that the word "object" actually does not appear in that definition.

DEAN ANDERSON: Right. And you believe the forcible dodgeball at the genitals problem, which, you know, has got to be part of some harassment somewhere --

CHAIR JONES: Serious harassment.

DEAN ANDERSON: Right. Right. And a lot of sexual assaults happen as part of hazing.

MAJ BATEMAN: Yes, ma'am.

DEAN ANDERSON: So you believe that that would not be covered under sexual contact and should be covered.

MAJ BATEMAN: I believe that it shouldn't -- I don't believe it is covered now, and I don't believe it should be because we do have -- we have hazing crimes. We do have assault consummated by a battery, and we have

other crimes that criminalize that. It's not that it's not criminal at all.

DEAN ANDERSON: Yes.

MAJ BATEMAN: It's just that it's -- there's a discussion and a dispute as to whether or not it is in Article 120, and it needs to be cleaned up in some regard.

And I think there's policy discussion -- you know, there's policy arguments on either side of that as to whether or not it should be -- some people I think would say, yes, if the genitals are touched in any way with any object by any means, that person should have to answer to the law under Article 120.

DEAN ANDERSON: But you're not saying that. You're saying that --

MAJ BATEMAN: I'm not, no.

DEAN ANDERSON: -- there are arguments on both sides. So you're not making a recommendation on sexual contact. You are simply raising the fact that this is at issue.

MAJ BATEMAN: It is at issue, ma'am.

And if I were to rewrite the law today, I would say to -- I think it's appropriate to include an object because, I mean, I -- again, with the time I have to come up with examples, I have come up with some very disgusting examples about -- and, actually, ACCA used some of these examples too. Talking about, what about the use of like a dildo? Something that is clearly -- it is designed and marketed and --

DEAN ANDERSON: Oh, yes.

MAJ BATEMAN: -- used for sexual reasons. So yes, objects -- I mean, I absolutely think there is a place for criminalizing the use of an object to touch a person's body with the intent to sexually gratify. I think it is too broad to just say that if objects touch sexual parts, you are looking at a sex crime.

DEAN ANDERSON: Okay. I think I'm good.

CHAIR JONES: Did I have someone else down here? I can't see with the way this is set up. Any other questions or comments?

MS. KEPROS: I have something.

CHAIR JONES: Yes, Ms. Kepros.

MS. KEPROS: Thank you.

CHAIR JONES: Are you going to launch your theory for us? I'd like to hear it.

MS. KEPROS: Do you want me to?

CHAIR JONES: Certainly.

MS. KEPROS: I do have a theory to throw out to you, Major, but I'm going to start by asking you a few questions first.

MAJ BATEMAN: Yes, ma'am.

MS. KEPROS: And I do want to thank you for your extremely -- you did a wonderful job explaining something complex in a way that even I could understand. So thank you for that.

The only thing I just am having the hardest time wrapping my mind around is the version of rape that is committed by unlawful force, because what I don't understand is when that would not apply to a penetrative sexual act. Like I can't -- I mean, I agree with you. Yes, if it's consensual, there is nothing unlawful

about it.

MAJ BATEMAN: Yes, ma'am.

MS. KEPROS: But why isn't that chargeable along with every other version of rape in every case?

MAJ BATEMAN: So this is an interesting evolution of the law too, where -- so prior to 2007, the force element was essentially eviscerated. It essentially disappeared because -- and it went to just solely a focus on consent because, well, force can be the penetration if they are unconscious. Force can be the use of rank. Force can be -- so, really, force ended up meaning nothing.

So I think the -- in the way that this current version of the law was constructed Congress said, "This is going to be about -- we are making this about force again." We have taken the word "consent" out, we have put the word "force" back in, and we have made it, you know, a discrete way in which the crime can occur, but we are also going to talk about fraud

and inducement and threats and everything.

So they have -- you know, kind of what we learned I guess from the evolution of the law from 1951 to 2007 was sometimes force is not the right way to explain and conceptualize the bad act that occurred.

So I don't know if that addresses what you are getting at, but I mean, sometimes -- so, yes, if we were for instance -- talking like the pre-2007, if somebody is unconscious, the force, I suppose under the previous construct of the law, is the penetration of the vulva.

But we have kind of -- we have retrograded a little where we don't -- that's not how we think about the law anymore. That is not how we define "force" anymore. It does have a very discrete definition as opposed to just all these different manifestations of force that kind of develops over case law over 50 years.

So I think that's why it has been -- it is not always present in the pleading and not always present -- and the example I gave about

like the "when" cases. Like when somebody is unconscious, the way the law is constructed now, I don't know if it's even relevant evidence to talk about force and lack of consent when all you have is the stated elements are, did a sexual act occur? And what was the condition of the victim at the time that it occurred on them?

MS. KEPROS: Is it the case that under the current statute, the practice is to require some additional force beyond the sexual act? And even if that isn't practiced, is there a new law that says that is required?

MAJ BATEMAN: I think the way that the law is written now, yes, ma'am. It is a sexual act by some means.

So if the sexual act is, you know, one discrete element, unless we are talking about the bodily harm scenario where that definition includes -- explicitly includes that the sexual act, right? The nonconsensual sexual act, but even in that situation it is not saying that the sexual act is any sort of force. It is saying it

is an offensive touching. So even there it is kind of gone.

So ---- one other thing I didn't mention as far as kind of the peculiar construction of the law, and then how the judges have been dealing with it, is, you know, talking about unlawful force. So it seems clear, the way that the law was written, certain types of force can be consented to. Right? If you want to be pushed, if you want to be held down, that's fine. It is only criminal if it's unlawful.

But the second part of that is force likely to cause death or grievous bodily harm. The way that is written, it implies that consent is not relevant. We are not going to allow as kind of a -- you know, a social decision written into the law that one cannot consent to death or grievous bodily harm.

And it goes -- and Congress went so far as to articulate that later in the law when talking about the definition of consent. Which is quite lengthy in the current version of the

law, but they say, a person cannot consent while under threat or fear or under the circumstances described in subparagraph C or D of subsection (b)(1). So referencing back to the sexual crime of sexual assault.

However, what the judges are instructing on is not that because what they are saying is that's great that later in the law Congress said, you can't consent to, you know, force likely to cause death or grievous bodily harm, but in the construct of the law what they have said, though, is the sexual act must occur by those means.

So if someone consents to having a loaded gun held to their head during the commission of a sexual act, the judges will instruct that that causal connection, notwithstanding language in the law that talks about you can't consent to, you know, force likely to cause death or grievous bodily harm, because of the way that the construct -- the "by," which, again, is different from the other

version -- types of -- or the other laws out there that talk about "cause a person to engage in." They are instructing that even in those situations a person can consent, and it's the consent that causes the sexual act, not the manifestation of force likely to cause death or grievous bodily harm.

So that's another kind of peculiarity brought about by the way that the law is constructed between the sexual act element and the force or circumstance element.

MS. KEPROS: And I really appreciated in your slide where you sort of pulled that out as this concept of causation.

MAJ BATEMAN: Yes, ma'am.

MS. KEPROS: And what we sometimes call a proximate cause, right?

Here is the concern I have about that ---- and tell me if my concern is paranoia. I'm a civilian. I don't know what happens in real military judicial proceedings.

My concern is that by relying on the

judiciary and the lawyers to instruct on things that are not written in the statute, the accused does not get any notice, and then the unsophisticated bench or lawyers are going to miss the availability of defenses. They are not going to read these elements into the crimes, and there is going to be a problem of overbreadth, but also notice under the due process clause.

Do you have any -- am I crazy, or is that a real concern?

MAJ BATEMAN: Can you give me an example, ma'am? Like notice with regards to lack of a defense available, or --

MS. KEPROS: Yes. For example, you just explained that, in conflict with the statute, you have judges who are allowing consent as a defense to grievous bodily harm.

For example, erotic asphyxiation, that has a risk of causing death. It is something people in their sexual practices sometimes consent to. So if you have a trial where that non-existent element did not become part of the

instructions to the members, that accused is at risk of conviction, whereas someone who got the instruction would not be. Is that true?

MAJ BATEMAN: Okay. I understand now. That's one of the points I guess in the report that I was reading that I disagreed with.

It was stated -- which I think this is what you're getting at, that there is -- I don't know, maybe I -- so there was a point where it talks about where there was unnecessary protections of the accused with regards to proving an extra mens rea element, which, no, I don't agree with there necessarily. I think it is actually -- I don't think that has been written into the law in that regard.

Okay. So back to your point. I apologize. I thought there was something that -- on that point in the initial report, but think I'm mistaken.

Okay. The practice that I have seen -- the way -- if this question would have been posed three years ago, given the initial

instruction set that the judges were using, I think that would have been a concern because there were very few instructions regarding -- evidentiary instructions regarding how consent evidence is used, when it may be used, when it is relevant.

Now there are I believe six or seven different instructions for the judges to choose from, and the notes to those instructions say that you should give these instructions in every situation where any such evidence is raised. And it is at that -- they make it very clear, just as our case law says, and just as RCM 916 and 921 -- and 920 says as far as how to give instructions, if some evidence is raised, it will be instructed on.

And I think they -- they really are -- the instructions are very robust in that regard. So in practice, I don't believe that's a concern, no.

MS. KEPROS: I have a kind of follow up.

HON. HOLTZMAN: Can I just -- I'm sorry. Do you mind if I just follow that up?

MS. KEPROS: No.

HON. HOLTZMAN: I think what she is saying -- and maybe this is -- maybe it's just my ignorance here. What she is saying is, yes. As you mentioned, judges are instructed in the instruction books, if evidence is raised on a certain point on consent to charge on consent, even though it may not be in the statute.

As I take her point, an unsophisticated defense counsel may not understand that you can raise that evidence in the trial to begin with. And, therefore, you would not be getting the instructions because it's not clear from the statute. And so that is her concern. Am I correct? That's her concern. Would you just --

MAJ BATEMAN: Yes, ma'am.

HON. HOLTZMAN: -- address that, please?

MAJ BATEMAN: I think it's -- I'll

give a bottom-line recommendation on this. You know, my opinion, not of anyone else, the School, the Army, DoD. I think it is appropriate to have an affirmative defense as to consent in the law.

And I think that has been borne out by the fact that we have so many complex, overlapping, confusing instructions that the judges -- again, there are various opinions on when they apply. If it is an affirmative defense in the law, absolutely, then the accused is on notice.

We can more clearly tailor the instruction set, and I think it will cause some of these very lengthy, confusing, and in some cases redundant -- because sometimes for the accused it's actually worse to have more instructions. You've got a panel listening to -- and most times they are given in written form, but reading seven pages.

Literally, if all of those three instructions that I kind of walked through and some of the facts that apply, it is almost seven

pages of instructions to the fact-finder about how the evidence was presented, how it might be used, what element it might go to disprove, as opposed to if we have an affirmative defense as to consent written into law.

MS. KEPROS: Is it the case that most of who you are teaching are early in their legal careers?

MAJ BATEMAN: Yes, ma'am.

MS. KEPROS: So they maybe also haven't had other experience navigating these kind of complicated statutory schemes?

MAJ BATEMAN: Yes. But what -- it is kind of -- it is split between -- probably about half the practitioners I have taught are in very early stages of their career. And about a third to half are mid-grade officers who have come out of practicing with version one, two, and maybe even three of the law. And so it is kind of split between those two cohorts.

MS. KEPROS: To me, that is another reason to really look at simplifying things.

MAJ BATEMAN: Yes, ma'am.

MS. KEPROS: Thank you for that information. So here is my proposal, and I just want to shop it with you to see if it makes any sense at all.

I have struggled ---- you can probably tell from my question, with the relationship of consent and force in this scheme. And I'm wondering if maybe a more readily understandable model might be based on the notion of consent.

And rather than try not to have consent in the statute say, "The baseline crime is a nonconsensual sexual touching." Then -- and that could also encapsulate a person who is incapable of consenting for, you know, impairment of whatever kind.

And then for things like some act of violence, maybe that would create an enhanced crime. Or for a more penetrative sexual act, that might create an enhanced crime, but really using consent as the baseline. You know, and then if there is multiple perpetrators in the

situation, that might enhance the penalty.

But again, actually instead of avoiding consent, embrace consent as the issue that really defines this crime. Do you have any thoughts about that or whether that makes sense?

MAJ BATEMAN: Yes, ma'am. So I think this is where I have -- my perspective on this has absolutely evolved as the understanding of the law has evolved.

Because when we first started teaching this, in discussing it ---- we did a lot of ---- with our mid-level practitioners, right? And they can read the law and they can understand it because they have been prosecuting these crimes for 10, 12 years some of them, throughout their career.

So we talked about legislative construction and the paradigm shift of offender-focused prosecutions, and isn't this great. You know, consent is gone, so now it's -- you get to talk about the accused and only the accused and not -- that's not the case at all. I mean,

that's what we have ended up discovering over the last three years is consent is always relevant, it's always instructed on, and it always comes up.

So that being the case -- if you would have asked me that question three years ago, I would say, no, that would be a huge kind of regression in the law to go back to this very victim-focused -- but now that we have actually seen it play out, we're there.

We're already there. It is already focused on that issue, and I think it would make it cleaner to just affirmatively bring it back in the law explicitly. So I think that is, fundamentally, why I do agree with your proposal.

MS. KEPROS: Thank you so much.

MAJ BATEMAN: Yes, ma'am.

CHAIR JONES: Any other comments? Ms. Holtzman?

HON. HOLTZMAN: Thank you very much. I want to join my colleagues in expressing my deep appreciation for your candor, your

expertise, and your willingness to share your experience with us. And very knowledgeable and we really appreciate that because we have been struggling with the statute. At least I have been struggling with the statute.

And I guess my big questions are, how much of this -- how much -- let me start. This is one of the worst statutes I have read in terms of drafting. And, you know, there is this paradigm about if you put all the monkeys on a typewriter then you'll get Shakespeare. Well, we didn't get Shakespeare here. Far from it, okay? We got monkeys typing on a typewriter.

And so we have complicated issues, some smaller issues and some bigger issues. I mean, the whole -- the fact that this statute tried to take consent out of the picture, and now consent has come back in, has created a kind of a pretzel approach. Everybody is twisting things around to kind of figure out how to get the language of the statute and the concept of consent in and how we do that.

I guess my -- I have just an overall question, which is ---- I take it some of these fixes can be done with small steps, small language changes that you pointed out.

MAJ BATEMAN: Yes, ma'am.

HON. HOLTZMAN: But some of the bigger issues, like dealing with consent, you can't just make an itty-bitty statutory change. Is that correct?

MAJ BATEMAN: Yes, ma'am.

HON. HOLTZMAN: Okay. And the second -- I just want to raise some other language issues with you, which is -- and Professor Schulhofer raised this, and I agree with that, and I just want to ask you about it.

The bodily harm point -- I think one of the documents we got today points that out, too -- that when you commit -- yes, sexual assault. When you commit a sexual act upon another person by causing bodily harm to that person, I mean, it's kind of redundant. I mean, not redundant, it's circular reasoning because of

bodily harm itself. Let's see where the definition is.

MAJ BATEMAN: It could be the sexual act. It could be pled that way, and that's what the further definition in (g)(3) --

HON. HOLTZMAN: So you're committing a sexual assault by committing a sexual assault. In other words, it's meaningless.

MAJ BATEMAN: Correct.

HON. HOLTZMAN: Okay. All right. Just wanted to make that clear. And I wanted to also share my concern -- share the concern that was raised by Ms. Kepros about the term "unlawful force."

I find it confusing, and I don't know the extent to which other people find it confusing. So I just raise that with you.

MAJ BATEMAN: Yes, ma'am. I think that has not been the hardest part of the law for me to teach, honestly, because I have just been able to parse it out by --

HON. HOLTZMAN: Okay.

MAJ BATEMAN: -- you know, sometimes force, as we, you know, commonly think of it or conceptualize as doing something harmful, restrictive, to where somebody cannot escape, right? That sometimes that is done lawfully in that they were given the consent to hold that person down.

Or there might be -- I mean, because if we really want to get a little bit, you know, on the edges of absurdity with this though. Based on the definition of sexual act, I mean, the penetration, if somebody -- if a medical procedure has to be done on somebody, and they just will not, you know, sit still ---- you've got to hold them down, so that maybe, you know, the mouth or the anus or the vulva can be penetrated in some way. So that would be the -- you know, that's why it's unlawful. Right? It's without legal justification or excuse.

And then the reason why I think then, there is -- what's more confusing is why do we have (b)? Like I understand, you know, (a) is

easy to explain. Unlawful force, right? Not all force is bad if it's consented to, but the force causing or likely to cause death or grievous bodily harm, I think that was parsed out because, again, the follow-on definitions section where it talks about the definition of consent under (g)(8), where it says a person cannot consent to -- for example, what I think they have envisioned was, you know, the autoerotic asphyxiation or the gun to the head or something like that.

But again, the judges eviscerated that by saying there is a causal connection. So at the end of the day, we don't care what it says in that definition section about the definition of consent and what can be consented to and what cannot be. The way the law is constructed, if you consent to any of those things in there, then crime not committed because there is not that proximate cause, straight line between the two elements.

HON. HOLTZMAN: To what extent do you know from your experience or from what you've

heard from trial counsel and other defense counsel, how confusing is the term "bodily harm"? Because to me the term "bodily harm" suggests some actual injury that somebody experiences.

MAJ BATEMAN: Harm. Right.

HON. HOLTZMAN: Harm. Right. I mean, normal construction of the English language. You're thinking somebody has got bruises, they've got -- they've been hit, they've been assaulted in some way. But the definition can be as minor as something that is offensive.

MAJ BATEMAN: Yes, ma'am.

HON. HOLTZMAN: And so to what extent are juries persuaded or confused by the language and say, "Well, I don't see any bodily harm here, so I can't convict." I mean, are we seeing that? Is that something that is happening out there?

MAJ BATEMAN: I think that it would be really tough to determine since, you know, we can't get into the deliberative process of our judges or the panels of whoever the fact-finder is. I think the raw data in that regard -- I

think the successful prosecutions, the rate has ticked up slightly under the current version of the law. So ---- but I don't know what that is to be attributed to. So it's hard to say.

I think it's, again, not -- of all of the confusing parts of the law, I don't think that is proven to be the most confusing. People I think are able to understand that a person can be restrained, they can be touched in offensive ways and not necessarily come away with bruises or injuries or that sort of thing. So I think that is easily explainable to a fact-finder.

HON. HOLTZMAN: Okay. I don't have any further questions. Thank you.

CHAIR JONES: Anything further? Professor, I know you -- welcome. Oh, please, don't apologize. Are you okay, by the way?

PROF. SCHULHOFER: I have one question that you may have covered already, but kind of follows up on Ms. Holtzman's questions.

If it's true that juries are not confused by this, is there -- could there also be

a problem in terms of what cases come into the system, or what cases are considered prosecutable? Is it possible that the ambiguity or contradiction or conceptual oddity of this situation has an influence on what kinds of cases will proceed to a general court-martial?

MAJ BATEMAN: Not that I know of, sir. I mean, I think that would be a good question to ask, you know, the folks who are prosecuting and advising the prosecutors throughout the Services.

But I mean, I have received -- this is the feedback that I have received from folks practicing out there is -- going back to my point about the sexual act, that's only half the equation. To say a sexual act happened, to say sexual contact happened, that is half the equation. People are -- as soon as that happens though, as soon as anything resembling a touch or something of a sexual nature occurs, it triggers an investigation. It triggers a criminal proceeding.

So at least the initial threshold,

they are coming into this as they are getting investigated, and they are getting prosecuted -- again, just raw numbers-wise, the prosecution rates have increased since the enactment of this law. So I think the numbers show that these cases are getting into the system, they are going forward to trial, they are being prosecuted. And as far as how successfully they are being prosecuted, again, that rate has ticked up slightly as well.

So ---- but I can't offer any other perspective on that, sir.

PROF. SCHULHOFER: Thank you.

MAJ BATEMAN: Yes, sir.

CHAIR JONES: Ms. Holtzman?

HON. HOLTZMAN: I'm sorry. I just have one more question if you can answer it. We have been enjoined by some of the people who have presented to us not to change the statute in any substantial way because it has been changed so many times over a short period of time. Do you have a comment to make about that?

MAJ BATEMAN: Yes, ma'am. Again, I think in kind of an evolution of my perspective on this as well is from what I have seen -- whether it's formally changed by Congress or not ---- it is still changing and evolving. So we can't avoid the fact that -- the way the instructions are changing. So the way ---- when facts applie to law make it into a courtroom, it is changing.

So I don't think changes to the law at this point -- I think appropriate measured changes would be good at this point because it is already -- there is a level of confusion. There is a level of inconsistency potentially because of the way that people have adjusted to their understanding of the law through, you know, just pleading decisions and evidentiary instructions.

In that regard, I don't think we should be scared of changing it because it is going to cause all sorts of, you know, unrest in the force. It is already unrestful. So I think changes are okay and not to be strictly avoided

at this point.

HON. HOLTZMAN: And you certainly can handle the change.

MAJ BATEMAN: Yes, ma'am.

HON. HOLTZMAN: Okay. Thank you very much.

CHAIR JONES: Dean Anderson?

DEAN ANDERSON: So what a fascinating dialogue this is, I really appreciate your candor and insight.

It does seem to me that one of the things that is unique about military culture in dealing with these issues is that there is a seamless connection between the legal imperative, which the military engages in vis-à-vis its Service members, and the imperative for prevention and education.

We don't see that in the civilian world. In the civilian world, folks who do -- by and large, not entirely, but overwhelmingly, folks who engage in defining the laws don't have much to do at all with the practice of trying to

prevent the crime in the first place.

The only analogy I can think of is campus sexual assault. Where folks at the campus level are defining disciplinary codes and making decisions about that, and also engaged in an attempt to prevent the crimes.

I think for me one of the challenges comes when -- there is a number of anecdotes that pretty much everybody in front of us recites -- where some commander says something like -- or some low-level officer who is trying to educate says something like, "One drink and no sex." And I think, why is that a critique of the law or how the law is constructed?

I see these as really different -- you know, they may be an imperative for good order and discipline, and it is certainly true that the commander -- or nobody should be saying one drink meets the legal definition of impairment. Right?

But I think I wonder about the ways in which the culture, because the imperative is both a legal imperative and an educational/good order

and discipline imperative, how the fact that the same entity is trying to do both at the same time --

MAJ BATEMAN: Yes, ma'am.

DEAN ANDERSON: -- sometimes the random anecdotes about excessive prevention or excessive education were inaccurate, then have us rethinking how we should construct the law. Do you think that's -- am I being too -- am I painting with too broad a brush here?

MAJ BATEMAN: No. I think I understand what you're saying, and if you look at how we -- you know, we have these organizations called Sexual Harassment and Assault Response and Prevention.

DEAN ANDERSON: Right.

MAJ BATEMAN: So we have put together harassment and assault and response and prevention. Those are four completely separate and distinct things and issues to deal with.

Yet because we are super-efficient, and we, you know, can solve all the problems in

really, you know, efficient, bureaucratic ways here -- which I know those things are contradictory, but I think here is the cultural difference we have and why, you know, us lawyers are even talking about prevention because it is straight line from that commander who briefed, you know, one drink and you may not -- you cannot consent. You cannot have sex.

That commander then Monday morning brings us that case directly, and the commanders are the ones who drive the train and drive the system, so then what -- so it could take us down the path to illegitimacy with regards to the law.

It's not like in the civilian world where if somebody comes and says, "I had a glass of Chardonnay last night, and then I had sex with my husband." They're like, that's -- "Have a nice day." That's not what happens in the military.

Initially an investigation is opened, resources are expended, lawyers are involved, and so in the legitimacy of the law there is a

potential to degrade the legitimacy of our sex crimes laws altogether if this cycle continues.

DEAN ANDERSON: So that is a really important and fair point, that the person who is doing the prevention education, and messaging on prevention and education, may be exactly the same person who is receiving complaints or bringing complaints. That is helpful.

I guess the thing that struck me about your -- many things struck me about your presentation. One of them was that these folks get one hour with you. We have had the benefit of almost two hours with you -- I think I'm reading my watch correctly -- and we still are struggling with the basics.

And you are saying that you are briefing -- you are briefing commanders, you are briefing educators, you are trying to brief judges, and you are charged with -- this is, again, the seamless way in which prevention and education are with the law in the military.

MAJ BATEMAN: Yes, ma'am. Well, so

some of these people end up being repeat offenders in my class though. So I have taught -- I think I have --

(Laughter.)

DEAN ANDERSON: Repeat offenders. That's an interesting --

(Laughter.)

MAJ BATEMAN: So I have taught -- I have probably taught a block of instruction on -- at least billed as being about Article 120 probably about 50 times in the last three years, to in excess of I'm going to say almost 3,000 students.

However, we don't even have that many people in the JAG Corps. There is only 1,750 active duty officers in the JAG Corps. So clearly, there are more -- and so also I have taught this to Reserve components, I have taught this virtually through recorded classes they can push out to the Force.

So I mean, I think at least 3,000 people but some of those people sat through my

class in their officer basic training, they came for intermediate trial advocacy training, they came back for Special Victims' Counsel training, and then they came back for graduate course training.

And then in the graduate course, I do teach an elective that -- where we do go more in-depth in some of these classes and talk about changes and nuance and a lot of that sort of thing. So some people, over the course of, you know, the three years I have been there, maybe they have been with me for four or five hours, and then there is the outreach and that sort of thing, and so we are a reach-back asset to people out there in the Force and all the Services.

The Army's Judge Advocate School has helped all of the different Services with training in that regard. So we -- but yes, ma'am, it is -- again, it's --

DEAN ANDERSON: You've got your work cut out for you, don't you, Major?

MAJ BATEMAN: Yes, ma'am.

DEAN ANDERSON: Thank you for your work.

MAJ BATEMAN: Thank you.

CHAIR JONES: Thank you very -- I'm sorry. Did you have a question?

MAJ GEN(R) WOODWARD: Just a real quick question.

CHAIR JONES: Yes, please, General Woodward.

MAJ GEN(R) WOODWARD: As the non-lawyer and the person charged with doing that sexual assault and prevention --

MAJ BATEMAN: Yes, ma'am.

MAJ GEN(R) WOODWARD: -- and response piece is, I have to say that the way I understand it as the non-lawyer is that we are actually writing laws to prevent crimes. Correct?

So maybe I would submit that having that connection, that close connection between prevention and the law and the understanding of how the law influences prevention, is actually probably a beneficial closed loop.

MAJ BATEMAN: Yes, ma'am. And that is where, you know, when we look at the legislative theories and the social constructs that have caused these changes to occur, it has been the shift from telling victims ---- who have traditionally been viewed as women, to don't drink, fight back. You know, that sort of thing.

As the law has changed to become offender-focused, that discussion has shifted. So I agree that the way that you talked about prevention of crime has changed. And so that has been the positive shift in society, in the narrative, and in prevention, that sort of thing. So I absolutely agree with you, ma'am.

The problem is when the law is articulated incorrectly in the prevention training, and that is where we run into the problem of degrading the legitimacy of the law. When you have someone saying -- because it -- it is absolutely good, beneficial training to have people saying, do not consume excessive amounts of alcohol. It could put you in a state that

would make you incapable of consenting, and in that state you may have things done to you that are bad, that are criminal, that you would not otherwise want to be done.

The way I just explained it though, I have never heard it explained in Army training. If you have a drink, don't be putting things in other places where they shouldn't be.

MAJ GEN(R) WOODWARD: Right. So less ambiguity is really what we are trying to get at. So that not just lawyers but laypeople understand what consent and incapacity really is.

MAJ BATEMAN: Yes, ma'am.

CHAIR JONES: Thank you very, very much, Major Bateman. I echo all the compliments you have already been given, and we do intend to reach back for you. Wherever you are, we are going to find you. So we will see you again.

MAJ BATEMAN: Thank you, ma'am.

CHAIR JONES: Thanks so much.

We are going to take a five-minute break, and then the next panel are trial counsel,

which we are very anxious to hear your perspectives on.

Thank you.

(Whereupon, the above-entitled matter went off the record at 10:47 a.m. and resumed at 11:01 a.m.)

CHAIR JONES: All right, we're going to continue now with the trial counsel panel, and I think then after that, just so people know what's happening, we'll probably break for lunch, because we've run so long this morning with Major Bateman, and for all I know we'll run overly long with all of you as well. All right, unless you have an order that you'd like to speak in, I would start with Colonel --- is it Thielemann?

LTCOL THIELEMANN: Yes, ma'am.

CHAIR JONES: Great. Good to hear from you. Marine Corps.

LTCOL THIELEMANN: Good morning Madam Chair, ladies and gentlemen; it's a pleasure to be here again. As a brief introduction, and also in light of the numerous questions that were

posed, I am going to limit how much I give in my opening comments, because the questions you posed before, I'm sure everyone on this panel would like to have the opportunity to chime in on.

CHAIR JONES: I think you're right.

LT COL THIELEMANN: For education of who I am, Lieutenant Colonel Chris Thielemann, currently the Regional Trial Counsel for the Western Region of the Marine Corps -- fancy term for the chief prosecutor for every case that originates west of the Mississippi, out to California, to include Alaska. Prior to that, I served a tour on the bench as a trial judge -- one of those trial judges that does struggle with this statute -- and then before that, I served as the Regional Defense Counsel for the Pacific Region, which is essentially the chief defense counsel for that particular area.

I come today with an overarching premise, and I want to make sure it's clear that these are my views alone, they are not those of the Department of the Navy, United States Marine

Corps or the Staff Judge Advocate and Commandant for the Marine Corps, or the Judge Advocate General of the Navy. First and foremost, I do not think any substantive changes should be made to the statute, minus some appropriate measures taken. I say that because if there's too much definition of law, that can actually constrain and limit the justice, not promote it, as we've been trying to do. And I think as I read the Judicial Proceedings Panel's initial report, and as I've listened to other people speak, I think there's a little bit of an assumption that there's something wrong with the law, rather than how we're trying those cases. I think we fault more-so on the side of how we're trying those cases and putting the right cases into the court process.

That does not mean that there aren't problems with the law, and I think we can address those appropriately. I --- unfortunately or fortunately, however you look at it --- had the opportunity to prosecute and defend over all

versions of 120, from the 2002 statute which was the statute that we had in 1969 to the '07 and then to the '12, and it is a bit of a nightmare when you have to prosecute or defend cases over overlapping statutes. This is considered a new tool; it is a very, I would say, poorly written statute, no offense meant to Congress; I'm not trying to show any contempt to them, but we are still trying to learn how to use it, and I suggest that we should be allowed to learn how to use it.

Most importantly, it's still largely undefined by our higher appellate courts, whether it be the Service Court or the Court of Appeals for the Armed Forces. Let's let it settle, and I will submit to you that I think some rulings are going to come out in the near future that's going to help define certain definitions that are at issue. In particular, what does "incapable of consenting to" mean? I can speak for my region, we have at least two, if not three cases that are currently before NMCCA that are going to address

the very issue that a trial judge took the definition of "impairment" from Article 111 to define what it means to be incapable of consenting. I find that quite surprising that that use of impairment would be put into that statute; just because somebody is over the legal age --- excuse me, legal standard for driving does not mean you can't consent to sexual activity. It's turning it into a strict liability offense, and I know that is not congressional --- our Congress's intent.

I also think that any significant changes that we make might be antithetical to the progress, as we don't know if anything is broken just yet, save some of the definitional terms that we are trying to move forward with. And I'll close with my overarching premise that as we try to define certain terms here in the future, such as, perhaps, "incapable of consenting," or shoring up the definition of consent, which I do believe needs to be done, we have to be careful of putting so much strict limits on what might be

an incapacity to consent, because we're dealing with sexual conduct, and I think the sexual activity that we have to address in our statute has to be in relation to contemporary norms and standards. And it should be the sexual norms and standards of this century, and I don't mean to be flip about that or crass. We're dealing with a generation of folks who we often see in our court-martial process that are exposed to different sexual norms than maybe the panel or I -- and I'm not trying to make this as graphic as possible -- but we've got to make sure we're not criminalizing behavior that could be considered lawful behavior by the participating individuals.

With that, as I looked at those 11 issues that are before us, I have many comments to make about all of those. I will simply focus on Issue 1, dealing with the definition of "consent," as well as Issue 3 that deals with whether or not we need to define "incapable of consenting," as well as Issue 5, of whether or not "bodily harm" needs to be clarified. I will

defer to Colonel Grammel --- if that's how you pronounce his name --- who previously testified and provided input on how to modify consent. I also know that my colleague, Lieutenant Colonel Pickands, is going to talk about consent. I find that to be acceptable definitions to help tidy it up.

With respect to anything related to "incapable of consenting," first let me say that I don't think we need a definition. We do not need a definition for "incapable of consenting." If the panel ultimately decides or Congress decides to include a definition for that, that definition should probably be in line with what we saw from Colonel Grammel. It's a very short, succinct one that hearkens back to our 2007 statute. But again, it's not necessary. As I look at that particular definition, it's really all about common sense, and I know that may hurt some legal minds' ears or lawyers' ears when we say it's all about common sense, but truly it is. And it's how we advocate the law, it's those

people who are the finders of fact that matters the most.

I saw that most recently just finishing prosecuting a rape by force trial. Those members were dealt with a pretty nasty fact pattern, but it had a lot of credibility issues, and they were listening to the law, and then just like we see oftentimes from the judges, you're to apply your common sense understanding of the ways of the world and your own life experiences to determine whether or not the elements of the crime have been met. And I use that very basic wavetop example to import to you that we are not giving the prosecutors, the defense attorneys, and most importantly, the triers of fact the credit that they can understand very basic definitions that are simple. We don't need to continue to add more and more definitions so that the trial judge has to read upwards of 30 or 40 pages of instructions to those members. How many of them are going to remember those instructions?

Finally, with respect to any other

definition, that would be the bodily harm concern that I have. I recognize Major Bateman's concern; I think it's a concern raised by many that we have that tag-on phrase to the definition of bodily harm about nonconsensual sexual activity or acts. I don't have a problem with leaving it there, but you can take it out if you tighten up consent. If you tighten up the definition of "consent," removing that from the "bodily harm" definition is appropriate. However, I suggest that we should allow it to stay in there; much like with the definition of "consent," we have many instances where the definition for "consent," in conjunction with the bodily harm with its tag-on phrase, allows us to catch the full sexual assault fact scenarios of withdrawn consent, consent to some but not all of the sex acts that may occur, and nonconsensual sex acts within a relationship that include consensual sex. Again, that is scenarios with withdrawn consent, consent to some but not all sex acts, and nonconsensual sex acts within a

relationship that includes consensual sex.

I raise those three general areas; that is the bulk of my practice. That is the bulk of the sex assault cases that we see that give us the hardest times in court. Two consenting adults initially who are overcome by intoxication; it comes back to whether or not they were incapable of consenting. It is very rare, at least in my practice in the Marine Corps, to deal with that unlawful force or the threat of force by grievous bodily harm; those are simple things to handle. So we get to this scenario, I think if you want to tighten up consent, you do that; you don't have to worry about the finding "incapable of consenting" because it's going back to: Could that person have consented based upon this clean definition? And then if you look at bodily harm, you can then remove that nonconsensual sexual activity as a part of it. However it stays in there, I don't see a problem with it.

I will stop rambling; I have many,

many more prepared remarks, but I know my colleagues have many comments they would like to provide. Thank you.

CHAIR JONES: All right we'll be back to you, Colonel. Thanks. Colonel Pickands?

LTC PICKANDS: Yes ma'am; thank you for inviting me back to speak with you. I spoke with the Panel last fall. For those of you I haven't met already, I'm the Chief of the Army's Trial Counsel Assistance Program and our Special Victim Prosecutor's Program. So collectively, I'm responsible for providing all continuing legal education and training to Army prosecutors, and to kind of put that into context, Major Bateman gets them when they're in the initial course at the JAG school, when they're becoming judge advocates; I get them when they are prosecutors or newly mantled as prosecutors, and then I train them all the way through the cycle from basic training matters all the way up through advanced.

In running the SVP Program, my team

and I are collectively responsible for prosecuting all sexual assault, domestic violence and child abuse in the Army. I have also practiced and have experience with cases running all three statutory schemes, I guess I would call it. The old one -- I say not even back to 1969 -- is kind of the Blackstonian English common law version of rape by force without consent, all the way up to this present scheme. I would also say that even though the scheme is very complicated, it can be explained as you saw with Major Bateman earlier, and I would also say that even though I think some changes are warranted, changing the scheme itself would be completely undesirable. We have three schemes out there now; I have prosecutors in the field right prosecuting over two of those schemes, and I've had prosecutors in the last two years prosecuting under all three schemes in a single case. Those changes I think could be fairly limited.

When we spoke in the fall, we talked a lot about the definition of "impairment" or

"incapacity"; since it was discussed again at length this morning, I did come prepared with a suggestion for a definition. I do it not with a definition of "incapable of consenting," but in fact a definition simply of "incompetent person." I would suggest putting it as a subsection 9, right after the definition of "consent," with some minor changes. I think they should be linked together, so briefly I'll read what I propose. I also have some good material that I can provide the panel on Friday when I return back to home station.

"Incompetent person. The term 'incompetent person' means a person who is unable to correctly perceive or knowingly and deliberately interact with his or her environment. For the purposes of this subchapter, a person is incompetent when he or she is unable to (a) appraise the nature of the sexual conduct at issue; (b) to formulate a decision whether to participate or decline participation in the sexual conduct; or (c) to

effectively or affirmatively communicate that decision. Incompetence may be caused by a mental disease or defect, physical disability, or an intoxicant." And it wraps up all of the reasons why you could be incompetent to make a decision.

It's also important to note that that's largely a medical definition of incompetence. So somebody who is unable to correctly perceive their environment, to make a decision about how they want to interact with their environment, and then act upon that decision, those are capabilities. You either have those, or you don't. Any other definition, like the definition about whether you can enter into a contract, or the definition of "impairment" from Article 111 that was referred to earlier, those are legal definitions of "competence," which is to say, you could consent, but we're just not going to credit you with that decision under the law, right? So we say children can't consent and so forth; those are legal definitions of "consent."

I urge you not to adopt a legal definition of "consent," but in fact, one that is based on the functions, the three abilities. That's why I've also worded it with a disjunctive "or," because lacking any of those three abilities would render them incompetent. A person needs perception, cognition and execution in order to interact with their world appropriately. I think that definition of "incompetence" would solve the issue with "impairment" and "incapable of consenting."

With regard to the definition of "consent" being unclear and ambiguous, it is workable, frankly, in practice. It was discussed earlier, how there's been kind of a causation injected into it, but that has been injected into it, and it's important to note that reliance on the Military Judges' Benchbook to define some of these terms and to, in certain cases like that, add what amounts to be an element of an offense is inappropriate. The Military Judges' Benchbook and the panel instructions are not long. As you

have heard from Major Bateman, when they started originally, it was around six pages, then it increased to 14 with no change in the law. They also clearly don't represent the statement of the law; rather, a statement of what that panel believes the law should be, or an interpretation of the law.

If you rely on the judges to define that, they will define that, I think, in a way that skews us back to earlier versions of the statute, which are the judges' experience under the law; it's a natural bias back towards that scheme. That being the case, I think we have a kind of misconception or we may be talking past each other, as I heard earlier, about consent being a defense. Consent can be a defense theory, but that is different than consent being an affirmative defense. So an affirmative defense under the law would be something that if demonstrated, even in the presence of the prosecution's ability to demonstrate all of the elements of the defense, that would relieve that

person of culpability under the law.

So when you look at each of the offenses to decide whether consent would be an affirmative defense to that offense, you have to say in your mind if both the defense and all of the elements of the offense are true, this person should not be found culpable of the crime. If you do, I think even a cursory analysis of say, rape to start with, you'd find that consent is not an affirmative defense under any of the theories of rape. Forcible rape, it requires unlawful force; unlawful force is defined as one without legal justification or excuse. If there's consent, there's legal justification or excuse. It's simply an attack on proof, not an affirmative defense. Rape by inflicting grievous bodily harm, you cannot consent to aggravated assault or grievous bodily harm, so consent can neither be a defense nor an attack on proof.

For rape by threatening death, grave bodily harm or kidnapping, one explicitly cannot consent under these circumstances; the definition

of consent itself excludes that possibility. If the government proves that threat and the victim's fear, there's no consent. Consent then would be at most an attack on that element of proof. Rape by rendering unconsciousness, one cannot consent if unconscious; the definition of consent contemplates that. Rape by administrating an intoxicant, in this theory the government must prove, among other things, that the victim was unaware of the intoxicant or forced to take that intoxicant; it is also rendered impaired or potentially incompetent by that substance. The consent is expressly disproved in both circumstances, so consent would not be an affirmative defense; it would be an attack on proof.

I think consent generally is defined in a way that it is workable. My problems with the statute and the problems that I've seen from the practice of my trial counsel is not in the area of unlawful force; it's not even in the area of bodily harm. Bodily harm, I know there was

some commentary about bodily harm being conflated with the contemplated act, I have actually had the case where the victim is positioned such that --- and unclothed -- such that the offender was able to penetrate her without removing or moving clothing, manipulating her body, or touching her in any other way. If you can't conflate the bodily harm with the sexual act, you cannot prosecute that case as a sexual assault. It contemplates a real situation; this is not a hypothetical, it's an actual case, and it should be understood that way as being adequate.

Finally, I would say that policy-wise, the problem that I see with rape and sexual assault the way they are now is actually in that portion of the writing "to threat of wrongful action" under the sexual assault subset. I think that's poorly worded and too broad. What kind of wrongful action? Only wrongful actions, not enticement any longer, but now we can use threats of some kind of administrative nature? An economic nature? A harm to reputation? What

wrongful actions could we contemplate by that? I see that as going to be a problem. I've had cases where my prosecutors have charged and have gotten convictions on career-based wrongful actions. I wonder how those will come out under appellate scrutiny; what kind of harms are they trying to legislate there?

I personally am a purist. I think rape and sexual assault are crimes of violence; I think that extorting sex by means that is removed from forced or violent coercion or taking advantage of an incapacity is another kind of crime; it can be some form of criminal sexual misconduct, but it's not really rape or sexual assault. If we are going to change that at all, I would suggest adding a threat basically of physical harm into that wrongful action. So a wrongful physical or violent action contemplated by the communication or action, and I would make that criminal sexual enticement or extortion other offenses elsewhere in the Code. I'll pass the mic to my colleague there in Air Force.

Thank you very much for inviting me back; I appreciate it.

CHAIR JONES: Thank you, Colonel Pickands. Major, I'm really working hard to be able to see your --- is it Rosenow?

MAJ ROSENOW: It is Rosenow, ma'am.

CHAIR JONES: Great. Thank you.

MAJ ROSENOW: Distinguished members, thank you so much for having me back. My name is Major Mark Rosenow from the Government Trial and Appellate Counsel Division, United States Air Force. I had the opportunity to speak to you back in September of last year. Just as a reintroduction, my job in the Government Trial and Appellate Counsel Division is the Special Victims Unit Chief of Policy and Coordination. But that is meaning that one of my primary duties is to provide initial consultation to staff judge advocates and trial counsel across the Air Force on charging decisions. What that breaks down to is most weeks, I get two to five different cases from the Air Force that come forward with

proposed charging schemes; I'll get the report of investigation, statements of the accused and the victim, I'll review those things then pass back recommended changes to how to approach.

I also provide training at all different levels in the Air Force -- junior, intermediate, and advanced training -- to both trial counsel and defense counsel; I also spend a fair bit of time with Special Victims' Counsel in group sessions. I also hold that training at the Federal Law Enforcement and Training Center for OSI agents who are coming in to investigate sexual assault offenses. And beyond that, I'm still functioning as Senior Trial Counsel in the Special Victims Unit in the United States Air Force, and today I looked at my list before I came in; I'm actively prosecuting, I believe I've prosecuted 12 cases in the Air Force in every single version of this gauge that Colonel Pickands was just talking about, I'm actively prosecuting, not all in the same case, but I have gone under every version before 1 October 2007,

before 28 June 2012.

Of course, like everyone else, I'm speaking only for myself; this is my opinion, not that of the DJAG or the Service. I do want to surface for your consideration in my initial remarks just three matters that I believe deserve most of your attention in our conversation; the rest of the changes I don't necessarily recommend and I would like to be heard on them given the opportunity, but it's Issues 3, 9, and 11. Issue 3 that's been surfaced is: Should the statute define "incapable of consenting?" With all due respect to the people who have taken positions before, I do as a trial practitioner really want this to be defined. I have a recommendation, and I am going to offer written comments once I have the benefit of listening to everybody else --

CHAIR JONES: Could you, just for my sake, move the mic a little closer?

MAJ ROSENOW: Absolutely. Is that better?

CHAIR JONES: Yes, it is. Thank you.

MAJ ROSENOW: I talk kind of fast, so I'll slow down a little bit, too.

CHAIR JONES: I didn't want to tell you to slow down, but that's great, too. Okay.

MAJ ROSENOW: Ma'am, I'll provide written comments afterwards as well.

CHAIR JONES: Thank you.

MAJ ROSENOW: But you had initially mentioned one of the proposals for the language; so one of the language sets that I would propose for your consideration comes almost the same as what's proposed earlier in the session. "The term 'incapable of consenting' means unable to appraise the nature of the sexual conduct at issue, decline participation in the sexual conduct at issue, or communicate unwillingness to engage in the sexual conduct at issue." And what you will see is all that I've done there is I've taken out the phrase --- I'm sorry --- the word "physically." Physically, again respectfully, I think a legal definition is the appropriate one here, not the medical definition.

You're always going to have the accused have the opportunity to mount a good mistake of fact defense. So if the person is not necessarily indicating these things that show that they're intoxicated, vomiting, urination, all the different things that might indicate, they're going to have the relief of that defense. But I think you need to review that word "physically" carefully, because what ends up happening -- and I talked about this a little bit before -- is defense counsel, and I think in an unfair way here, can mislead the members to focus on all the acts that he or she was able to take. When you get into the idea of "physically," could the person roll over to get up and throw up in the bathroom, they opened the door to get to the bathroom, they lifted up the toilet seat before they threw up; is that person in a condition they would necessarily trust their making intelligent decisions? I would submit to you no.

So if you get rid of that idea of physically unable, I've seen in my trial practice

that being a very close focus for members. Physically unable, if you don't say physically impossible, is it physically impossible that someone will come down and interrupt the act? Physically impossible. Virtually, it might be impossible depending on where the bathroom is, but physically it was necessary to be impossible, so I would submit that for your consideration. One of the things I mentioned before is while there is a focus on a loss of critical judgment and impairments of executive functioning, which I think is really where we're getting at in criminalizing having sexual acts and sexual contacts committed on a person who's intoxicated.

The other point I'd hit on 3, before moving on to Issue 9, this is very important for junior trial counsel and junior investigators. The way the Office of Special Investigations runs is one of the first things you're going to hear when you come into the unit, you're going to be a probationary agent, so you're going to have some supervision in running the investigation. Within

about a year, you're likely to be on a very complex sexual assault investigation. And I'll tell you when you go to the units, they don't have the Military Judges' Benchbooks in there, they don't have printouts of the latest unpublished decisions from the Air Force Court of Criminal Appeals; what they've got is the names of court-martials and their own book from 2012, which is wrong on a lot of the stuff because it's been updated and it's been amended in different ways.

I think it's important to have in statute direction and black letter to junior agents and junior trial counsel across the Services who can read it and go, "The instruction I'm going to give at the end of this investigation or prosecution is going to be something very, very close to this statute in defining 'capable of consenting.'" So I think there's a value add in injecting that early into the process and, for lack of a better term, surfacing it so that everybody knows early on:

That's what we're looking for when we're interviewing witnesses, and that's what we're looking for when we're talking to victims about have you been the victim of a crime or was it just a bad situation? It ups the stage between those two things.

Issue 9: Are the definitions of sexual assault and sexual contact too narrow or are they overly broad? Unlike a lawyer, I'm going to answer it with both. I think on sexual act, I'd agree with the previous speaker on the second definition of a sexual act, and again I'll give you written remarks. Under 120 (g)(1)(A), I think that's good, because that involves the penis is involved in the penetration. I think the second one under (g)(1)(B), we should just strike out the language "or mouth." I think that gets you where you want to go, gets you around that example involving the toothbrush. So that's one where I think it's too broad. I think sexual contact is too narrow; certainly if called upon, I'd argue the position that's been argued by the

Army in U.S. v. Schloff, that the language could be read in such in a way to include an object for sexual contact, but I believe the more prudent course is to put it in the definition and say "or an object" at the end of that tag-on, which is to how the touching can be accomplished. That makes perfect sense, because you can accomplish a touching through another person, so using another person's arm to touch someone's breast, is that a crime under this, but not to use a sexual apparatus? That seems silly to me, and there should be no room for interpretation of the law when we get around what's an obvious crime.

And I'd also note that when we start talking about things like throwing a volleyball, I guess at someone's genitals, and things like that. At least in my experience in the JAG Corps, there's a lot of discretion that the prosecutors exercise, and I believe exercise reasonably. I am not aware of any case in any Service court that's been prosecuted to success, and it's not so far off field for somebody to

look at a toothbrush situation being charged as a rape. I just haven't seen it. So I would just submit to you, you have honorable women and men who are serving as staff judge advocate who are prosecuting these cases and serving on the bench, so a lot of objections to what Lieutenant Colonel Thielemann had mentioned from the Marine Corps, that function just as the nature of the system working. I hesitate to have a whole new system in place because of these marginal cases that don't bear out and are more from law exam curiosities than what I actually see in function.

LTC PICKANDS: Amen.

MAJ ROSENOW: I would also say though that I want a broad definition of sexual contact, and if I can give you more info on that very quickly. I prosecuted a case of a chief master sergeant attacking a technical sergeant, and the attack was --- and that's what the defense would have you believe -- it was a hug through clothing in an empty house, there was genitals touched against her genitals through the clothing. She

was diagnosed with post-traumatic stress disorder; she has a working doctor to help her deal with it. She was discharged from the Air Force for that. You don't know how you find your victim, and you don't know what the impact is going to be, and sometimes when you get removed from the actual facts, you think, "Well that kind of hug couldn't possibly be the kind of thing that should register somebody for a sex offense." But I can tell you more about that in a different setting if you're interested.

I also have other circumstances around the crime, but that victim, he should absolutely be required to register for how he accomplished that crime against her, even though under a strict definition test, you might want to cheat a little bit to make it a little bit narrower there. And then I can be very brief on Issue 11; yes, we do need the offense of indecent act to be added back into the UCMJ. There's competing schools about whether or not you should just do it through the President for 134, or we should

put it back into the 120. I believe the definition of "indecent" could be added before under the version if we could. This comes up a lot; there's marginal offenses, and if one is ejaculating on a sleeping victim. I'll tell you on feedback from some of the victims, sometimes that's the worst part of a crime, the defacement that goes along with that, and I'd like that to be something that we could register someone for a sex offense, and I also want to message again, to the junior counsel who are at 'fill-in-the-blank' Air Force Base or Army post, when they are reading it and they are doing their initial step for charging decisions, they need to know about all of the case law. They need to know when they look at the Manual a good idea of what crimes were committed, and how to best characterize those crimes. So thank you.

CHAIR JONES: Thank you. We'll turn now to Commander Kirkby, who's been with us before as well. Nice to see you.

LCDR KIRKBY: Good to see you again,

ma'am. Madam Chair, distinguished committee members, thank you for the opportunity to appear before you. While I present, the views here I present are my own, not those of the Judge Advocate General of the United States Navy. We do appreciate the opportunity to appear before you and to answer your questions and present some comments. As a little background, I wanted to give you a little bit of my history. I have practiced for about 10 years, predominately in the courtroom. I've done both trial and defense; most recently, prior to this tour, I was a Senior Trial Counsel in the Southeast, a large region with three trial offices, trying cases across the spectrum. I'm currently the Branch Head for Military Justice Policy at the Office of the Judge Advocate General Code 20, and I am a Military Justice Career Litigation Track Officer, which means in 2007 I was basically identified and selected to go into a track, and some of you know about that track. I received my LL.M. from the Beasley School of Law at Temple University in

2010. So essentially a prosecutor, a defense attorney, a litigator for the military.

Article 120 as you know has over the past few years actually seen a turbulent time. The most recent version is just about coming to -- the cases are coming forward now to the appellate courts, and we're about to see where this really takes us. In total, I think this is not the appropriate time to be making fundamental changes. I know Representative Holtzman says, "This is a horrible statute, this is anything but clarity," and I agree, ma'am; it is, especially when you come into the system and you look at it and you compare it to some fairly good state and federal laws out there. However, we are currently stuck on the third version of 120. If we change it fundamentally, that makes a fourth version; these cases don't simply go away. We'll try them ad nauseam into the future, and we'll be stuck with this version.

I submit that some changes -- as my colleagues have suggested -- would be

appropriate, definitional changes. I don't, however, believe that we need a definition of "incapable of consent." I think that could be achieved, I think that can be done if we just clear up the word "consent." If we define that one, we'll be able to get "incapable of consent." Members of courts-martial are not stupid; they understand what "incapable" means. They are going to figure this thing out, and even under the current definitions, we're able to get convictions for the appropriate crimes. I would echo the comments of Major Rosenow. The academic side of this is one thing; the practical side is another. I have yet to see a case where somebody has been prosecuted as a sexual offense for putting a toothbrush in somebody else's mouth. We have senior prosecutors, we have commanding officers, who would simply quash that concept, and say, "That's a great academic argument, now get real; let's move on." That's not the kind of thing that commanders support, and we don't prosecute that. So as an academic thing, yes,

maybe the law would be --- it would be nice if we cleared that up, but it's just not necessary at this time.

I think the definition of an "object," I think we should wait; I know there's case law coming out, and hopefully that case law comes out soon and that can guide where we go with this. The use of a stethoscope I believe is simply an extension of the hand; I don't see how that case went where it goes, and hopefully CAAF will give us some guidance on that. I'm going to keep my remarks fairly brief and talk about this, but one thing I did want to talk about was the purpose of the UCMJ. In the preamble to the UCMJ, it says, "The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the Armed Forces, and to strengthen the national security of the United States." That's a preamble you don't find in a lot of criminal codes; that sets our ethos and sets where we're going. So as we move forward in changing these statements based upon state laws

and federal laws, we need to bear in mind that that's the purpose of what we're doing. So I caution against changing things in order to get them perfect when our system is set up to be different and has a different concept. So that's something that I would ask the panel members, please read the preamble, what guides us in doing these things.

Another thing that guides us is Article 137, and this is kind of a unique one. This essentially says that we have to inform, we have to explain certain provisions of the MCM to new recruits coming into the military when they first --- within 14 days of them first coming in, either on active duty or into the Reserve component, six months later, and upon re-enlistment. So this is the only time you'll see that somebody has to be explained the criminal code that they're subject to. It doesn't happen in the federal system; you're expected to know the law even though most people don't. These people are --- we have to explain it to them. We

have to tell them they're subject to this Code and these are the things. And Representative Holtzman, I know you hate this statute, you hate 120 and I don't disagree with you, but we found a way to explain this to the satisfaction of those people, and I think as we keep changing, we have thousands upon thousands upon thousands of people who we've already explained this to. If we start changing this like furious, we start having to relearn or re-teach them what the new law says. It's just a consideration for you; I think the fact that Article 137 is still out there that says, "We will instruct people of the law," is telling as to the preamble about what the purpose is. The MCM is a guide; it's how we ask people to comport themselves to what our norms are, but with that in mind, I'll ask for any questions and report those questions.

CHAIR JONES: All right, thank you. At this time, one question for each of you, same question. No one's really talked about this Issue 2, which is the whole notion of what's

going on with how judges are handling the consent issue, and whether they're getting enough guidance from the, you know, in their Benchbooks, et cetera. Do any of you, just tell me: Are you for or against, I suppose, trying to make it clearer, or clarifying it, or does it need clarification in terms of what defense is, is consent a defense available -- obviously it has to be -- but is it clear enough in the statute, is it clear enough in the charges, or is it a problem at all? I know it's --- we have consent, we have mistake of fact, et cetera, but I think you know the issue that I'm pointing to.

LTCOL THIELEMANN: Yes, ma'am. I'm in line with Lieutenant Colonel Pickands when we talk about whether or not consent would apply, especially to 128. With 128, all of those five theories of culpability, consent's not an issue. Consent only becomes an issue under 120(b) with a sex assault. I think tightening up the definition of "consent" cures that for us. With respect to mistake of fact as to consent, I had

some significant experience with that recently on the trial bench, and I struggled with it quite a bit, and that's because I operated under a regime where mistake of fact as to consent under 2002 through 2012, so those two other schemes, it was applicable and commonly used.

So I think some clarification that would identify when mistake of fact as to consent and which portion of 120 it applies to would be helpful in practice, and I want to cite to U.S. v. Howard, which is a case which I was trial judge on, and I did give an instruction related to consent based upon the evidence that was presented in court, but I refused the defense request to give a mistake of fact as to consent. And it was a 120(b) prosecution for bodily harm -- again, bodily harm makes the toughest prosecution that we have out there --- and the reason why I denied that instruction on mistake of fact as to consent is because the facts and circumstances did not warrant it. However, it was something that could have been used.

I don't want to get offside here, but in that instance, I was unclear as a military judge at that point whether or not I should be giving it, and I understand my sua sponte duty to instruct if some evidence is raised, but the only evidence that was raised related to whether or not that individual had consented, the victim had consented to any of the sexual activity, not that the accused had a mistaken belief or mistaken fact as to that consent. So some clarity where mistake of fact as to consent does apply under 120(b) would be helpful; I think it's not applicable under 120(a).

CHAIR JONES: So how is it in this kind of case that you had on those facts, where the only issue was: Was there consent or wasn't there? I think that's what you just posited; how do you deal with that in your instruction right now? Is it this causality instruction that's given or --

LTCOL THIELEMANN: It's an attack on the proof, ma'am.

CHAIR JONES: Right.

LTCOL THIELEMANN: That was it. We weren't worried about the causality; we were looking at the surrounding facts and circumstances. That's a nice catch-all that should be retained in the definition of "consent." So the facts and circumstances of that event suggested that consent could have been attack on the proof, but not as an affirmative defense, and when I see mistake of fact as to consent being requested or asked for, that is now transitioning from an attack on the proof to actually being some form of defense for that individual.

CHAIR JONES: Well how are you telling the jury if you find that the victim consented there's no rape? Is that what you're saying?

LTCOL THIELEMANN: No, ma'am. I wish I had my instructions for Howard in front of me; I know CAAF is taking a look at them right now. It's --- if you look in the Military Judges' Benchbook, as Major Bateman hinted to, there's 14

pages if you look at all the notes, and matter of fact, they look to me to add three levels of consent which you can give instructions on. If you look at the definition that Colonel Grammel had provided and modified in his presentation back in April, if there's been some evidence, any facts or circumstances that could show that the victim may have consented to the behavior or the activity that was going to lead eventually to it, again, keep in mind we have to be cognizant of a consensual encounter that transitions into a nonconsensual encounter, where there's been withdrawal.

CHAIR JONES: Right.

LTCOL THIELEMANN: That area baseline four- and five-line consent instruction seems applicable in almost every situation where the facts and circumstances that are elicited at the trial could be seen. And it is that simple to me as I sit there in the courtroom. And it's not causality; it's just members, you should take into account the behavior of the victim. And I

hate to say it that way, because we're moving away from an offender-based prosecution, which we all focus on, to one paying attention to the victim. But I think the trial judiciary, I think the law demands that if there are some considerations out there that should be taken into account as it relates to consent, it's an attack solely on the proof. But many times, it's not just an attack on the proof, it becomes an attack on the credibility of the victim, and that's why I don't like consent being considered an affirmative defense or even as a mistake of fact as to consent.

CHAIR JONES: Okay, all right, I understand the issue with respect to labels, but you're telling me that judges, if there is evidence of consent produced by the defense, they will give the consent definition to the jury?

LTCOL THIELEMANN: Typically ma'am, and I don't want to be aloof or ambiguous, but it does depend upon the charging theory presented by the government.

CHAIR JONES: Well, yes.

LTCOL THIELEMANN: So --- but I will tell you as a default for most Navy and Marine Corps trial judges, which I've worked with exclusively for three years, that definition of "bodily harm" that has that clause at the end of nonconsensual sexual activity almost always triggered giving that consent instruction. It's almost de facto it's going to happen; we don't even need to hear argument about it. The fight is always on the mistake of fact as to consent, and that really hasn't been much of an issue; it's all been the state of fact as to capacity to consent.

CHAIR JONES: So you don't see any problem? You don't think the judges are struggling with what instructions to give, or if they are, that it could be fixed?

LTCOL THIELEMANN: I would hope they are not. I will tell you I struggle with it because we just want to do the right thing. As Lieutenant Colonel Pickands has brought up, I

1 think everybody shares that; there's honorable
2 and good men and women who are trying to do
3 what's right. What I do see, and please do not
4 take this negatively, is that many times those
5 who are prosecuting or defending in front of the
6 trial judiciary are more experienced than the
7 judges. We are getting better at that, and I
8 share that with you because when I came to the
9 bench, I'm just a straight litigator for the
10 Marine Corps. That's it, that's a unique thing
11 in the Marine Corps to have somebody only focus
12 on litigation. But I see in other Services were
13 folks haven't been in the courtroom for maybe a
14 decade, two decades, who are now the trial judge,
15 perhaps even the appellate judge, for which now I
16 have people like Major Rosenow or Lieutenant
17 Colonel Pickands in there who know the law inside
18 and out, and that causes some confusion for the
19 judges, some uncertainty, and the default is
20 going to be let me just overcome any potential
21 appellate issue and give whatever the defense may
22 ask for.

CHAIR JONES: Do any of you have any additional or different takes on whether we should do something about making it clearer as to whether there is a defense of consent? I think I know where you stand, Colonel Pickands, but please, go ahead.

LTC PICKANDS: I think it should be specified; I don't think it would be a difficult task.

CHAIR JONES: Where would we do that?

LTC PICKANDS: I think you could it -- - attach it to the statute at the end.

CHAIR JONES: And that would be Congress, right?

LTC PICKANDS: I think so, otherwise you would have to rely on the JSC to do it and submit it up executive order and --

CHAIR JONES: Right.

LTC PICKANDS: --- and some kind of explanation for it. When the last Article 120 Benchbook instructions came through for soliciting input, I asked the judiciary to

explicitly say the defense of consent applies to this theory, not this; this one, not this one. They declined my invitation. I think if they're not going to do it, it should be done, because I've seen instructions given for defenses that do not exist logically in the case that it's been instructed for. For example, an incapacitation theory has, as an element of proof, that the person be incapacitated and that the accused knew or reasonably should have known about that incapacitation. If the government has proof of the incapacitation, and if they should have reasonably known that they were incapacitated, they cannot also be reasonably mistaken about consent. So that defense is not applicable to that theory. I've seen that instruction be given out of confusion like Colonel Thielemann said, so it would be useful to do the 45 minutes worth of work that would be required to list those defenses.

CHAIR JONES: Are you going to provide us with your 45 minutes worth of work?

LTC PICKANDS: I was planning to do that, ma'am.

CHAIR JONES: I would appreciate it. And I think you said you had other written materials as well?

LTC PICKANDS: I do; yes.

CHAIR JONES: Thank you. Thank you very much. Major Rosenow?

MAJ ROSENOW: If there's one thing I can offer on it is a model specification could accomplish a lot of this as well.

CHAIR JONES: I'm sorry, a what?

MAJ ROSENOW: Yes ma'am, a model specification could have accomplished this as well when you're talking about a sexual assault by bodily harm or abusive sexual contact by bodily harm. So if the definition includes in there "offensive," I think that clearly implies nonconsensual touching. In my charging reviews for the Air Force, I'll just give you a background on it first. The instruction that we give across levels every single time is we err on

the side of the accused when it comes to instructing on defenses. The concerns of appeal are too great to risk that, so that's what we absolutely -- from an Air Force perspective and a trial counsel perspective -- we tell everybody at every level of training, it's of constitutional import; get this right. If there's any evidence, don't be clever or cute; you raise it for the consideration of everybody involved.

And one of the ways we manifest that in the Air Force is in my charging reviews, I recommend a defense by bodily harm, I actually recommend at the end of it that you have from the Military Judges' Benchbook, the last version, is I add that element at the end, and its non-bodily, but essentially what it is, to wit, a sexual act, and then you're talking about causing bodily harm to him or her, but not necessarily the intent and then comma, without his or her consent. And I'll put this all in writing so it makes a little bit more sense to you. So that was in the specification, and you don't have to

follow up on that spec necessarily, but if you did do that, and you explicitly charge it, now there is more debate, and I don't know if you want to do that or not in terms of how we're going to approach this as a policy matter.

I like doing that in the Air Force because it communicates to the trial counsel you should be approaching this case from the very beginning as if you're going to have to disprove consent, because 99 times out of 100, it's going to be raised up in your case if you're charging something with bodily harm, if at all. From a personal citizen perspective, I don't want to have a sex offender be a person who engaged in a consensual sexual act, so I'd just as soon make sure that I am disproving, beyond a reasonable doubt, consent. So that's one of the things that we do in the Air Force, and that's consistent, that's been since I've been in this job for the last year, doing this specific job, and in the two years before, when I was just on the circuit going around doing these things, it was still the

advice that we were giving and we were working under it. So that's another way you can approach it is if the language did end up coming out in the model specification as to include that language, once it becomes part of the specification, you have to disprove that there was consent.

CHAIR JONES: When you say model specification, you're talking about what?

MAJ ROSENOW: We do not have model specifications yet, so in the Manual, ma'am, normally what the statute will have is, for instance, at some point, they would give us actual model specifications if we --

CHAIR JONES: Does this become an executive order?

MAJ ROSENOW: Yes.

CHAIR JONES: I see.

MAJ ROSENOW: Absolutely, ma'am. So that's one of the things that can come up, and it's already in, again, the Military Judges' Benchbook that came out of the Army Trial

Judiciary does include if the act is the same, so if the bodily harm is the same as the act or the contact, then you are at least encouraged by their recommendation to include "without consent." And at least on that last point, I will admit I agree with the one who said that the bodily harm is oftentimes going to be the same thing as the sexual act. It's the same physical thing that happens, but then the intent either applies or doesn't apply, and the difference would be that it's done without consent by the other side. So we have that all the time. If you touch someone's breast, and that's all you did sometimes, how else could there be another bodily harm that we'd inject on that? So you just extend that sometimes for the sexual assaults too; otherwise you get into these very thorny issues of: Was she really not consenting to his right hand on her left shoulder? Was she not comfortable with him being positioned over her if they were consensually kissing before? Getting rid of that and charging on the bodily

harm being the same as the sexual act or sexual contact in some instances focuses the trier of fact on what matters and why we're criminalizing their misconduct.

CHAIR JONES: Consent?

MAJ ROSENOW: Yes, ma'am.

CHAIR JONES: Okay. And let me just ask you, Commander Kirkby, anything to add?

LCDR KIRKBY: Only that the President has on his desk at the moment, I believe, a proposed executive order that does have the model specifications, so that process is ongoing; that's currently with him and we anticipate that will be signed; no one can guess when the President signs it, but I would say soon --

CHAIR JONES: That would be very helpful.

LCDR KIRKBY: --- probably within the next few months, and I think that's one of the reasons that we need to be very cautious about changing things, because whereas those come up, those may change the practice of law, that whole

process through the EEO goes up through DOJ, it goes up through the whole process, the interagency review process, to get a lot of people's feet in to make sure that that is the correct thing to do. That's why I say statutory changes are problematic sometimes, because we may end up with a model specification that came out now for an Article 120 change that is no longer any good and then it's going to be another two years before we see another change to that. So I think there are swings and roundabouts here, but to have the continuous change doesn't necessarily do us any good.

CHAIR JONES: Thank you very much. Other questions from the panel? Ms. Kepros?

MS. KEPROS: Thank you. My question is inspired by what may be my misunderstanding of Colonel Thielemann's comments about mistake of fact as to consent. So any of you can please feel free to weigh in on this. I guess I may have misunderstood the situation in the Henry case, but I'm concerned about this scenario and

how you think appropriate instruction would be given. Let's say there is a situation where, from the victim's perspective, there was not consent; it was charged under a bodily harm theory. From the accused's perspective, there was consent, or there was nothing indicating nonconsent; the person reasonably thought everything was okay. Both of them have a good faith belief in their position; is that not a scenario where it would be appropriate to instruct on mistake of fact as to consent, even though from the victim's perspective, there was not consent? Or am I misunderstanding the scenario you were describing?

LTCOL THIELEMANN: A little of both, and I'll take the brunt of the blame, ma'am, because I did speak about U.S. v. Howard off the cuff. The factual matters in that case are slightly different than you described, and a good example of the problem we have with bodily harm charging. Oftentimes when we charge bodily harm, we have a convergence of "incapable of

consenting" at the same time. We have a lot of alcohol involved, and in some instances, we have been informed that over our prosecutions, members are not really going to buy into that level of intoxication that we see in the investigation as something that fits an incapability of consenting. So in turn, our charging theory goes to bodily harm. So in the case that I'm mentioning, the government did choose to charge with culpability on bodily harm, but there was significant drinking that was going on, and the testimony that was presented by those percipient witnesses showed her to be significantly intoxicated. She does not remember the event until being thrown into a camper in the back yard in Alaska.

The only information that was presented to the finder of fact came through the interrogation of the accused, but that was limited in its presentation. So what you have is a victim who testified, knowing that she had been picked up out of the hot tub, dragged across the

yard into a camper, and had forcible sex pushed upon her. There is no other evidence that had presented to suggest to the gunnery sergeant that she was willing to consent to that activity, and she thought that it was a good idea to cheat on her fiancé, who happened to be the gunnery sergeant's subordinate staff NCO, who was right in the other room. So that fact pattern to me was difficult to assess. What evidence was presented, either through the presentation by the prosecution, and in turn by the cross-examination of the civilian defense counsel of the victim, suggested there was a mistake of fact as to consent on behalf of the accused? I don't know if I'm making this clearer to you, but it was this conflation of two possible charging theories.

MS. KEPROS: If I'm understanding you correctly, as the judge, you felt there was not a scintilla of evidence, there was not some sort of evidence?

LTCOL THIELEMANN: The standard for

me, ma'am, is some evidence that I'm required to instruct on in defense, such as a mistake of fact as to consent. The only evidence that had been presented, and I was informed by a recent CCA opinion, and I can't remember what it was, but hypothetical questions posed by defense counsel during cross-examination such as, "Isn't it possible that you could have reached for his penis?", is not sufficient for some evidence of a mistake of fact as to consent. That's all that we had in that case, was cross-examining questions that were hypotheticals, well isn't it possible, kind of what you heard from Major Rosenow. Well, there's many things that are possible, and that is not sufficient, at least by my Service's court of criminal appeal, on establishing a threshold of some evidence for that particular instruction.

And let me end this with that was the first time ever in two and a half years on the bench that I did not give mistake of fact as to consent, partly because I was concerned that I

was not upholding the constitutional rights of the accused, much like we heard earlier, but in this instance, as I became more educated, much like you heard from Major Bateman, as you spend more and more time in the trenches dealing with that statute, you realize that it can be pretty clear when consent and mistake of fact as to consent does apply. In that scenario, I did not find it to be the case; CCA did agree with me, however, I suspect that Judge Baker and the CAAF may have their own two cents on that as well.

MS. KEPROS: This scenario that I posed originally, is that a scenario in which mistake of fact as to consent would be appropriate to instruct upon?

LTCOL THIELEMANN: On the bare bones that you provided to me, possibly. I'd like to hear more, and I don't mean to say it flippantly. I want to see the facts and circumstances; I need to see it in context at that moment. That's something that often gets lost when we just read the black and white of a transcript, or black and

white of an opinion from an appellate court, is that when you're in the moment, watching the case develop and hearing those facts presented, that's what's really driving those military judges to decide what instruction should be there. So yes, it's possible for that to have been given.

MS. KEPROS: And I don't want to foreclose any other comments on this issue. I do have to, I guess, offer my own observation, which is, one thing we have struggled with already in our review of this scheme is the role of these laws as training tools for Service members to describe appropriate standards of behavior, and whether the complexity that accompanies their interpretation maybe is something that is lacking because the judge doesn't even know what the law is until the trial has occurred, so I'll throw that out too if anybody has any comment on that as maybe one of the goals of the law.

CHAIR JONES: Did you want to respond, Colonel Pickands?

LTC PICKANDS: I was just going to say

that the circumstances that Colonel Thielemann describes where there are multiple charging theories that might apply, the two that most commonly overlap are bodily harm and the incapacitation. In my practice and in the practice of most of my prosecutors, we disfavor incapacitation for a couple of reasons. One is that there isn't a definition presently, but the other is that you're capturing --- the criminal conduct that you're capturing is extreme. The condition of the victim and the incapacitation that the 2007 scheme -- and similar to the definition that several others have proposed that we bring back -- is not unconsciousness, but it's very close. So when panel members are hearing that somebody is walking, even if they're having to walk assisted, that bears on their analysis, and as a prosecutor, I have to think about that as I'm coming up with my charging theory, and it's no surprise to anybody, if I have multiple charging theories and one of them is easier or one of them is more susceptible of proof, I'm

1 going to choose that one. So bodily harm often
2 became at least my default for alcohol-
3 facilitated sexual assault, because it was easier
4 to establish that. I worry about -- to his other
5 point -- I worry about instructions from the
6 judge on things that are not elements of offenses
7 nor affirmative defenses, because when a judge
8 instructs on something that is not an element nor
9 an affirmative defense, it raises that thing to
10 the level of a defense or an element, and it
11 gives it a quality that Congress has not given it
12 by not putting it in the statute, and it has not
13 been established as law. It raises that, the
14 importance of that, and that has a functional
15 impact on it. If you're doing a guilty plea
16 inquiry, and something is potentially a defense,
17 the judge has to inquire into that defense. If
18 it's not a defense, not so much. So it affects
19 both trial practice and guilty plea practice, so
20 if we could come up with any kind of
21 clarification as to how it would assist the
22 judiciary in figuring out when consent is

relevant vice when it is an affirmative defense, that would be desirable.

CHAIR JONES: Any other? Yes, Professor?

PROF. SCHULHOFER: Excuse me. Sorry. I have a scenario that's been troubling me. And I just wanted -- I'll try to say it briefly.

And I'd like to get a reaction to it from the panel members about whether it involves a violation of Article 120.

Basically, two enlisted Service members are at a bar. At a club drinking. Dancing together. Affectionately dancing together.

The woman has three beers over the course of about an hour. And after dancing, she just kind of plops down on the sofa.

And he plops down next to her. And they're kissing and hugging. And then he penetrates her.

Does that violate Article 120? And does the answer change if she has had no drinks?

Or if she's had three whiskeys, each followed by a beer chaser?

LCDR KIRKBY: Well, what was the whiskey?

(Laughter)

PROF. SCHULHOFER: What was the whiskey? I don't think -- 80 proof.

LCDR KIRKBY: I think the problem is, you need to -- we'd need to see the evidence. We'd need to see what her state of mind is.

You'd have to see what else came out. You're going to have to get over that evidence.

I mean, we're talking about the facts and circumstances surrounding. And I think we go a little bit more into detail than those bare bones.

It goes back to the question earlier about, you know, she says there was no consent. And he says there was consent. Well, is there a mistake of fact that's concerned?

Where were --

PROF. SCHULHOFER: Both had some --

first of all, I kind of anticipated that you would say, well, we need lots more circumstances.

But I think -- I'm thinking of a situation where there basically aren't a whole lot of more evidence.

They both agree on -- they both tell exactly the same story. It's not that he said she consented and she said no, I protested. They both tell exactly the same story.

Which is that they flopped down on the sofa. They were kissing. And the next thing she knows, his fingers are in her genitals.

LTC PICKANDS: But I think the practical answer to that is that there would be reasonable grounds to charge that as a sexual assault.

But, there would also be --

PROF. SCHULHOFER: In all three cases?

LTC PICKANDS: I don't think the level of intoxication matters until you get to the threshold of being unable to consent. Physically unable to consent. Or express consent.

So the beer doesn't -- or the amount of alcohol there doesn't seem to change the fact that there are reasonable grounds to charge it as a sexual assault.

You would have a fight over consent. And that's contemplated in the definition of consent.

It states -- it says, takes all circumstances into account, that a lack of or absence of resistance is not necessarily consent. That a lack of resistance shall not constitute consent.

So, there would be a fight on your hands in that case. But we charge those cases. And some of them we get convictions on and some of them we don't.

So, unfortunately, that's a long-winded answer to say, maybe. But it is enough for me to charge certainly.

PROF. SCHULHOFER: Okay. My interpretation would be, she didn't con -- she never said yes. So, even if she hasn't touched

any drink at all, it would be a violation of Article 120.

And if that's true, the incapacity issue really doesn't come up at all except in a case where the woman actually said yes. But was so -- her mind was so altered by drinking that she wasn't able to understand what she was agreeing to.

And the typical case of incapacity that I think of, is the person who the incapacity prevents them from saying anything. That would be a violation whether they had a drink or not.

LTC PICKANDS: I think that's one part of it is, one of the reasons that the definition I suggested is kind of a, hopefully a clearer paraphrase of the 2007 version, is that I've had cases where victims have told me, I was terribly intoxicated. I was nauseated.

All I was trying to do at that moment was not vomit all over myself. And so I didn't want to have sex. I was not manifesting any desire to have that.

I was really just trying to keep my food down. And I was huddled in a fetal position when I was penetrated.

So that's somebody who understands that a sexual act is about to occur. Is able to formulate a decision about whether they want to participate. But is not able to communicate that decision.

I think that's why you have to have kind of those three prongs. Perception, cognition, execution.

LTCOL THIELEMANN: I disagree with Lieutenant Colonel Pickands on your baseline fact pattern. We see that quite a bit. And that comes back to my original premise about what we're trying to do with the 120 statute.

First and foremost, if I received a base fact pattern like that, sir, I would probably assume it would go the way of the prosecutorial merits memo as I lay out the strengths and weaknesses.

PROF. SCHULHOFER: I'm sorry, I didn't

hear that.

LTCOL THIELEMANN: Oh, prosecutorial merits memo. That is something I think was talked about in September about how we process cases.

I know there's been a lot of media attention about this is a command-drive process. There's no discretion.

The attorneys -- but in particular in the Marine Corps, who I can only intelligently speak on, we reorganized in 2012. As part of that process you created this weird, shiny toy of a regional trial counsel.

And we are now the supervisory counsel that come in and look at cases. And give that prosecutorial assessment for the staff judge advocate to advise his convening authority on.

So, I --

PROF. SCHULHOFER: Are you just saying that that case would be declined for prosecution?

LTCOL THIELEMANN: I would likely recommend it to be declined. And I only provide

you that input, not to say that the facts couldn't be expanded much.

Like I just heard from Lieutenant Colonel Pickands, that what he described to me with what was going through her mind, if I knew that, I had that information, I'm definitely charging. At that point.

But your fact pattern, sir, when it started, it goes back to my premise of what are the sexual norms of this century? What are we trying to criminalize?

And when I listen to that fact pattern, what I heard were two young adults that we deal with in the military, time and time again. College-aged kids that were engaged in drinking.

They seemed to have an affinity for one another. They laid down on the couch together. And they started kissing.

And the next thing you know, what appeared to be a consensual act is now possibly being prosecuted and criminalized. That's my

concern that we're possibly criminalizing consensual activity just because there was no affirmative consent required.

Because that's what I gleaned out of your hypothetical to me. Is that she didn't say yes. That means that we want an affirmative consent.

PROF. SCHULHOFER: I was --

LTC PICKANDS: That's what the definition of consent actually says.

PROF. SCHULHOFER: Exactly.

LTC PICKANDS: All right, it says lack of any manifestation of consent.

LTCOL THIELEMANN: But isn't that -- that's just a gray area of the law.

LTC PICKANDS: It certainly is. And I'm not at all surprised that there would be differences of opinion on the use of prosecutorial discretion.

I am and have been -- I've served at every level of prosecution from the most junior to now the most senior. And never served as a

defense counsel. I am definitely a prosecutor.

I would consider charging that case. I have charged many such cases.

I think the risk of getting penetrated by somebody should be on the penetrator, generally speaking.

MAJ ROSENOW: I just -- I've served as a defense counsel. And I don't know if I could charge that or not. I'd need to know more.

But the one thing that for sure is implied in the hypothetical, even if we don't start dressing it up with more facts, Professor, is somebody made a report. That's a huge cleave between this kind of consensual activity and this kind of nonconsensual activity.

I'm sure going across barracks, across the world on ships or wherever, that exact fact pattern is happening right now.

And some of them, a very small number of those are going to be raised to my attention. Because somebody's going to come forward and say, I didn't want a part of that.

And that's implied in the fact right there. So that's going to always move it into a different class of case that I'm looking at.

Because under your scenario, sir, of course I'm looking at that. And that might be the start of a lovely relationship or a continuation of one, who knows.

But for the purposes of our examination, if it comes to me, then somebody wasn't comfortable with what happened. And that goes a long way in testing was there consent for that.

PROF. SCHULHOFER: So you'd consider charging it?

MAJ ROSENOW: I would look very closely at it. When somebody wants to, in this climate or any other climate, embarrass themselves, and it's an embarrassing process.

You know when you prosecute these cases, everyone knows. It's the most uncomfortable situation you possibly could be in.

Nobody who gets burglarized feels

uncomfortable calling the police. And they're, oh, my God, somebody broke in. And then they go, did you leave your window open? That never happens.

But we do know that we're dealing with a social -- social norms. And we're getting better at it, absolutely. And the Service norms are getting better at it, absolutely.

It's just different. So for somebody that managed that and that braved that. That means a lot to me when someone comes forward.

So I look at that very closely.

PROF. SCHULHOFER: I want to say one thing to clarify my follow-up questions. I'm trying to avoid making tendentious, or suggesting that I have a position.

But I might follow up with any of you with respect to the answer. And one thing that's, I'm thinking, or one thing that's bothering me, is the definition under (g)(8)(A), which says, "consent means freely given agreement."

If I take that literally, I have to think that Colonel Pickands' answer is the correct one under the statute as it's written.

And that a prosecutor arguably, or we would wonder, is a prosecutor being derelict in not charging the case when the facts as we presented are that there was never at any moment, even without any drinking, there was never at any moment an affirmative expression of consent?

And then the woman came forward and complained that she was shocked and, you know, totally taken by surprise.

LTCOL THIELEMANN: I clearly don't think it would be derelict in my response to you, sir. But if you look at the definition of consent, there's an important catchall phrase.

"All the surrounding circumstances are to be considered in determining whether a person gave consent." So it's not just the verbal communications.

It is body language. It is the engagement of the human being with one another.

We operate so differently in those social situations.

So, I don't say this lightly because I deal with an enormous amount of sexual assault investigations that come forward. And this is the hard part piercing through that.

And when we think about Major Rosenow's comment that, well this is a different class because it's been reported. Clearly it's been reported if it comes before me.

Well, I'd like to understand how it got reported. Was it just the next day that the guy or the girl, whoever reports, is saying, hey, I hooked up with so and so last night.

And the person they're talking to goes, "Well, did you have something to drink?" "Well, I did." "Well, that was a rape. That was a sex assault because that's what my SAPR training teaches me."

Maybe that's how the report came. But the victim in the end that makes the ultimate report, as the Major said, is making a decision

that is a very tough one.

And in that instance when we start talking to the victim, hence why our prosecutorial merits memos are not just off the cuff. They require a lot of investigation.

We start working with the Victims' Legal Counsel. The Uniformed Victim Advocate.

We start talking with that victim to understand what was going through their mind and help us inform our charging theory if we're going to go forward.

So, please don't take it that based on those facts alone I'm not going to charge. The bare bones you have, I have to inform myself of this definition of consent.

MAJ GEN(R) WOODWARD: Let me interject something just really quickly as the person on this board who is not a lawyer. But is serving as the -- or here to be the voice of the commanders.

Is, these guys won't charge anything. It is the convening authority that does that.

They will make recommendations.

And I only bring that up because I think it's a very important point that that commander has a responsibility that may be different than in the civilian world. Because that commander has a responsibility to both members, the accused and the victim.

And in some cases they will lean towards moving a charge forward because that is something that is valuable to that victim who is forced to live in this environment. And it may not necessarily be something that's easy to prosecute.

But it is something that is valuable for that commander to provide to that victim who is a member of their command. To say, "I believe you. I will move this forward as a prosecution."

If that makes sense. So, it may be different.

LTC PICKANDS: And I think that's a good point. Because I've had commanders say, well, I would like to take this case forward

because I want -- I need to demonstrate that this is important to the command.

And for a whole host of reasons that go beyond my assessment of the evidence in the case. So you may have a case that goes forward that is not very strong because there are interests -- other interests that the commander has and is charged to analyze.

Just like my learned colleague there with the preamble. That's what they're considering. They're considering what's just and fair in their unit and to their command.

That being said, in the time that I have been advising commanders on what to charge and not to charge, I have had a disagreement with a commander and a commander went a different way than my recommendation once.

LTCOL THIELEMANN: I've had a different experience, often disagreeing with our approach. But I also would note just for education purposes, for former prosecutors or folks working in the civilian justice system, our

determination whether to charge something is a different standard.

I know the commander openly refers. But to determine whether or not we want to prefer a charge against an individual, it's really a probable cause determination as opposed to what I would think U.S. Attorneys, States' Attorneys, DA's look at is, can I prove this case beyond a reasonable doubt.

If we were to take that standard, there would probably be many cases in the military you would not see in court.

Hence why when we look at conviction rates as the success or failure of military justice is a wrong step to use. Because we have a much lower standard on deciding whether to charge.

MAJ ROSENOW: Ma'am, just to talk on that one point. I've never seen a commander though take that tact when you have the baseline of a probable cause of determination.

MAJ GEN(R) WOODWARD: Right.

MAJ ROSENOW: Absolutely nobody would endorse that. And I haven't seen that happen, not once. For messages of command or anything else, there's that baseline guarantee because the person who's preferring the charges is swearing an oath that to the best of their information, knowledge and belief, the offense was committed.

So there's always that. That guarantee of probable cause.

MAJ GEN(R) WOODWARD: Right. But you have to believe that there's at least that level of -- right.

MAJ ROSENOW: Absolutely, ma'am.

CHAIR JONES: Ms. Kepros?

MS. KEPROS: I just have one question. You know, because this is completely not on my radar.

There, in my civilian practice, is an ethical standard for prosecutors. They are not to file cases that they cannot prove beyond a reasonable doubt.

Is there an ethical standard in

military jurisprudence that guides anybody? I don't know if commanders are even attorneys?

LTC PICKANDS: They have to have reasonable cause. Reasonable grounds is the standard. The Navy and Marine Corps have a JAG instruction for professional responsibility.

Interesting note though, in the instruction that says as long as we have reasonable grounds or probable cause, the discussion section cites to two cases. One that looks at probable cause and one that looks at proven beyond a reasonable doubt.

So there's a conflict in the discussion section there. It is a topic of discussion in the Marine Corps at least, from the regional prosecutor's standpoint, when we have cases we know we're not going to prove beyond a reasonable doubt.

But we meet that very low standard, are we ethically barred from prosecuting? And that becomes a conflict with our State licensing authority.

So we have this dual world to live in, which makes it difficult.

CHAIR JONES: Yes, Dean Anderson?

DEAN ANDERSON: So, what a treat it is to have this kind of experience in front of us. I very much appreciate your experience and wisdom on these issues.

I'm getting an overwhelming sense that this panel does not want major change. The first comment from Lieutenant Colonel Thielemann was that you don't think there should be substantive changes.

And that there's a risk of limiting justice by making changes. And then the last comment that Commander Kirkby said was, you know, don't worry about perfection, for heavens sakes. Let this settle. I think someone else said let this settle. And leave the thing alone.

And yet we've just spent about an hour talking about substantive changes on the definitions of consent, incapacity, when mistake of fact -- now, the mistake of fact issue may be

as, as Lieutenant Colonel Pickands suggests, simply a clarification that mistake of fact does not apply under certain circumstances and does under others.

But, and I take that as procedural more than substantive, arguably.

LTC PICKANDS: I like that.

DEAN ANDERSON: Pardon?

LTC PICKANDS: I like that.

DEAN ANDERSON: You like that. But, you know, I think the defense would say that that's substantive. And that the -- and that mistake of fact should be an affirmative defense under a whole host of conditions that you would say, no, that's simply a failure of proof of the prosecution.

And I think one of the things that I'm struggling with is, each of you wants us to really dive into something different. And take some time to explain it.

And yet, it all revolves around consent. It sounds like Lieutenant Colonel

Thielemann wants us to clarify where mistake of fact applies. And to tidy up consent.

I think you're opposed to -- I get a sense that you're opposed to the affirmative consent standard as it's laid out in the statute.

It sounds like Lieutenant Colonel Pickands wants to clarify impairment and incapacitation. And has given us a theory of incompetence to do that.

Which I love that theory. It's going to be controversial. And others would object.

And Major Rosenow wants us to define, desperately wants us to define "incapable of consenting." Because right now that essentially falls to unconscious.

And that that precludes a number of circumstances in which there would otherwise be an opportunity potentially to prosecute effectively. And justice might demand that.

And Commander King wants us to define consent a little bit more carefully as well. All of these are important substantive changes.

It seems to me if we get into consent and really start to grapple with it, and change what is actually a fairly straightforward definition right now, there would be controversy on that statement.

But when I read 120, it's like, look, it's affirmative consent. And you take in a bunch of circumstances. And you make judgement calls.

Why should we tinker with this? Why should we tinker with this?

LT COMMANDER KIRKBY: I'd be quite happy if, you know, I think we need to define "substantive." What does "substantive" contain?

If we're simply striking certain words or we're changing certain language, I don't see that as a substantive change. I don't see that as changing our practice that much.

But if we're going back into 120, into the statute rather than the definitions, I think that's where we get into substantive changes. I think that's the stuff that we're

saying, leave that stuff alone.

That it doesn't need changing. It's not a moral authority. But we know what it says and we know how to work it. We know how to prosecute the cases.

And better than that, accused counsel know how to defend those cases. So I think that's one of the keys we can't forget here.

It's great for us prosecutors to sit up here and say, we know how to do this. And we know how to, you know, thread the needle.

But better than that, in the appropriate cases, the defense counsel know how to defend those cases. And that's -- you know, this needs to be just. It needs to be just and appear to be just.

So we can't simply come in there and quash it. Or as some people would say, strike consent entirely.

You know, years ago in the federal statute, you didn't have consent. Let's go with that one.

I would point out that feds don't typically do these cases. That's not in their bailiwick.

I think there are things that need to be changed. I think you need to look at consent. But I would suggest, we don't need to define "incapable of consent" if we get consent right.

The problem is, is you're going to get the dispute about what is the right definition of consent.

MAJ ROSENOW: I'm uncomfortable with the language of consent. And the focus that I have on the capable of consent is more based on what I've seen in the practice.

That the margin of cases are not getting captured. I have the exact same experience as Colonel Pickands.

95 percent of the defendable, right charge is going to be bodily harm when it's a sexual assault case. And I say that, it's probably 99.

And the reason is, if she does

anything or he does anything during it, a whimper of no. A recognition that things are going on, any kind of resistance that you tend to see.

So she's blacked out or he's blacked out the whole time. And there's this pocket of memory where I remember having, and I kind of tried to push away and then it fades to black again.

Now we're in a scenario where I got to charge that as bodily harm if I want any chance of prevailing. Because clearly, if she remembers during that or if he remembers that one pocket taking actions that are affirmative, then I'm in the world of blackout versus pass out.

So it's really just a disconnect between her long-term memory and her short-term memory. And the defense can drive their entire case through that.

So your one memory is being an active participant in a sense. You say that you were saying no. But this is in the fog of being drunk.

And you don't remember anything else. What was happening for the 20 minutes before and the 20 minutes after?

I think that's why if you want to give any teeth to "incapable of consenting" as a theory of criminality, it needs to be better defined. Otherwise what's going to happen is, we're always going to retreat back to bodily harm.

And it would be nice to have that other kind of crime below passive.

DEAN ANDERSON: Thanks.

MAJ GEN(R) WOODWARD: Can I ask for clarity on that body, of bodily harm? What are you using as the bodily harm?

Is it merely the penetration?

LTCOL THIELEMANN: It depends.

MAJ GEN(R) WOODWARD: But then you have to -- if you're saying it's nonconsensual penetration, then doesn't nonconsent have to be part of it?

You still have to go to nonconsent,

right?

MAJ ROSENOW: Absolutely. She did not consent. Right.

LTC PICKANDS: That would be part of our form of proof. We'd have to establish lack of consent.

MAJ GEN(R) WOODWARD: Okay. So you're not getting around the lack of consent by charging bodily harm?

LTC PICKANDS: No, what we would be getting around is having to establish "incapable of consent." That's what we're saying it is.

And while we might differ slightly on what that threshold is, I think it's -- it is important to describe. We describe elsewhere in the statute, we refer to people who are incompetent from mental disease or defect.

We're trying to protect the same interest. Those three things have to be defined the same way.

That's why I -- instead of doing it by defining "incapable of consenting," I talked

about incompetent person. Because we want to charge folks with exploiting people who are not able to make that choice.

We want to prosecute people who have chosen otherwise. And who are unable to have that choice.

And that's why I think it should be defined. But it should be defined at that level. Which is at the extremely intoxicated level.

LTCOL THIELEMANN: And for Dean Anderson, ma'am. Again, I know that I said that I don't want to tinker with much. I do think definitions need to be done or modified.

And while I am opposed to giving a definition for "incapable of consenting," I am not opposed necessarily to what Colonel Grammel put in there.

However, one of my concerns is that we are missing the broader point where there should be some discretion of putting the right cases into court.

And my reason why I do generally defer

to bodily harm, we have had successful prosecutions on "incapable of consenting" without a definition. Because what we were focusing on is that standard of knew, or reasonably should have known of the condition of the victim at the time.

We've been putting focus on the accused and the actions that he took. Much like you heard from Lieutenant Colonel Pickands.

That person that sees that person who has been drinking. And continues to drink. And then took action.

So I don't really think you need to have that definition of "incapable of consenting." Because the facts and circumstances, buzzwords from the consent definition, help you accomplish that.

And if you have a tidy consent definition, leave it as is for example, we don't then need what is incapable. Because the members are being instructed to use their understanding of the ways of the world and life experience just

to understand what something is that is "incapable of consenting."

DEAN ANDERSON: Thank you.

CHAIR JONES: Yes?

COL(R) SCHINASI: You both touched on this a little bit. So I want to ask it directly.

As a practical matter, the way 120 is written today, does it inhibit you at all in charging and moving forward on any offense that comes within its specter?

LTCOL THIELEMANN: Not for me.

LTC PICKANDS: I think the only cases that might be problematic would be military -- some misuse of military authority type situations. Because that threat of wrongful action seems to me too, so poorly defined.

You can have a situation in which, you know, I have -- let's say I have three captains. I can give our highest rating, the above center of mast rating to one of those three. They all deserve it.

So it would not be wrongful to give it

to any one person. I express or imply that if you want to get that above center of mast that you got to do something for it.

It's not a threat of a wrongful action career-wise. It's an enticement. And it's distinctly different from a sexual assault.

I don't know that we have an adequate way of prosecuting that offense presently. If that's one that Congress wants to prosecute, wants us to prosecute, we're going to have to do something with it specifically.

Not try and shoot one into rape and sexual assault.

MAJ ROSENOW: I'd echo that, sir. I think initial entry training is particularly dramatic. That situation, I would embrace.

Again personally, a strict liability offense of people in the first eight or ten weeks of their time in the military. That the power disparity is just too stark.

And another thing, I think we are actually being limited a little bit in, we can

functionally charge it. It's just not easy to notice that we can charge it.

It's what I talked about at the beginning in terms of indecent acts.

LCDR KIRKBY: Sir, I don't know that I would go with the strict liability of certain offenses. Especially when that brings sex offender registry into account.

I think there's a lot of things that go into that. I'm hesitant with strict liability for those offenses.

But I think in answer to your question, I don't know. I think we're waiting for CAAF to come out with their answer on the stethoscope to tell us where we go with that.

COLONEL SCHINASI: With respect to those cases that you believe should result in a conviction, does 120 work against your getting a conviction?

LTCOL THIELEMANN: It's a delicate response here. It depends, sir. It depends on who my judge is. It depends on who the panel is.

And I believe, although not having practiced on the civilian side, I have a civilian HQE. I work with three other HQEs throughout the Marine Corps who have great civilian experience.

Our panels are tremendous. They're very educated. They're smart. They get it.

I saw that just recently four weeks ago in my own --

COL(R) SCHINASI: That's not the focus of my question.

LTCOL THIELEMANN: But I'm trying to get to that.

COL(R) SCHINASI: Okay.

LTCOL THIELEMANN: The reason why it's inhibiting is how they are being trained by SAPR folks. And in turn what I would call SAPR fatigue.

And jury or panel fatigue. We are seeing the same members time and time again coming into our court-martial from that particular command.

And they may have seen a 120 that was

just the intox. It may be the scenario that the Professor gave us earlier and they found him not guilty.

Well, they get another case in which they come in and they hear the reading of the charges and go, "Uh oh, here we go again. Another one."

So it's more of the churn of the volume of cases we have in the Marine Corps. And also some of the education pieces that we are constantly in SAPR training.

It is overload. And that's all they hear. Whether it's misinformed or right information, I think it does taint that.

And this is truly antidotal for you, sir.

COL(R) SCHINASI: My focus is on the statute. Irrespective of all the things that are involved in getting a case to trial.

Is there anything in the statute that prohibits you from getting convictions in those cases where you believe there should be a

conviction?

LTC PICKANDS: I would say that if there is, it is only that "incapable of consenting" phrase. I think you don't get away from it by focusing on the condition.

The impairment being known or reasonably known by the accused. Because you still have as an element of the offense, establish and main capacity.

Some panels may, because of their SHARP training, so for example, at Fort Belvoir where I'm stationed, I have to do annual SHARP training despite the fact that I'm responsible for prosecuting all the sexual assaults.

I sit there in the class. I hear, if you have a beer, you can't consent to a sexual act. Every time I get that class.

I go up to the instructors afterwards and I say that's not the law. And then I invite them to change their instruction.

You have panel members who have been deluged with this training. And they may read

"incapable of consenting" as something like what Colonel Thielemann described to judge and jury by instructing on impairment from Article 111.

Or ability to contract, to confess to crimes, to do things that -- like that. And maybe you may have panel members who believe that incapable means somebody whose eyes might be open, but is otherwise not home because of their intoxication.

That wide range of potential understanding of that phrase is problematic. And it should be clarified for them.

That's really the only place in the statute where I see where there's a roadblock. Everything else is just something we work with and around.

MAJ ROSENOW: I would just echo that "incapable of consenting" should be clarified. That would be helpful in those where we otherwise might win.

Although I'll say, if we give a definition that's not the right one, the

ambiguity that before was helpful, is now going to be harmful when it's more particular.

And that would mean -- I just don't want to leave open to interpretation what is sexual contact through a particular. I think it should just be very clear that you can do it.

LCDR KIRKBY: Sir, every case that I've ever taken to trial I thought I could win. So the statute was an impediment every time I lost.

(Laughter)

COL(R) SCHINASI: Okay. Last piece of this. I realize you're not the SJA and you're not carrying the case into the CG.

So this is going to be kind rumor and hearsay. Do you ever hear back from the SJA that the convening authority had difficulty with the statute?

That he would otherwise have moved forward but for the complexity or whatever, uncertainty of the statute?

LTCOL THIELEMANN: I have not heard

that. But I've heard other reasons why a case went forward.

LTC PICKANDS: In my meetings with convening authorities and secondhand, I have not heard that complexity of the statute is -- has been the deciding factor on a decision.

MAJ ROSENOW: I've not heard that. I've spent a lot of time educating SJAs in my line of military justice billets for a while. So, no, haven't seen that.

COL(R) SCHINASI: Okay.

LCDR KIRKBY: From convening authorities or SJAs I've never heard that.

COL(R) SCHINASI: Okay. Thank you.

MAJ GEN(R) WOODWARD: So, I just have an example of how the Air Force went from that commander-directed investigation I did at Lackland at basic training. They were not able to take cases forward as Article 120 except for one where they had proof of forcible rape.

Where they didn't believe that 120 would cover it because of the disparity in power.

And I would submit that was a case where they couldn't get a conviction that we would normally like to convict on because of the way it's written.

Is that --

MAJ ROSENOW: Most of those cases were drafted as unprofessional relationship cases for the MTI cases. I prosecuted the last one. U.S. versus --

CHAIR JONES: I'm sorry. Could you repeat that. I can't hear you.

MAJ ROSENOW: Yes, ma'am. Actually most of the MTI, military training instructor cases were prosecuted as described by generalized unprofessional relationship cases because of the nature of what was going on. And what we actually have on the statute.

The last case was by force. We finished that. And we began the other hearing U.S. v. Silva. We didn't get a conviction on that case when they had --

MAJ GEN(R) WOODWARD: But do you think

there are a couple that probably should have been under 112 though?

MAJ ROSENOW: Oh, yes. Those are absolutely things. Understanding what the training environment is like, I was assigned as strictly San Antonio-Randolph for two years.

It is different than if we can possibly explain to people who haven't served in the military.

MAJ GEN(R) WOODWARD: Right.

PROF. SCHULHOFER: Major, when you said it was only professional relationship cases, do you mean fraternization?

MAJ ROSENOW: They were characterized, sir, as unprofessional relationship cases. There's an AETC, Air Education Training Command instruction that prohibits that kind of --

PROF. SCHULHOFER: What article is that?

MAJ ROSENOW: Under Article 92. There's also ways of characterizing it under 134.

LTC PICKANDS: And it's slightly

different for each Service that I know we had some discussions in the fall about superior support relationships being otherwise criminal when we had the discussion about strict liability.

Which I think if enacted, should be limited to the basic training circumstance. Which is culturally and physically completely different than the rest of the military experience. At least in the Army.

But the point that military authority itself, that it's difficult if that's all you have. If you don't have some kind of force or bodily harm or something like that. That's difficult to capture presently in 120.

That doesn't bother me as 120. Because I don't necessarily think that one's superior rank is an adequate constructive force.

I know that we had cases that arose out of the drill sergeant abuse scandal at Aberdeen where the appellate courts made abuse of military authority a constructive force element.

I don't think logically that works. I don't think somebody's rank implies the likelihood of physical violence or power.

I do think it should be criminal. I just don't think it's traditional sexual assault. And it's not captured well here.

HON. HOLTZMAN: May I?

CHAIR JONES: Yes, Liz?

HON. HOLTZMAN: Well, at least one of the statutes that we've been given to look at makes it a specific crime of sexual assault "if" -- I'll read you the language -- "the actor has supervisory or disciplinary power of any nature or in any capacity over the victim." And I think that that's an important principle.

I agree with you that although we've heard varying testimony on this point that wrongful conduct, we've been told at various times, that the wrongful conduct provision covers this kind of problem.

But you're saying you're really shoe horning it in. And it's an inconvenient way to

do it. And not a really effective way to do it.

LTC PICKANDS: Well, it kind of really is --

HON. HOLTZMAN: But I do think, my own personal view is here, that to use the power in that way is a kind of force. It's the same as for example, someone in a priest-penitent situation.

You're using -- it's a more subtle kind of force. But it still is force. And it's overcoming the will of the victim.

So, I just wanted to make that point. I want to make one other point.

Even though I have complained about the statute, I thought I had made the point -- and I will make it again if it's not clear enough -- that the question before us is the extent to which we can make -- it's better to make those changes that are -- that might be required. Or not, depending on the consequences.

And disruption, and all the factors that you've pointed out as arguments against

change, we've heard and have to take into account. There's no question about that.

There's also no question about the fact that this is not a well-drafted statute.

CHAIR JONES: Dean Anderson?

DEAN ANDERSON: Very quick follow-up. Do you see -- I'm always interested in this idea that there's a disconnect between the education, the preventive education given to folks who are just entering -- or even throughout I guess their time in the military, and that particularly when they're just entering -- and what the law requires.

Do you -- is it difficult to seat a panel that is just on these cases? As a result of misinformation they've been -- they've received in SAPR training?

LCDR KIRKBY: Ma'am, we've seen that a couple of times where they've been told in SAPR training, you know, one drink means you can't consent. We've dealt with that on the training side.

But these are military officers or senior enlisted people. The judge tells them that is not the law.

DEAN ANDERSON: Right.

LCDR KIRKBY: I'm going to tell you the law. Can you follow the law? And I have no doubt, I mean, I've never even --

DEAN ANDERSON: Right. That's what I'm wondering. It's sort of a bogeyman out there that this will lead to injustice in the courtroom.

And it sounds like you're saying that although it is an issue, the disparity between what the law says and what the education is, that that doesn't lead to -- particularly because of the discretionary moments that the prosecutor exercises before deciding to bring a case forward.

And because they're told to follow the law. And disabused of misinformation.

LCDR KIRKBY: Correct.

DEAN ANDERSON: Is that my -- is my

sense correct there?

LCDR KIRKBY: I believe so. I believe that we have that issue. The voir dire process eliminates those people who can't get past that.

Who can't get past that misfit training. So, and nowadays there's so much training that they've probably been told at different times that that's not the standard.

So, you know, we're now required to fix the problem that we created earlier on, so.

LTCOL THIELEMANN: It's the difficulty. It does get done. I think the panels that are seated for the most part are just. They wouldn't be there.

The judge has many tools to make sure the panel is there. But it's hard. I watch every junior enlisted or junior officer that comes in front of panels when we had the initial SAPR burst.

We had the problem in the Marine Corps that we also had the Heritage Brief from the Commandant that raised all kinds of levels of

concern about UCI, coupled with the SAPR training that the junior folks are listening to that.

And even when I as a judge said, if I tell you the law is this, are you going to follow it? Well, my Commandant said, or SAPR says, if I hear that, they have to go away.

And that's the hard part. So the difficulty is it takes the process longer. And we could have avoided that hiccup.

DEAN ANDERSON: Thank you.

CHAIR JONES: I have one quick question. Colonel Pickands, am I correct that you think force, that term and that word should be limited to physical force? Where there's a bodily harm?

LTC PICKANDS: Right, in my initial comments I think I referred to a suggested change I had. In threatening or placing that other person in fear, which is a definition of an element in sexual assault.

I suggested inserting the words "physical or violent" in front of "action

contemplated by the communication or action." Because it seems to me that the threat and sexual assault ought to be tied to physical violence or force.

And then if we want to get to military authority and coercion, we ought to have a provision for that. But we shouldn't try to shoe horn it in as a theory of sexual assault.

They are very distinct harms that we're talking about. When you're talking about somebody who is forcibly coerced or intimidated somebody into a sexual act, that is different in my mind than when you have provided them a choice that they should never have had.

Choose between this wrongful action to your career or your personal autonomy and the sexual act. That is wrong. And it should be criminal.

But it is a choice. The person who's being offered the -- hey, get the buzz in your mast or I will give you a bad OER if you don't do this -- has an opportunity to leave the

situation. Report, do other things.

That choice has been taken away from you in rape and sexual assault. I think it ought to stay that way.

And I think if we're going to criminalize the misuse of military authority, it should be done explicitly in its own offense.

CHAIR JONES: Thank you for clarifying that.

Thank you all very much. This was extraordinarily helpful.

I'm sure -- I would appreciate any written comments that you have. I think we've already said it. It would be very helpful to us.

And we're going to take a 40-minute break now. And come back at, what is it 20 to 1:00? To -- pardon me? Yes, so about 1:30? What is it now? I can't see the clock.

HON. HOLTZMAN: It looks like 20 to 1:00.

CHAIR JONES: Okay. 1:30? Great.

(Whereupon, the above-entitled matter

went off the record at 12:42 p.m. and resumed at 1:24 p.m.)

CHAIR JONES: All right, we're going to continue now with the Defense Counsel Perspectives.

We're going to finish all of the presentations today, so don't be concerned that there was some intent on us speaking to ourselves. We've decided speaking to you is more important.

So, with that, let's begin with Colonel Zimmermann.

COL ZIMMERMANN: Thank you. Good afternoon, ladies and gentlemen. Can you hear me okay?

CHAIR JONES: Yes.

COL ZIMMERMANN: I tend to speak quickly and too much, so please feel free to let me know if I am.

CHAIR JONES: So, if I raise my hand like this, you'll know?

COL ZIMMERMANN: That would be very

helpful. Thank you, ma'am.

CHAIR JONES: Okay, sure.

COL ZIMMERMANN: I'm really delighted to be here today on behalf of the Marine Corps Defense Services Organization.

I'm standing in for Colonel Stephen Newman who is the Active Duty Chief Defense Counsel in the Marine Corps. I am his Reserve counterpart. So, that's why they have my job to fill in for him when he's not available.

And, just for your information, I have been a Marine Corps judge advocate since 1993 and I've been both a prosecutor and an appellate military judge and a defense counsel litigating these cases, these sexual assault cases.

And in my civilian practice, where I do exclusively criminal defense, my personal docket is almost, I would say, about 75 percent military.

So, this is what I do day in and day out, both as a civilian and as a Marine Corps Reserve lawyer.

And I do both trials and appeals, by the way. So, I can't decide what I like to do, I just do a little of everything.

So, with that background, I have just a couple of introductory thoughts and then there's not time for me to go through all 11 questions that the Subcommittee asked and we will submit something in writing with our answers to those later.

But, I think the first three questions are probably the ones that are getting most attention.

But before I get to that, I noticed that the previous panel mentioned the preamble, which I think is really important.

What is the purpose of the military justice system? And one of those purposes is to achieve justice.

And what is the purpose of any criminal justice system in our country? It's to punish people who intentionally or with some culpable mental state take an action that we, as

a society, deem as inappropriate and unlawful.

It's not to punish people who do things, for the most part, by accident or mistake. I understand there are some things that require strict liability.

But, for the most part, our criminal justice system is intended to identify people who break the law, punish them and deter other people from committing the same type of conduct.

And so, I think it's really important to keep that in mind when we're talking about whether we tweak a statute, whether we rewrite a statute, what is the purpose of the statute? What kind of due process concerns do we have? What kind of notice concerns do we have?

All of those factors, in my opinion, militate towards completely rewriting the statute. I know I'm contradicting the prior panel, but my view is, and the defense counsel view from the Marine Corps is that whatever this Subcommittee recommends, no matter what the result, there's going to be some change

recommended.

This statute is a mess. It is just unworkable. It's too complicated. It's unwieldy and it's not fair.

So, there is going to be some change, I think, that will come from there proceedings. And so, people in the field are going to have to adjust to some change.

In my view, it's appropriate for us to rewrite it and get it correct, as correct as we can get it. Nothing's ever going to be perfect, I know that. But I think we ought to start from scratch and get it right and then people can adjust to that.

I'm not too concerned about people saying, well, there are going to be four statutes in effect. Well, there's going to be four statutes in effect no matter what change is enacted.

So, as opposed to tweaking, my recommendation is that we start from scratch.

So, the issue of consent is really the

pivotal issue. Most cases involve a factual determination of whether consent was involved in a particular transaction. Right?

If the two parties agree that the behavior was consensual, then there's no case unless it's something like an adultery or fraternization case which are uniquely military offenses. You don't see those in the civilian world.

But in the military, even completely consensual behavior between adults can still be illegal, but it's not a sexual assault that's going to require a lifetime of sex offender registration.

So, if the parties agree it's consensual, then it doesn't go forward. And if the parties agree that it's not consensual and accused is willing to admit that, then the case is going to be resolved with a guilty plea. So, most cases are resolved one way or the other, those two options.

But cases that are causing us the

heartburn and why we're here today are those middle-of-the-road cases where there's not an agreement between the parties and consent is the issue.

And so, let me turn to the definition, that first question is, is the current definition of consent unclear or ambiguous? And I think it's very clear from all of the presenters today that, yes, it's totally unclear, totally ambiguous.

And my proposition is that the very first sentence, what is freely given -- that consent is freely given agreement by a competent person, that part's okay. What the problem is, is each subcomponent concept contained in that sentence, that's where the ambiguity is. That's where the unclear language is.

In other words, a freely given agreement by a competent person, well, what is an agreement? And we've talked already a little bit today about whether we expect an affirmative expression of consent.

And I know there are some jurisdictions that require that and I would respectfully submit that that's not what we want to go to in military.

Agreements can be expressed or implied. They can be verbal. They can be nonverbal. And it needs to be more clearly defined.

And as the professor so aptly noted, the consent definition in the UCMJ seems to combine and make ambiguous four different components of consent definitions from other jurisdictions and it's a complete mess.

So, how does the fact finder determine whether there's been a meeting of the minds if it's not set out in the statute?

Now, the next component, freely given, how does one freely give anything or an agreement? And I guess that's related to the issue of force, physical force, other force.

How does one give an agreement? Again, express or implied? The nonverbal cues,

the nodding of the head, the touching, the dancing, the words that are said. There's so many different ways that one could give agreement or express a lack of consent.

And, again, the purpose of the statute is to set out what is the law. So that not only potential people who might be charged with the crime know what conduct is prohibited and know what's not prohibited.

But, I didn't even think, honestly, about the investigators who are investigating these crimes. What a great point that was made earlier today that, you know, we can't expect non-lawyers or baby lawyers or military Service members to be well-versed in the case law and have copies of the Military Judges' Benchbook handy to delve through to see how the President has decided something's going to be decided.

The statute needs to say, this is what you can and can't do. And so, all of these terms, agreement, freely given, how does one give, all those are things that need to be

defined so that people know what they can and can't do and so that investigators can investigate and lawyers can prosecute, defend and judges can fairly and justly rule on these cases.

Now, I have a question: what is the relationship of the term "by a competent person"? To the part of the definition that the person cannot consent if sleeping and unconscious or incompetent under subsection B.

I mean if "competent" or "incompetent" isn't defined, again, we're back to not really knowing what the standards are.

And then I want to talk about strict liability later because I'm on a time constraint.

But the bottom line is that the current definition of consent leaves all of these questions unanswered.

So, moving on to question number two which is, whether the statute should define defenses relying on victims' consent or accused's mistake of fact as to consent and sexual assault cases?

The answer, I think, I loved Ms. Kepros' -- I don't know if I pronounced your name correctly -- I love your proposition. In fact, my proposition is written on my paper that I wrote yesterday says, the elements of the statute ought to include a lack of consent.

And here, I think the statute can be very simply written, not in these exact words but with this concept that if someone commits a sexual assault, if you have a -- if you touch somebody intentionally either in a place that we traditionally think of as sexual-like, you know, the genitals or the breasts or buttocks, those sort of things, or you touch some other part of the body with a sexual intent and to arouse their sexual desires. And the person who's touched doesn't consent to that.

Because if you do one of those touchings and it's consensual, then it shouldn't be illegal and we all agree on that.

But that's a very simple way to define the statute is that you touch somebody in a way

that you shouldn't touch them and they don't consent to it.

And then, I agree with the proposition and discussion earlier that aggravating circumstances can then be added on to that. You know, if it's a full-on rape, that's obviously a much more significant serious crime than a touching of the breast over clothing. And that can be dealt with by having a graduated series of penalties for the conduct. But the basic baseline conduct ought to be unwanted, nonconsensual touching.

And this is not an onerous burden to put on the Government to require the Government to prove a lack of consent. All they have to do is call the complainant and ask the complainant to testify, did you give your consent verbal or otherwise, express or implied? Did you consent to this behavior? And the answer, I assume, would be no.

And then that would be for the fact finder to consider all the evidence presented by

the prosecution and the defense and determine who to believe and whether the fact finders think that the government proved lack of consent.

And in a case of an incapacitation, the government can put on that evidence that, well, other witnesses saw the witness passed out, sleeping, throwing up, whatever the case may be.

But asking the government to prove a lack of consent is not an overly onerous burden and they should have to do that, in our view. And that should be in the statute that consent is a complete defense as is mistake of fact as to consent.

I realize that RCM 916 incorporates that defense and so, we, as lawyers, know that we can still use that but if we're going to rewrite the statute, let's get it right. Let's have it as complete and thorough as possible while being simple and unambiguous.

And so, one sentence in there about when mistake of fact applies and when it doesn't, I think, would be helpful to everyone.

With respect to the third question about whether the statute should define "incapable of consenting," I think the answer is, yes, it should. Again, we need to put people on notice of what they need -- how they need to conform their conduct.

And I would note that I practice in Houston, Texas and I think I would win a contest for making the understatement of the year if I said Texas is a prosecution-friendly jurisdiction.

But even -- I just, for curiosity sake, pulled the Texas statute on sexual assault and I would make that recommendation, too, by the way. I note that some of the other folks have made reference to the federal statute, and while there is one that has a knowingly mental state, by the way, most sexual assaults of the kind that we see in the military are not prosecuted by the federal government.

They're mostly your run-of-the-mill sexual assaults and rapes that are prosecuted day in and

day out by state authorities, the District Attorney's offices and the local jurisdictions.

And I would recommend that the Subcommittee maybe do a collection of -- let's not reinvent the wheel necessarily by ourselves. Let's get input from other legislatures that have considered the issue and see how the states have defined their sexual assault statutes. It doesn't have to be controlling, but it can be informative as to how we might craft our statute for the military.

But even the Texas statute, being a very prosecution-friendly jurisdiction requires intentional or knowing conduct and it has to be nonconsensual.

And the way they defined the lack of consent, they kind of incorporate the incapacitation and we could do a similar thing where it says, they have a whole laundry list of circumstances under which a sexual assault is without consent.

And some of them include things like

if the other person is unconscious or physically unable to resist due to mental defect or disease, the other person was at the time incapable of appraising the nature of the act or resisting and so forth.

So, I don't know if we need a separate definition or if we want to incorporate the definition into our definition of consent, but one way or the other, I think the statute needs to clearly set out, what does the government have to prove and what are the factors that go into that proof?

I think I'm going to cede the balance of my time to my colleagues from the other Services unless there's any questions for me now.

CHAIR JONES: Yes, Ms. Kepros?

MS. KEPROS: Can I have the citation for that Texas statute?

COL ZIMMERMANN: Yes, ma'am. It's Section 22.011 of the Texas Penal Code.

CHAIR JONES: Great. And now we'll hear from you, Colonel, is that Pitvorec?

LT COL PITVOREC: Yes, ma'am, it is.

Good afternoon, Chairman Jones and distinguished members of the panel. I'm truly honored to have this opportunity to speak with the Subcommittee on the recommendation regarding Article 120 set forth in the preliminary report.

As a brief reintroduction, I am Lieutenant Colonel Julie Pitvorec. I am currently the Chief Senior Defense Counsel for the East Coast, Europe and the AOR and have been a military defense attorney seven of the 16 years that I have been an Air Force JAG.

I have also served as a trial counsel for a number of years and I was also the Deputy Staff Judge Advocate a few years back as well as an Air Force Fellow.

And today, I'm privileged to represent the 187 members of the Air Force Trial Defense Division who are charged with providing zealous, ethical and professional defense services to Air Force members worldwide.

My comments today are my own and do

not reflect the opinions of the JAG Corps, The Judge Advocate General or the United States Air Force.

And while as a lawyer, I tend to have very distinct opinions about many of the recommendations and that might be just another major understatement, I have tried to limit my substantive comments.

In my opinion, it is the first three recommendations that go to the heart of what is trying to be accomplished for this review.

And probably an interesting comment to a congressionally mandated panel, but one I feel I need to make initially, is that I truly believe we have a tendency to over-legislate matters. And a common issue that we have is doing piecemeal legislative fixes which is something that I think has hurt us in the past.

And for an issue like sexual assault, it is so complex. When we do piecemeal fixes, we tend to break some things that we're trying to fix.

And sometimes, taking a holistic look at Article 120 and, in this case, what this panel is trying to do, taking a look at Article 120 in its entirety is important and should be required so that we're not limiting our focus but are looking at how the elements fit together to achieve justice.

It is more important to get this right than it is to make simple tweaks which we'll, just in turn, be forced to rework in another few years.

As an aside, I will also propose that simplicity is an important aspect when rewriting a code on this very complex issue.

And what I mean by that is as we tend to add everything into the statute, we add all of these definitions and add all these things into the statute itself, that it tends to be -- we tend to look at the statute as if it's not in there, then they must not have meant to criminalize it which I don't think that's at all what we intend to do.

I understand that gone are the days of "by force, without consent" which is the statute under which I began my military career trying and defending cases.

And understandably, the force aspect of this equation is no longer required. But in order to get this right, we need to simplify the elements so that they address exactly the conduct that we believe should be criminalized.

Going to the issues that you have laid out in the -- that you've asked us to comment on, and I'll start with the beginning, that is the current definition of consent unclear or ambiguous?

I think Colonel Zimmermann really spent a lot of time talking about this. I think one of the issues that I have, yes, that it -- in short, yes. It is somewhat ambiguous. And I think it's somewhat internally inconsistent.

But one of the things that I struggle with with this definition is that it is a prime example of adding so much to the content of the

statute that then we look to, well, what's missing? If it's not there then it must not have been -- that must not be prescribed.

And I don't think when we're talking about some of the other things, given the totality of the circumstances, do we really believe that an MTI case, an MTI who sexually assaults someone, you know, in their -- in basic training, should that be prescribed? Of course it should be prescribed.

We recognize that it needs to be prescribed. It doesn't necessarily have to be a strict liability offense for us to understand that that conduct is wrong and that is something that we can try in a trial by court-martial.

And I do take issue with the affirmative consent portion of the definition of consent as it's currently written. And the reason I do that is because it's just not our social norms.

There are very few people who ask, you know, would you like to have sexual intercourse

with me and actually get an assent, affirmative yes, I would.

And so, recognizing that that is not how this normally transpires, there has to be a look at across the board, every part of that behavior that comes into being. I think that's written into the statute, but I think that's something that's important.

We keep saying this affirmative consent, affirmative consent. In fact, that's not -- my issue with it is that there are so many cases that it's up to the prosecutor to decide, their discretion to say, well, in this case, she didn't say yes but she didn't say no. And then this case, she didn't say yes and we don't know if she said no. And so, one case goes forward and the other one doesn't.

Many cases do not go forward when they're just as no/yes because the consent is implied because of the surrounding circumstances. So, to require an affirmative yes, I think it may be taking a step beyond where we're comfortable

with our own social norms.

The second issue, Issue #2, should the statute define defenses relying on the victim's consent of the accused's mistake of fact as to the victim's consent?

I'm not sure that needs to be included in the statute as clearly RCM 916 allows us to include both of those defenses. However, I agree with a number of previous presenters that the historic availability of these defenses is important and should continue.

And just to briefly talk about a previous presenter back when I was here in September or in D.C. in September, a previous presenter talked about the California model where they introduced the opportunity for either consent or mistake of fact as to consent as a defense but not both.

And I would argue that that could lead to inconsistencies and I could envision certainly as inconsistency in application.

In short, the defense of consent and

mistake of fact as to consent are likely to be substantially similar, evidentiary speaking in many cases.

And the same facts could illustrate an objective manifestation of consent on the part of the victim and could also demonstrate how the accused could have misinterpreted those facts at a time when the victim had testified that she did not consent or that her behavior did not constitute.

So, I would just say that those -- having both of those defenses available, I think, is important and to adopt the California model which allows one, but not the other in different circumstances or allows the defense to choose one but not the other I think may be a bridge too far.

And I would add that, in the traditional sense, that I would still argue that the consent on the part of a legally competent victim should negate any criminality on the part of the accused. And again, when I mean legally

competent, again, I think we're using -- now I'm using more terms that are ill-defined.

But I think we mean someone who is capable of consenting and that kind of segues very nicely into the next element here, issue number three.

And should the statute define "incapable of consenting"? And I believe, obviously, wholeheartedly yes. The ambiguity in the laws that currently stand leads to misapplication of the law and, therefore, injustice.

I find it really interesting that the panel of prosecutors sat and talked about how difficult it is to prove "incapable of consenting" without a definition or --

I have seen in a number of cases where young prosecutors are arguing, not how difficult it is, but that the standard for "incapable of consenting" is actually like the legal drinking limit, you know, the driving limit.

And to say that at 0.08 or 0.10 that

I am "incapable of consenting," I think it belies logic.

But, if you convince a military judge that that's the standard to use, then I think we had a misapplication of the law without a better definition that's included across the board.

The other thing I find interesting and I am somewhat troubled by, this is that the prosecutors all discussed how they charged one theory but yet, intended to prove elements of another theory.

And the way our notice charging and the way we do things, I find that very difficult that they are giving notice that they're going to charge based on this force when there really isn't force and intend, instead, to prove up and proposed definitions of "incapable of consent" that do not comport with the law.

And I'm not saying that they're doing it on purpose, but I think they are looking for ways to actually get prescribed behavior before the jury but they're arguing both sides and I

think that's -- if you're not charging both ways, then I think it's very difficult for the defense to be put on notice that, in fact, you are arguing under both theories.

So, I find myself actually agreeing with Colonel Grammel who is the military judge who put forth a very good paper. I agree with his definition of "incapable of consenting." And he defined it as meaning "unable to appraise the nature of the sexual conduct at issue, physically decline participation or physically communicate unwillingness to engage in the sexual act at issue."

I was, in all of my reading throughout this, I really was swayed by that definition and I felt like that that actually encapsulates exactly the conduct that should prescribed.

And one, since I share my colleague's concern that legislative changes could prove unworkable or add confusion to the issue, the argument is the fixes, if you will, that make changes through the Military Judges' Benchbook

through more detailed instructions or definitions or through executive order.

But, again, the problem becomes that the normal airman, the normal soldier, the normal marine, the normal sailor has no idea what conduct is prescribed unless we do it in statute.

Thank you for the opportunity to discuss with you and I look forward to your questions.

CHAIR JONES: Thank you very much.

Pardon me, Major Kostik?

MAJ KOSTIK: Ma'am, members of the panel, thank you for inviting me back. In September, I testified in front of the Joint, Judicial Proceedings Panel in Ballston and I've actually followed the testimony and watched many of the presentations given over the last several months because I've taken a personal interest in the proceedings.

As you know, I'm the Senior Defense Counsel at Fort Leavenworth, Kansas and for much of the last year was the Senior Defense Counsel

at Fort Leonard Wood, Missouri.

I have been a trial counsel, I've been a defense counsel, I've been a brigade judge advocate advising commanders both in garrison and deployed. I've also been an appellate attorney and I received my degree at The Judge Advocate General's School with a focus in military justice.

In addition, I've also been an administrative law attorney advising our officers charged with doing our Article 32 formal investigations, now hearings. And so I feel like I have a fairly good grasp from an operator level, not from the supervisory level and, let me clarify what I mean, I try half the number of cases that counsel carry.

So, if my counsel were carrying 15 cases, I'm carrying around eight or nine, if they're carrying, you know, ten, I'm carrying five. And then I also supervise all those counsel and their cases.

As I sat down to prepare to address

the mandate of this Subcommittee and look at those 11 issues, I tried to address each one of them from the perspective of the defense counsel, but also from out of the judge advocate who's going to switch sides.

And as I've listened to many of the presenters, I'm kind of struck with the idea that I don't see many of the problems and certainly as someone brings up a unique issue, for example, this morning, throwing of the dodgeball, hitting the genitalia of another pilot, I've never seen that happen.

Well, I guess you could find that to be a sexual contact, but I haven't seen that happen. And we're not facing the problem in the field and I do trust that in the large majority of the cases, the prosecutorial discretion first held by the judge advocate was advising the commander, as was pointed out earlier, is going to temper that.

And so, first and foremost, I do not believe that we need a total rewrite of the

statute.

If I can pick a presenter whose opinions I most follow, it would be Colonel Grammel and I practiced in front of Colonel Grammel when he was a judge. And, of course, retired Colonel Grammel, he is a subject matter expert for our Defense Counsel Assistance Program and is charged with training all of us, of course, in charge of training the junior counsel.

And so, with that said, I will address, I think, Issue 2, 3 and 9 to start, but I do have specific comments for each of the issues and have prepared to at least provide my opinion on each of the other issues.

So, with Issue #2, should the statute define offenses relying on the victim's consent, of the accused's mistake of fact as to consent and consent?

I think sure, absolutely. First and foremost, let's just face it, it's a statutory curiosity to have the defenses outlined in the statute.

I mean if we look at Article 128, assault, you don't see the defense of self-defense articulated in the statute or in the Code. But, to the extent that practitioners are -- in the field are confused and judges are confused on whether those defenses apply because Congress specifically removed them out of the 2007 draft, then let's put them in there and remove ambiguity.

I don't think it makes one difference whether they're in there in or not. Every single case that we try in which consent or mistake of fact with consent is an issue, we're getting the instruction, we're able to argue with cross-exam and on those theories.

And so, it's not causing problems, at least at Fort Leavenworth or at Fort Leonard Wood. But if there is some confusion and there's a risk that a judge in the future may come in and say, well, it's not in the statute, it's not part of the statutory scheme, then we shouldn't put it in there or it shouldn't be instructed on, then I

say we should make it clear and put it in.

The next issue is whether "incapable of consenting" should be defined. As I said at the JPP in September, I think it does need to be defined. And the reasoning is fairly simple.

When looking at "incapable of consent" and you combine it with the word "impairment" in 120(b)(3)(A), a real issue evolves when you combine it with the training.

And we've talked some about the training here this morning and my concern is that when judges and practitioners are left to their own devices, their own knowledge of the ways of the world and how things work. In Torres, a Marine Corps case, the Navy-Marine Court said we should use the definition when trying to figure out what capable of consent is.

I think there's a real risk that some people or some Service members who should not be convicted are convicted because we don't know what "incapable of consent" means.

And, frankly, adding a definition, is

a laser-like fix, as the term was thrown around in the last hearing. And I would recommend adopting Colonel Grammel's definition.

I listened to the definition from this morning. Those all sound interesting to me, but you know, we are used to the definition that Colonel Grammel used because it's from the 2007 statute. We shouldn't make it any harder.

Lieutenant Colonel Pickands' definition also sounded to me as a reasonable definition to consider.

But those are two variations of the definition that I think would be workable within the statute.

And then the last point that I'll cover in my initial comments is Issue 9 which is are the definitions of sex act and sexual contact too narrow or are they overly broad?

I do think the definition of sex act is too broad and, as I said in September, I believe that the definition of sex act could be made consistent with that of the Federal Code.

Having read Colonel Grammel's submission to the panel and his marked-up recommendation of the statute, I believe this solution is just as workable, and perhaps, maybe even better.

As far as sexual contact is concerned, I did not -- I had not considered that definition prior but Colonel Grammel's markup of sexual contact that includes "or any object" at the end, "touching may be accomplished by any part of the body or any object" is a workable solution.

Only I would add to that "when the object is used to arouse or gratify the sexual desire of any person" to make sure -- to avoid the dodgeball scenario.

So, those are the three issues, I think if I only had three to change, I would change those three. If you ask me to choose between a rewrite or no changes, so a rewrite or no changes, I would say no changes. We are able to defend these cases. The defense is able to win these cases. The Government prosecutes these

cases and, by God, they win a lot.

So, it seems to me, that the statute's working, we could make corrections, but in the field, the government gets their convictions, we get our acquittals and the fact finder decides the hard issues in the case that commanders send them to the panels for, to decide those hard issues.

And so, I'd be happy to answer any questions about the other issues. But I'll pass the mic.

CHAIR JONES: All right, thank you very much, Major Kostik.

Commander Federico?

LCDR FEDERICO: Good afternoon, Madam Chairman, this distinguished committee, I'm thrilled to be here. This is my first time attending the Judicial Proceedings Panel or the Subcommittee. If I was a radio call-in, I would say I'm first time, long time.

You know, in a lot of ways, I'll be singing to the same tune as this chorus but

probably going off in a few solos.

By way of introduction, like a lot of my colleagues in the previous panels and on this panel, I've been both a trial counsel and a defense counsel. I did two tours as a prosecutor including the Senior Trial Counsel in Europe and currently serve as the Officer in Charge in Jacksonville, Florida where I run two offices throughout the Southeast in the docket there.

It's where the inverse of the previous Navy officer on the panel, Lieutenant Colonel Stuart Kirkby, an officer I have great respect for, he and I have been trying cases against each other for a number of years, so we seem to always be on the opposite sides of the aisle.

As I start to think about comments today and listening to the discussion and reading transcripts, I notice that the tension, particularly this was pointed out in the page four of the Executive Summary, the February report of the Judicial Proceedings Panel, that many have said don't change the statute.

A fourth change now in less than ten years would prove to be really impractical when prosecuting cases that may fall under different statutes. But frankly, it's just hard for us to really grasp and implement.

And I thought to myself as I was sitting here this morning, I don't speak German, but there's this word in German that I won't try to pronounce but a direct translation is "to make something worse by improving it." And as I thought about this debate that word came to mind.

My view is that there have to be changes no matter how hard it is for us to implement. Although I think some of these changes could be done with the scalpel and not the axe.

And so, one of the concerns also I wanted to mention that I heard this morning was that, you know, the common law can take care of this. Common law by virtue of what it is, is an incremental process between the trial judges crafting instructions, the appellate courts

breathing life into the statute by creating factors, pulling them from thin air for definitions, that it will work itself out.

But I thought to myself that, while that process and that incrementalism is going on, there are sailors potentially serving sentences for offenses that may not have been an offense under the law.

And so, to me, in my mind, the risk is enormously large to not do something when I think there are just enormous gaps in the law and in the statute.

Another argument I heard was that the instructions get really confusing the more definitions you add.

In my experience -- and I should also say, given the caveat at the beginning, I'm speaking only for myself -- I'm confident a lot of members, fellow members of the defense bar in the Navy share my views, but I'm not here to speak on behalf of the Navy.

But going back to the idea that the

instructions and adding definitions proves to be unworkable to the members, in my experience, the issues that members have looking at sexual assault instructions is almost always the interplay between the defenses and the government's burden of proof of the elements.

In other words, the who has to prove what and finger pointing both ways. That seems to be -- you can even see the expression on members' faces, confusion when those instructions are read.

But rarely have I had or experienced members being confused by definitions. And, in contrast, in our system, and I heard someone say our members are smart and I agree, we're talking about aviators, people who drive ships, people who do all kinds of things, you know, with advanced degrees throughout the military, we have smart panel members. They want information. They want the law to define for them what is prohibited.

And so, when they get to come back

from the deliberation room and ask questions to the military judge, in my experience in sexual assault cases, they're always one of two things, either procedure about how to actually do their jobs back in the deliberation room or they want definitions. They want clarity on what some of these terms mean. And I think we owe it to them in the statute to give it to them.

So, as I think about, again, whether or not there should be changes, again, I know there are 11 issues before this Subcommittee, I'm going to pick really two and here's where I'm going to sing on key a little bit.

First, and by far, to me, the most important is Issue #3, should the statute define "incapable of consenting"?

My respectful suggestion is that it absolutely has to. This is, in my experience, the most wide gap there is.

The reason for that, and I don't have metrics or data, but just anecdotal evidence that I'm confident a lot of my colleagues would agree

with, is the vast majority of cases that are coming before our courts martial system have alcohol involved.

Whether or not the charge is incapable to consent due to impairment by alcohol, which is a very common charge, or even by force, in some way, alcohol is involved in the case.

And so, when you think about then how those cases begin to be investigated and how the evidence presents in court, there is lack of memory and ability to recall. The case turns into, a lot of times, you'll see a lot of expert toxicologists using what's called the Widmark equation to try to extrapolate what BACs were at that point in time, when, of course, a BAC wasn't actually usually taken.

You see psychologists coming in to talk about memory, the difference between a blackout and a pass out. That's what these cases often involve.

But the question as to what is impairment or "incapable of consent" is the one

that I've seen baffle members. And I know this, and I'll give a case example.

In September 2013, I tried a case at Naval Station Mayport, Florida. It was a general court-martial where the client was charged with having committing a sexual act against a civilian who was "incapable of consenting" due to impairment by alcohol.

During voir dire, the members were asked this question, how many of you believe that if a person has one drink of alcohol, they cannot legally consent to any sexual activity? Out of the 12 panel members, nine raised their hand in the affirmative.

In other words, then they thought one drink, one sip, because as we individually voir dired them, that's what they were told when they were given sexual assault prevention and response training.

I have heard Major Bateman say this this morning, that a lot of the trainers go out, and the prevention part of this is key for the

Department of Defense, everyone up here, if you're a defense counsel, it doesn't matter what you do, believes wholeheartedly in prevention. So this is not, in any way, a comment upon that.

But the people going out to do the training are often, it's either materials that are given or in an effort to be aggressive and get to the left of the problem, are making comments such as if you have a drink, they can't consent. And you've heard that.

I've heard of judge advocates being in the back of the room in those trainings and hearing that and having to raise their hand and say, well, I'm not sure that's really what the law is.

But when the members said that at that general court-martial and were individually voir dired on that question, they said, well, this is what we were trained.

And this was really the key on that. The judge couldn't tell them they were wrong. The trial judge didn't have an instruction or

statute that he could look to to say that that's wrong.

And so, what happened in closing arguments was the counsel had to stand up and spend an enormous amount of time trying to convince the members that what they had heard in training wasn't true without the benefit of the instruction of the military judge.

And so that case, as I watched that in the courtroom really, in my mind, solidified where this gap was between what it means to be "incapable of consent" as it relates to impairment.

I echo, and here I'm really going to sing on tune, that Colonel Grammel suggested a fix to the statute and adding that definition. I think it's very workable. But we have to give the members something to help them to decide. And, again, from my experience, they want some more clarity and I think that having it as a statutory change is the only way to do it.

I will agree with Major Rosenow who

was on the previous panel in saying that even investigators or legal offices, no one's really looking at the Military Judges' Benchbook unless you're a counsel on the case.

But the Manual for Courts-Martial is everywhere. Lieutenant Commander Kirkby talked about one specific article in which it requires there to be training of Service members.

So, having it there in the statute, I think, is really the way, the only way, to fix issue number three.

The other -- and I'll also note that actually on Issue #3 that, and Major Kostik just mentioned the Torres case from the Navy-Marine Corps Court of Criminal Appeals, that case was an as-applied challenge to the constitutionality or argument that it was unconstitutionally vague, that term. The court held that it was not.

Well, up and coming potentially at the CAAF, the Petition is pending in a case that was tried in my office, United States v. Corcoran in which it was a facial challenge to the

constitutionality of whether or not, excuse me, that term is unconstitutionally vague.

In reading both Torres and Corcoran from the CAAF, I thought to myself, I think our standards should be a little higher than, well, at least it's not unconstitutionally vague.

So again, I've probably beat this drum loud enough. On Issue #3, that would be the suggestion I would respectfully submit to this committee that some definition should be in the statute as to what that means.

The second issue I'll take on, and Major Kostik just spoke about Issue #9. I agree with Colonel Grammel in terms of sexual act deleting the word mouth and there's been a lot of discussion about the object.

But really, what I want to talk about is the definition of sexual contact in subpart B, the discussion about "any body parts" and with the specific intent hook at the end.

Colonel Grammel suggested edits to the statute or amendments to the statute. Basically

just struck all of subsection B and then took the specific intent element and put it into subpart A, and I would agree with that.

And there has been the hypothetical that keeps coming up about the dodgeball, but in my experience, I can see how this has come up in practice in a different way.

You know, there has also been discussion about prosecutors selecting theories of liability in which to charge. As a former prosecutor and now as a defense counsel, I can tell you prosecutors often pick all theories of liability to charge and charge in the alternative. And frankly, it's strategically a very sound way to go.

And so, in one case I was involved with what began as really a harassment complaint. A civilian working at the Marine Corps Exchange at Parris Island, there was a hospital -- Navy sailor who was in charge of going around and doing basically sanitary inspections, but he came around a little too often and just made sort

flirtatious -- one-way flirtatious comments.

And one day when she was stocking the refrigerator, he came up to her again, was making such comments and then he poked her a couple of times. He poked her in the neck, he poked her in the arm, he poked her in the leg and then she finally issued a formal complaint. She didn't want him around anymore.

When that case and that investigation went to the prosecution office when charges were preferred, there was the sexual harassment change. There were three specifications of battery and there was a charge of a violation of Article 120, subsection B because of the "any body part" with the assumption that it was with the intent to gratify his sexual desire based upon his flirtatious behavior.

I think that, to me, encapsulates the risk that really you're taking what, objectively, is at most flirtatious behavior and capturing it in really what are serious sexual charges. And we know they're serious because the Department of

Defense has said in a recently updated instruction that if convicted, that the offender shall report themselves as a sex offender registrant.

That issue, I can tell you with clients, always comes up as extremely important in your analysis as to whether or not to take a plea deal or how to go forward. When you look at the risk involved in going forward with that type of charge in the charge sheet compared with seeking some type of resolution for harassment-type, the client facing sex offender registration is always going to avoid that risk of what the court's called a collateral consequence. And my experience, in some cases, it's the whole ballgame.

Now some people may look at that case and say, well, that's a great outcome. It reached a pretrial agreement at a special court-martial for sexual harassment and the batteries and he was convicted of that, and maybe properly so in -- pursuant to his provident pleas.

But I think that charging that theory of liability really was such a game changer that to me -- to answer the question number nine. I think the subsection B to sexual conduct or contact ---- excuse me, has the potential and has in fact ensnared conduct that, again, objectively, is at best flirtatious but not really what I think the statute is meant to actually prescribe.

So with that and those two points and recommendations, at this point, I guess I will either cede the microphone back to Colonel Zimmermann or to Madam Chairman for questions. Thank you for your time.

CHAIR JONES: Thank you, Commander Federico.

Questions? Would anyone like to begin? Yes, Colonel?

COL (R) SCHINASI: In conversations with your clients, is there ever an issue that they didn't understand what rape was or what Article 20 covered and they are surprised that

they're charged with a crime?

COL ZIMMERMANN: Well, let me start because I'm the oldest one here.

It's not like, well, I looked in the Manual for Courts-Martial and I didn't see that element in there. But what they're surprised about -- I mean, not to be disrespectful, but I mean really, I would say the majority of the sexual assault cases that are litigated are what we call colloquially, drunk sex.

Where both parties are intoxicated and they get frisky and one thing leads to another and then the next day, for whatever reason, either it truly was unwanted or there's some other reason why Monday morning quarterbacking makes it unwanted. A sexual assault complaint is filed.

And once that ball starts rolling with today's climate, we have cases that are at general courts-martial where the 120 allegation is not even referred to trial, but there are other charges that came up during investigation

are now this guy's facing a felony conviction.

So to answer your question, no, they don't say, well, I didn't understand the elements, but they say, you know, I was drinking, she was drinking, she was kissing me, she grabbed ---- I have a case on appeal right now where the guy says she -- we were dancing together. She grabbed my penis while I was on the dance floor with her. I don't remember touching her breasts, but if I did it was because that's how we were dancing and that guy has a conviction, a felony conviction now, for sexual assault.

COL (R) SCHINASI: But that's not a problem with respect to the Rule 120, that's -- excuse me -- that's the vicissitudes of proof. But is there anything in the statute itself that's a surprise? The fact that this crime is prohibited? Is that ever a surprise to your clients?

COL ZIMMERMANN: It's a surprise to my clients when they feel like who assaulted whom? I mean we were both drunk, we both touched each

other, why is that a crime?

That is a surprise then, so that's why the definition of incapacitated and impairment is so important and I mean truly, it's been described ---- when I've complained about this or talked with my colleagues in the field about why is it -- when it's truly both parties are intoxicated, why is it only usually the man or always the man who's charged?

Because he's got the equipment and I'm a woman and I don't think that's fair. I mean I have clients that tell me, well, I want a SARC. I want a UVA, because you know what? She assaulted me.

I have a client right now ---- again, not a Marine client, but a client right now who was solicited for sex. He said no, I've taken some medication that makes me go to sleep, so please don't come over, and the woman came over anyway and had sex with him. In my opinion, she committed a sexual -- you flip the genders, she's committed a sexual assault, but guess who's on

trial? My client because he had sex with her.

So it's not a fair way of doing business, and so while they don't say, well, I looked at Article 120 before I went to that party and I made sure that I conformed to it, they are surprised by the fact that someone's accusing them of a crime for doing what kids do, which is get drunk and have sex.

COL (R) SCHINASI: Is that something that we could clean up in 120 or is that resolution someplace else?

COL ZIMMERMANN: I think both. I think that the statute needs to be clarified to say, what is the government's burden of proof? If we're going to take someone's liberty away from him, put him in jail and label him a sex offender for the rest of his life, what does the government have to prove in order to achieve that result?

And they have to prove a lack of consent, I think. And then I think there are other measures we have to ---- you know, the

training. The one and you're done, that's what we call in the Marine Corps, one and you're done.

I have seen with my own eyes marines confess to rape after being told by the NCIS agent, well, were you aware that she had a beer earlier that night? Oh God, now that you mention it, yes, I knew she was drinking. I guess she couldn't consent. I guess I did rape her. I've seen that with my own eyes. So it's got to be a combination of clarifying the statue and improving the education.

And I agree that some of these commanders mean well. If the standard for incapacitation is here, they don't want their troops getting anywhere close to it. They're going to tell them, hey, when you go out drinking, keep your hands to yourself. I'm a mother, I tell my kids, be careful. I mean we want them to err on the side of caution.

So, I think we need to clean up the statute and we also need to improve the communication about what's legal and what's not

legal when we educate our troops about the law.

LT COL PITVOREC: I would agree. I think really the education piece is huge on this. Again, is it the text of the statute or is it really educating the people about it?

Really, it's the education and I think that's one of the common misconceptions is that everyone is training this and we're all on -- you know, if you look at the Services, that we're all together on this. All the Services are training the same way. They're absolutely not.

I don't even think that internally in the Air Force we're training this the same way. I'm not sure if any two bases are training this the same way. And I think that's the biggest piece is that, again, a lot of Monday morning quarterbacking.

You know, girl talks to her friend and said, oh, so-and-so just left and blah, blah, blah. Yes, I guess we had sex and then the next thing's, she's like, well, you were drinking last night, you couldn't consent, you were raped.

That's the next thing.

And the thing is -- and this is the biggest problem, is that someone who honestly and reasonably believes they were raped, whether they were told by a friend or they were told by somebody else, they are going to act the exact same way as someone who was actually the victim of rape.

And that's the problem is that we are letting ---- you know, that this girl now believes it. And so, it's not -- and I don't feel like I don't think she felt victimized the night before, but now she feels victimized.

Now some people do feel victimized the night before. Some people really are raped, but I think because we've watered down this alcohol component that there are real victims of sexual assault, real people who are really victimized, who then are now afraid to report or don't report or -- I see it all the time. I see it all the time.

MAJ KOSTIK: Sir, I don't think my

clients are confused by what the law is. I think they're confused by what they did meets the element. And so ---- and maybe that's putting too fine of a tip on it.

But they're not sure what "incapable of consent" is. I think that's clear, they're not sure how to assess that in the real world. And then when they get called in to CID and they're told what they're charged with when they have their rights read, they're confused. They're like, no, that wasn't the case that night. That isn't what happened.

And the same way with the definition of sex act. It's, "well, I did slap, you know, Private Female on the rear end right after PT, but I didn't intend to satisfy my sexual desire, sir." That's weird, we were -- you know, I was ---- everyone was high-fiving as we're walking off the PT field, that's not what I meant.

So I think they're confused by the factual predicate in saying I didn't do that. They're not confused about what the law is, at

least in my experience. And again mine is narrower than these folks who have lots of counsel they supervise and try their own cases.

LCDR FEDERICO: Colonel, to answer your question directly, I would say the vast majority if not all of my clients are surprised they've been accused of rape and I can't think of a single time a client ever asked me about the statutory language.

But more broadly, my response would be similar to my colleagues. In another example, I had an officer client who, when the incidents were first reported, he was assigned a SVC. In the Navy we call them a Victims' Legal Counsel, but I think a Special Victims' Counsel in the Coast Guard. So he was treated as a victim. And six months later was charged himself with forcible sodomy.

That led to some confusion as to how he could flip roles so quickly as the investigation continued when really, the difference in the facts as to what was initially

reported were very small.

But usually the questions around the issues that I see is Issue 2 and Issue #9. We're talking about the issues of consent and whether or not, you know, how -- well, not that the knowledge as to consent is an element. And so phrased very differently than the statutory language, those are the types of questions I'm fielding from clients.

COL(R) SCHINASI: If you think about Article 120 with respect to your practice in general, has Article 120 caused convictions where they shouldn't be? Caused acquittals where there shouldn't be? Or has it had a neutral effect on your practice?

COL ZIMMERMANN: You mean the statutory language and the changes over the years?

COL(R) SCHINASI: If you look at it as it is now, has it caused convictions where it shouldn't? Caused acquittals where it shouldn't or had it has a neutral effect?

LCDR FEDERICO: Do you want me to start, ma'am? Okay.

I would say it's been an interesting -- even since the current statute took effect in June of 2012, colleagues and I -- even in fact, this morning, Major Kostik and I were discussing this. Coming out of the gate with this statute, we saw a higher conviction rate and I would say substantially to the point that the old standby in the defense bar is always go members changed dramatically to always go military judge alone. We were afraid of the SAPR training.

Since then I've almost seen the pendulum swing dramatically the other way. And again, this is completely anecdotal, but my belief is -- in a lot of ways I've heard this said that the folks out on the deck plate are kind of tired of being told so much about sexual assault that they now believe cases are over-prosecuted.

Again, whether or not that's a reasonable belief, I don't have any data to

support that. I would think though, back to -- not the old 120, but the old, old 120. When I first started as a prosecutor, the cases that were leading to convictions there were almost always guilty pleas.

We did not always expect to get convictions on cases that were purely sort of by force and without consent prosecutions, much harder to obtain under that statute.

MAJ KOSTIK: Sir, I can say that's a really hard question to answer. I can only think of a few cases in which we really believed that an acquittal hinged on the language of the statute.

In a case tried at Fort Leavenworth several months ago, we think we won the case on the lack of a definition of "incapable of consent" and "impairment." So we filed a lot of motions asking for a definition to be -- it was a military judge alone case, so this means that we were asking in advance for the military judge alone to tell us what he was going to apply as

"incapable of consent." And that was going to drive the guilty plea. And so, I supervised this case.

But that -- if his answer was bad for us, it likely would have driven a guilty plea, but he came back with this answer is, I will apply the law as -- I know the law and I will apply it correctly, which is the standard the appellate courts use pretty much --- military judge knows the law and applies it correctly.

Ultimately, before he deliberated we asked him to come back with special findings. Meaning if he ---- of course, if he convicts our client, we want him to tell us what facts he used to convict our client for the consumption of alcohol, and ---- because this case it was a question of whether the victim was asleep or she was drunk.

And he came back with mistake of fact sexual assault conviction on 128, which is a win, okay, for the defense. But I'm not sure that the -- I'm don't want to imply any bad intents on the

Judge, but I'm not sure that that case would not have gone different if we had a clear definition of "incapable of consent."

I think that was an easy way for the judge to convict on 128, max him out on the offense and avoid the appellate issue because the client still got the maximum punishment under the 128 and still got a bad-conduct discharge. So it was a way to avoid the appellate issue.

So to answer your question, I mean, I think it's possible. I don't see it a lot, that cases are hinging on the statutory language. I think in most cases, you know, the defense is getting the consent instructions or we're getting the mistake of fact as consent instructions, we're able to cross-examine the victim. So lots of these issues that we're talking about aren't really playing out, at least in the Fort Leavenworth and Fort Leonard Wood courtrooms.

LT COL PITVOREC: I just have one, and it's still actually really hard for me to talk about because I feel like it's the one that got

away.

And we were convinced he was not guilty. I had talked to my client extensively. And they came back with a guilty and I think my client's legs buckled underneath him. We had to pick him up.

Most of the people -- it was a members case, I think it turned on incapable ---- incapacity to consent.

The thing that gets me the most about this one is that when the members came back with the sentence, they read a statement that said, we believe that drunk sex occurred and because of that we believe this is the appropriate sentence and he received six months, a reduction of one grade and no discharge. So this was before the mandatory discharge.

But that was a capacity to consent issue on a person who -- it was charged as a by force and without consent. So she actually testified to a ton of force that nobody believed, but it hinged on how much alcohol they had had

and that really is the crux of it.

And I call that the case that got away because it still makes me a little bit sick because of it. Because there were a lot of issues about inconsistencies and outright lies in that case but it came down to alcohol.

COL ZIMMERMANN: Truthfully, I can't offer you anything more helpful than what these guys have said.

When I try a case, I, you know, really focus on the facts and the law obviously is important as well. But all I can say is if this room full of lawyers and experienced non-lawyers who are -- I mean people who are experienced in military affairs. If we can spend all day talking about how confused we all are about this then we should fix it.

CHAIR JONES: Any further questions? Yes, Ms. Kepros?

MS. KEPROS: I'm curious given that the defenses of consent and mistake of fact are not explicitly discussed in the statute -- I

understand they are in 916. Is that something that the accused are advised of either when they're initially charged or at the time of any kind of guilty plea? The availability of those defenses, that is, or potential availability?

MAJ KOSTIK: I can speak from experience, yes. So a couple of things.

When I prepare a client for a guilty plea, one of the things we have to do is we have to prepare them to deal with --- tell the military judge why what they did violates the law, and part of that is for me to go over each of the defenses.

And I go over those defenses and I say things like, well, you know, if she said yes at any point in time, we might have a defense and then we assess the credibility of that defense. The same thing with mistake of fact as to consent because the story invariably has some elements of, well, she did this or she did that. It made me think this, but then later she said no and so I knew a hundred percent that I wasn't permitted

to have sex at that point.

And so we talk about how we could use those things as a defense and how they probably wouldn't carry the day, but then during the providency hearing or the Care inquiry ---- in the United States v. Care, the military judge also talks about some of the defenses that are either raised by the stipulation of facts in the case or that just are raised by the accused's own words that explain why he violated each element.

And even if there's a defense that nobody thought of that sort of just kind of pops up in the courtroom, or comes up on sentencing. So the judge has already accepted the plea and now we're in sentencing. If a defense comes up during a sentencing witness, the judge will say, at this time, we're going to reopen the providency hearing, you stated X. X could be a defense in the case, though I'm not telling you that X would carry the day.

And at the end of all of that, he explains it and he says, do you still want to

plead guilty? Now, before you answer, take a moment, discuss that defense with your defense counsel. If you'd like a recess, we'll give it to you. I mean, they're very paternalistic when it comes to making sure they understand a plea.

The harder case -- I think you hit the nail on the head earlier, is in a contested court-martial, you know, are we as careful? I train my counsel to be. I train my counsel to open that Judges' Benchbook and to go through the elements and the defenses. That's their starting point for a case because we build the case backwards from what the judge is going to have to decide backwards.

And so that's where I train my counsel and I know the defense counsel across our region generally start their cases that way. So I don't think it's as big a concern, but again, my small slice of the world.

CHAIR JONES: Anything further? Yes, Dean Anderson?

DEAN ANDERSON: First, I just want to

apologize to the panel, I had a phone call I had to take for work. I'm very interested and also very compelled by the experience on this panel and really want to thank you for coming here to testify.

I'm still interested in this issue I keep bringing up to each panel and that is the disparity between some of the education -- preventative education and training that folks get and how that ends up impacting, if at all, actual justice as it's meted out.

Lieutenant Colonel Pitvorec, you have the one that got away and it imprints on your mind in part because it's so exceptional it seems to me, where the jury was chagrined to have to bring forward a moment of a conviction and clearly gave a sentence that was minor or mild compared to what was possible, I guess.

And I'm wondering with -- I'll ask you all what I asked the prosecutors earlier and that is, with all of the discretion -- it seems to me, right? There -- it sounds like there's a

disparity between the messages that are received by those who go through SAPR training and the specificity of the law and what it requires.

If there are discretionary moments of time when that something's not prosecuted. Someone is thinking, oh, maybe I was raped, but then she comes forward or he comes forward and the prosecutor says, no, actually, that's not what's going on. Those solve a lot of potential injustice problems.

I guess my question is, is there anything in the law or the definition of Article 120 that would address that concern that many people raise anecdotally. And it sounds like in one particular case, you, Colonel, have experienced an injustice. What you consider to be an injustice. Is there anything in the law that you would change to address that disparity?

COL ZIMMERMANN: I think one thing, as we've just spent a lot of time talking about is a clearer definition of what substantial incapacitation is because I think ---- you know,

with respect to the SAPR and the SHARP training that the Services do, it's having an effect in a lot of ways on the system. It's not just the members.

I mean we had lots of members struck because they say, I can't be fair. But usually the military judge can rehabilitate by saying, okay, well, you know that one and done is not the law. If I tell you that that's not the law, can you follow it? And, of course, they say yes.

But it affects more subtle things like the witness's perception of what's happening. If they see their friends drinking at a party and then they find out the next day that there was some sexual activity, it affects their perception and how they're going to testify as a witness.

It affects the complaining witness and their decision to report an offense or to go forward, make it a restricted report or an unrestricted report and all those sorts of things, whether to submit to a medical exam.

So the training piece, I think,

affects all levels of the investigation and prosecution and defense of the crime, not just the actual trial itself. So I think if there were more clarity in what the law is, we could improve the training and we might have more fair trials.

DEAN ANDERSON: Well it's interesting, both sides want us to clarify, if anything, that one thing about what "incapable of consent" or "incapacity" means. Both sides sounds like that would be key.

COL ZIMMERMANN: And I think if there were more guidance on what is consent, okay? If we made it clear that what -- your consent can be oral, you know, verbal, or nonverbal. It can be expressed or implied, you know, by your behavior.

If the troops were educated better on that, then perhaps there wouldn't be so many of what we might call misunderstandings, you know? Where she says, well, yes, I put my arm around him but I didn't mean for him to think I wanted him to have sex with me.

And if they -- maybe they were educated better on what -- you need to pay attention to what you say and what you do and then to the other side, just you need to be careful of how you evaluate the signals you're getting and don't jump to conclusions and make assumptions.

But if people were on the same page with what is consent and what is not consent, I think that would avoid a lot of the misunderstandings that result in criminal charges these days.

CHAIR JONES: Anything further from the panel? Professor?

PROF. SCHULHOFER: I have one relatively simple question. I think each of you has said that consent is a defense, but it would be helpful to make it clear.

As I understand it as of now, the prosecutor has to prove beyond a reasonable doubt the absence of consent. One way or another, it comes in through one word or another in this

statute.

If there's an amendment that says consent is a defense, would that then shift the burden to the defendant to prove consent or would it still be true that the prosecutor has to negate it?

MAJ KOSTIK: Sir, this is the problem under United States v. Neal. Right? This is what we had in the 2007 statute.

Lots of folks say that that case got it wrong because it was an affirmative -- I mean it's an affirmative defense. If it's offered as an affirmative defense ---- if that affirmative defense is unconstitutional, then why aren't all the other affirmative defenses that operate in the exact same way also unconstitutional?

I mean so the real issue is, is it just under the peculiarities of the 2007 version of the statute in the way that case sort of percolated up to -- you know, up to CAAF that created that unconstitutional burden shift? I think the answer to that is yes.

I think if we create a formal statutory scheme of affirmative defenses, we're not going to have that same unconstitutional burden shift that you had under the 2007 version. Otherwise our courts would be overturning every case that ever upheld an affirmative defense.

PROF. SCHULHOFER: I'm just reflecting my civilian perspective. Under UCMJ, is it typically the case that the prosecution has to negate every affirmative defense that's raised by the evidence?

LCDR FEDERICO: Yes, sir.

PROF. SCHULHOFER: Okay, so then -- so it wouldn't involve any burden shift?

LCDR FEDERICO: That's right, sir.

PROF. SCHULHOFER: Okay, thank you. One other question which is maybe a little bit more complicated. I think we all heard somewhat -- we heard two concerns I think very saliently from all of you.

One was the misunderstandings that can so easily arise in these very, very common

situations. And the other was that an affirmative consent standard is really several steps ahead of current norms or maybe a bridge too far, I think was the term you used, Colonel.

And I see some tension between the two of those because one of the concerns that we hear so often from both the victim advocates and defense advocates is that existing social norms by themselves are what create all this ambiguity and failure of communication.

And that one of the ways to resolve it, which is so often proposed, is to move a little bit ahead of existing social norms in the interest of making clear -- both in the statute and perhaps then the next step in education, making clear a conception of consent that would avoid some of that misunderstanding.

So, do any of you have any thoughts that would help us kind of bridge that difficulty?

COL ZIMMERMANN: I certainly do, surprise, surprise.

On the affirmative. First of all, I would note that there are very few jurisdictions in the civilian world that require that affirmative consent, and I think subjecting our service members who have signed a line to go get shot at to protect the rest of us deserve as much protection as their civilian counterparts. And I think it would be terribly unfair to make them have to comply with a much, much higher -- and with all due respect, I think an unreasonable burden in order to avoid criminal liability.

We have to remember that -- while I agree with you that it's a good educational goal and we should maybe work on educating our Service members about, hey, look, before you engage in this behavior, you need to make sure that the person that you're doing it with is consenting. I don't have any problem with educational efforts to that effect.

But when we're talking about labeling someone a sex offender, taking away his liberty, depriving people of retirements and other

benefits, I just don't -- I'm not ready to go there. I don't think that's fair.

And if I might just take a second to answer your first question about consent as an affirmative defense. My proposal would be to make lack of consent an element of the offense. Make the government prove a lack of consent, and we don't have to get into that discussion about shifting burdens and back and forth.

The Government needs to prove the touching -- whatever the touching is and that it was without consent and that would avoid that problem.

PROF. SCHULHOFER: Thank you.

LCDR FEDERICO: Yes, sir. I mentioned in my opening remarks how, in my experience, the ---- what is almost a visible confusion on behalf of members oftentimes is when they're being instructed regarding the elements the Government must prove. And then when you start raising affirmative defenses of consent and mistake of fact as to lack of consent.

What's been interesting, I think for me and my colleagues as we are thinking about how to present our case, and for example, whether or not to advise the client to testify in his or her own defense, often hinges upon our belief as to whether or not the members are going to understand those instructions properly. Or in another analysis, whether or not we can raise some evidence -- the standard of merit, for example, a mistake of fact instruction.

But the reality is, if we're doing that analysis ---- I heard Major Bateman say something this morning that I agree with, which is consent has always been found to be relevant.

So when we are trying to think about ---- you know, in looking at elements compared to whether we raised some evidence, the reality is, whether or not there has been sort of a doctrinal shift from a focus on the victim's behavior compared to the focus on the offender.

The cases don't look very different in the courtroom in terms of how the evidence is

being presented and at the end of the day, with some of these gaps that we've discussed as we're preparing our clients and our cases, part of the analysis comes with, well, do we trust that even with these gaps, is it going to work in our favor from the factual standpoint to go down the road even sometimes when the law doesn't necessarily support it, if that makes sense.

PROF. SCHULHOFER: Thank you.

CHAIR JONES: Yes, Liz?

HON. HOLTZMAN: First of all, let me thank you all for your very thoughtful testimony and for taking the time to come. I really appreciate it.

In terms of consent and the burden of proof, it seems to me -- and maybe I'm misreading the statute, but bodily harm requires -- that's an element of the crime, and an element of bodily harm is that there be nonconsensual sex.

So, nonconsent has to be proven ---- as I read the statute, please correct me if I'm wrong, by the Government if you're prosecuting

under the bodily harm section. Is that correct and how does it work in practice?

LCDR FEDERICO: The theory of liability -- I'm sorry if I jumped in -- on this charge that I have seen is -- and this came up earlier and in Colonel Grammel's remarks, is the statute seems to require both that the bodily harm is sort of what causes then the sexual contact.

But in reality, in the specifications I've seen, it is always one in the same. In other words, the sexual contact is the bodily harm and basically merges those two.

But I would agree, as it is written and as I would read it, that the having to prove the lack of consent is part of what the government must prove.

HON. HOLTZMAN: Well, how does it work? Does the government then prove lack of consent in practice? And what are the charges?

LCDR FEDERICO: On this one I'll fall neutral in that I would say ---- although I've

seen a number of these charges of bodily harm, I can't come to mind one way or the other in saying that I believe that either convictions were obtained or not obtained because of that particular charge falling one way or the other.

CHAIR JONES: Do you remember what charge was given to the members on a bodily harm case?

HON. HOLTZMAN: That's my question, not the outcome, but what the charge is?

LTCOL PITVOREC: If I may, what I have seen routinely on a bodily harm is that they charge the theory of bodily harm really with, by being a proponent of the theory of this substantial incapacitation.

And so the bodily harm ends up being the sexual intercourse or sexual act itself that's sufficient to establish the bodily harm element, and then argue under the substantial incapacitation or a capacity to consent issue.

And so they really do conflate them together, which is one of the issues that I have

with that is that it's because they seem to be arguing two different theories, but pushing them together and then throwing it at the jury, which I think does add more confusion. I'm sorry, if that's not helpful.

HON. HOLTZMAN: Any other comment?

MAJ KOSTIK: Ma'am, so the Benchbook instruction does instruct -- it says, so the government has alleged that the accused committed a sex act, to wit ---- in respect to the act ---- upon the victim and that the same physical acts also constituted the bodily harm required to charge sexual assault.

Under these circumstances, the government also has the burden of proof beyond a reasonable doubt that the victim did not consent to the physical act.

So, that is the charge.

CHAIR JONES: So in that particular section of 120, consent has to be proven because it's an element?

MAJ KOSTIK: Yes, ma'am.

HON. HOLTZMAN: And what percentage of the prosecutions are on a theory of bodily harm? Most? Many? Some?

MAJ KOSTIK: I would say that when they're not alcohol-related, it's falling into the bodily harm -- the charges are falling into the bodily harm.

And I would say, at least in our jurisdiction, it's a 50/50 split on whether or not the bodily harm is something else or it's the sex act.

CHAIR JONES: But I think from my past readings, most ---- and maybe what you've said, most of these cases do involve alcohol. So are you telling us that you get both charges for the most part? Bodily harm and then the incapacitation?

MAJ KOSTIK: I have seen that. We have a very senior SJA in our jurisdiction who's been an SJA multiple times and a Chief of Justice who has also been Chief of Justice, usually picks this theory and does different theories on the

charge --

CHAIR JONES: And what does he pick, for the most part, in alcohol cases?

MAJ KOSTIK: I'm sorry, I didn't hear the question?

CHAIR JONES: Which charge would he choose in -- which charge is most often chosen in cases involving alcohol?

MAJ KOSTIK: "Incapable of consent."

CHAIR JONES: Incapacity, okay.

HON. HOLTZMAN: Can I just ask one other question? I'm very troubled about this bodily harm statute, because to me, I don't really understand it at all.

I mean if you look at the -- B itself. "Any person subject to this chapter who, causing bodily harm to" another person. Causing means generally causing. Cause-effect, you are an actor. Okay, then if you go to definition of bodily harm, it says "bodily harm means any offensive touching of another."

Well, how can you cause if you are --

I think Professor Schulhofer and I have been through this before, but how can you cause bodily harm if all that you've engaged in is offensive touching? It seems to me that there's a problem in the language itself. Am I wrong? Am I confused?

COL ZIMMERMANN: It's very confusing and you're very educated and -- as are we and it doesn't make any sense. It's circular, saying you caused -- you did a nonconsensual -- offensive touching that was bodily harm which is defined as offensive touching. I mean, it's silly.

HON. HOLTZMAN: Yes, well you caused something but you're not causing something ---- there is an offensive touching.

COL ZIMMERMANN: To me, it's irrelevant. I mean if you're charging someone with, let's say, penetrating the vulva with the penis. Well, then charge -- that's the act that you did.

And if there's some bodily harm above

and beyond that like you punched her first, that's a matter of aggravation. That's not an element of the offense. The element of the offense is that you put your penis in her vulva without her consent. And if there was some other bodily harm above and beyond that, that's a matter of aggravation that should increase the sentence.

MAJ KOSTIK: And, ma'am, if I can add on to that. I think what will clean it up is to get rid of the second part of the definition of bodily harm.

So the "bodily harms means any offense of touching another, however slight, and including any nonconsensual sexual act or sexual contact." If you strike that language, and you think about what we're trying to do with that sexual assault provision, what we're trying to do is we're trying to say it's something more than the placing of the penis in the vulva.

It is, they held down the victim by placing hands around the neck, putting hands on

the shoulder, and so it's that bodily harm that they're capturing. So that bodily harm plus the sex act that they're trying to capture.

And I think it gets very confusing when you allow those two acts to be the same thing. I caused this sexual assault by committing the sexual assault. It's extremely confusing.

HON. HOLTZMAN: Do you think that there's a chance that whole thing would be thrown out on just due process claim that this is an incoherent provision in the law?

MAJ KOSTIK: I hadn't thought of that yet, but I'm going to try it next.

CHAIR JONES: Yes, go ahead Professor.

PROF. SCHULHOFER: My apologies, because I know I asked a question already, but this is on a different subject really.

Virtually every witness that we have heard -- not all, but virtually everyone has agreed that this statute is a mess. Where the witnesses differ is on whether to allow the

process to keep slowly, incrementally clarifying it, to allow people to stay with what they are familiar with, that the best is the enemy of the good and so on, on the one hand. And those who think that we should clean it up. And the latter seems to be a stronger view from this panel.

Some of us up here, and I include myself in this category, have given a lot of thought to what an ideal statute should look like. But again, speaking for myself, I have no idea how to think about the transition problem and the costs of trying to take something that's imperfect and make it less imperfect.

My personal experience in the civilian sector has been -- one part of it has been with the U.S. Sentencing Guidelines. Some of you may be familiar with that, which now has, I think, over 400 amendments with timing and transition and retroactivity problems with respect to every single one of them.

So four different statutes doesn't impress me, but I hear what people are saying.

And so, I wonder if you could give us some help on how to think about that and whether, if we do prefer to recommend a new statute or a clean start, is there some way to think about easing that transition so that it would not cause so many headaches for people as you move from one to the other?

MAJ KOSTIK: I don't think it causes headaches, I think it causes acquittals.

CHAIR JONES: Causes what?

MAJ KOSTIK: I don't think it causes headaches, I think it causes acquittals. And we have a -- I'm speaking for myself and not as a defense counsel, but as a judge advocate who's going to go back to the other side -- in 30 days, I'm going back to the other side.

So the concern for me is that what may be good for the Army in the long term is going to be very bad for a sexual assault problem in the near term. And I believe that we can make these laser-like changes in the near term and have very fair trials where accused's rights are

recognized and acquittals will occur, but convictions will also occur.

And so again, I fear that after a change, for the next year or more, as counsel sort of starts to figure out how to thread that needle of the perfect balance to get a conviction, the defense counsel are going to get a lot of acquittals and that's going to damage our Service and that's concerning to me.

LCDR FEDERICO: Sir, if I might just also add. I think it's because of the way the military justice system takes the statute and then implements it further through the presidential authority in Article 36 and the Joint Service Committee, it just can't happen quickly.

So in that way, it's hard to think of ways to really mitigate sort of on the timing aspect as you may have heard with the new statute and sort of the executive orders yet to come to still further implement.

So the process is inherently slow when

the two branches of governments and the Department of Defense are coming together to try to implement what --- the language that Congress has passed.

But again, you know, just because it's hard, I think that really ---- at least to me in my mind, as I said in the beginning, it's not whether or not there should be changes. You know, Colonel Zimmermann has said ---- and a lot of which I think very thoughtfully that, you know, maybe it's time to build the house from the foundation up.

But I think at this point, reasonable minds can differ. It's going to be hard either way, even if you're doing definitions but I do think from sitting through all the panels with maybe one exception, I think everybody thinks there has to be some changes and when you acknowledge that there's going to be some change, it's going to take time to implement and shift the way business is done a little bit, and then you just look at the overall utility as to

whether or not to, again, build that house from the foundation up.

COL ZIMMERMANN: I agree. I just think we ought to do it right. I think our Service members are entitled to have a good, fair, constitutional statute that gives them notice and allows them to have a trial that comports with due process.

And the fact that it might be inconvenient for the lawyers to adjust, I'm just not very sympathetic to that. I'm worried about the guy sitting in my office tomorrow. I'm not worried about these lawyers having to learn a new rule because they're going to have to learn some new rule anyway.

PROF. SCHULHOFER: Thank you.

CHAIR JONES: All right, thank you very, very much. Again, this has been extraordinarily helpful to us and I thank you for your candor.

All right, we're next going to hear from the appellate counsel.

(Whereupon, the above-entitled matter went off the record at 2:53 p.m.)

LTCOL GREEN: Judge Jones, I wanted to raise a point briefly. Professor Schinasi asked a question about the scope of the problem and how many of each of the categories of Article 120 offenses does the Service deal with annually, and I just wanted to bring up for the panel that the Department of Defense SAPRO office -- Sexual Assault Prevention and Response Office -- just published its annual report for the Department, which includes a tremendous amount of data. And I don't know that we've provided that yet to the Subcommittee. We will. It's a number of documents breaking it down by Services and --

CHAIR JONES: I think you provided that.

LTCOL GREEN: To the Panel.

CHAIR JONES: Oh, to the Panel.

LTCOL GREEN: We didn't provide it to the Subcommittee yet, though. But just briefly, to give you an indication, in 2014 -- fiscal year

2014 -- there were 4,660 unrestricted reports filed across the Department. And of that, 24 percent were rape allegations, 24 percent were allegations of sexual assault, 3 percent were aggravated sexual contact, and 44 percent were abusive sexual contact.

So this is all information that Lieutenant Colonel McGovern pulled out of Appendix B, the statistical data on sexual assault, and we'll provide that to the Subcommittee for your information, as well. Thank you again.

CHAIR JONES: That's great. Thank you. All right. We're now going to begin with the appellate counsel perspectives. I apologize in advance; I'm going to have to get up briefly, and Ms. Holtzman will take over as chairman just for 20 minutes or so.

All right. Colonel Jamison, would you begin?

COL JAMISON: Your Honor, distinguished members of the Subcommittee, good

afternoon. Thank you very much for the opportunity to come today to speak to you about Article 120 of the Uniform Code of Military Justice.

My name is Mark Jamison. I've been in the Marine Corps for 24 years, and I spent most of my career involved in implementing command decisions within the military justice system. I'm currently the Director of the Appellate Government Division for the Department of the Navy.

Prior to that, I was an appellate judge with the Navy-Marine Corps Court of Criminal Appeals. I spent approximately two years as a trial counsel prosecutor, a year as a defense counsel, three years as an appellate prosecutor, and approximately six years as an officer in charge of Legal Services Support Team, charged with prosecuting misdemeanor and felony cases within the Marine Corps.

While I can only speak for the Marine Corps, I believe the other Services share the

common belief that the military justice system is designed to meet global mission requirements in which the commander decides when and how to implement and execute the Uniform Code. I believe that congressional intent was to construct a carefully-balanced system, rapid and responsive to the commander, as a system of good order and discipline. It firmly established one of the constitutionally-based framework that ensures the rights of each accused is respected. And because the Uniform Code serves a broader purpose, as Lieutenant Commander Kirkby mentioned in his presentation, than just prosecuting criminal offenses and punishing individuals who are convicted of misconduct, in evaluating proposed changes to our carefully-balanced justice system, we face other challenges, I believe. Even minor changes can have unintended consequences and change the balance of the system.

In addition, I believe we must ensure that we have correct metrics employed to measure

the effectiveness of the system. If, for example, success is measured in terms of timeliness or prosecutory outcomes or success rates, I believe we need to ask ourselves whether any of those changes necessary to accomplish those goals come at the expense of an accused's right. After all, we ask our Service men and women to bear extraordinary burdens on behalf of our nation. If accused of a sexual offense or any offense in the Uniform Code, the Service member should be entitled to every right our constitutionally-based system of justice provides. We swear to uphold and defend the Constitution. Its protections, in my mind, should not be found wanting for any soldier, sailor, airman, or marine accused of a criminal offense.

Unlike the predecessor statute, I do not sense any significant infirmities associated with the 2012 statute that, at this time, necessitates a major course correction. The statute is less than three years old. And at the

appellate level currently, we are just starting to see the appellate courts analyze the statute to provide greater clarity and define some of the terms that we have been discussing all day.

Because we're very early, at least in my mind, in the incubation process of this particular statute, I recommend some strategic patience to allow the statute to settle a bit, to be informed by the President's rulemaking authority under Article 36. My understanding is the executive order is still pending, but I believe it's with OMB currently. And also some minimal level of appellate court interpretation. That's not to say that the statute cannot be improved or made clearer, and I look forward to your questions this afternoon and I look forward to responding to them. And I cede my time to Major Stephens.

MAJ STEPHENS: Thank you, sir. Good afternoon, Madame Chair and distinguished members of the panel. My name is Major John Stephens. I'm here, I'm a branch head with the Navy-Marine

Appellate Defense Division. Obviously, the opinions are my own; they're not the Commandant's or anyone else's.

That being said, coming from, it's called Code 45, the Navy-Marine Appellate Defense Division, I sat down with all the attorneys there. We have 12 attorneys there. We have a Division Director and some non-attorney staff, and we kind of roundtabled the questions 1 through 11. So it's sort of a joint view, but nonetheless, the opinions are my own.

As Colonel Jamison said, there is some latency between a new statute coming out and what the Appellate, Defense, and Government Divisions and the service courts and CAAF can do with it. The reality is is that from June 28th, 2012, with the new 120, is that you've got around 18 months or so until they start to trickle up into the appellate world. And so we are just seeing at the Service and at CAAF the first time that we're dealing with some of these issues. And the same is true of the appellate counsel dealing with

these issues.

Secondly, one thing that is interesting about Code 45, and I can't speak for the Army and Air Force Appellate Defense Divisions, but we have about 20 Reserve counsel. If the case is a guilty plea -- or the vernacular is dive -- if the case is a dive or it is a thin record, meaning that it's just a few hundred pages, even if it was contested, we would farm that case out to our reservists. That way, the active duty marines and naval officers at the Appellate Defense Division can deal with the more serious or bigger cases, if you will. Otherwise, you get bogged down.

So that being said, you know, we're not seeing, I'm not seeing every single case because a lot of them go to the Reservists, and I don't necessarily have much interaction with them.

In my own background, I was a logistics officer when I was a lieutenant and captain in the Marine Corps. I actually got out

-- I was in the defense industry and went to law school. After law school, I clerked at the D.C. Court of Appeals, and then I was in private practice doing civil litigation, and the Marine Corps pulled me back in. We didn't have enough senior captains and junior majors specifically for some of the litigation that we were having.

So I came back in. I've been a senior defense counsel, I've been a regional defense counsel for a few months, and I have been a senior trial counsel. And for almost the last two years, I've been at Code 45.

Having gone through some of the questions, one of the things I wanted to focus on was the current definition of consent: Is it unclear or ambiguous? I think we only had 30 minutes into the first presentation where we got to that. And no matter what a statute is going to do, I mean, if you go, you know, any sort of assault -- even a sexual assault -- anything that is going to be deemed any kind of a battery -- even if it's a sexual battery -- you're going to

have consent come up whether or not it's in the statute because, I mean, whether or not, you know, if you write it out of the statute, whether it's going to be the Service courts or CAAF or the Supreme Court, they're going to say, "No, it's going to be a defense of whether or not you consented to this touching." This is sort of, you know, fundamentals of western jurisprudence, right?

But one of the things that is troublesome is that, if the statute says "sleeping, unconscious, or incompetent." Well, you know, under just associated words in statutory construction, you look at "incompetent." Well, it's associated with "sleeping or unconscious." However, most of our trials -- in fact, around the office, we refer to this as fact pattern alpha where there is, you know, two young marines or sailors that have been drinking and they end up having sex and there's a disagreement.

The "incompetent," you know, what does

that mean? Well, it's associated with sleeping or unconscious, but most of the time the way the facts develop is that it turns into, well, the offender should have known that she was too drunk to consent. And then we get into the issues of, again, what is "incompetent"? Well, we have one case that's pending before the Navy-Marine Court of Criminal Appeals and there are a couple of others out there, and I know there's a judge on the West Coast, a Marine judge, that is giving Article 111, you know, basically, you know, DWI instruction of --- to what is "incompetent," what is "incapacitated." And, unfortunately, that's the way the members tend to view these issues. When I briefed units, including junior marines, on, you know, sexual assault laws and stuff like that, when I say, "Okay, we're going to have questions now, but I cannot tell you what the legal definition, you know, what the legal limit for blood alcohol is for consent," you know, and have the hands go down because that's the one thing everybody wants to know. Everyone knows

that it's 0.08, you know, if you get behind the wheel. But the pressing question is: "Well, how much is too much, and how am I supposed to know that?" And that's what our fact pattern alpha cases end up revolving around.

As a result of that, at the appellate level, we see lots of factual insufficiency cases where that is alleged as an error. Now, because our Service courts are required to do a full review of also the facts, and they can replace their own judgment with the finder of fact -- whether military judge or members -- it's not often but every once in a while a case will get returned from the CCA that says, "We know the member is convicted but we find this is factually insufficient, and it revolves around, you know, an alcohol-facilitated sexual assault."

The reason I bring that up is because there are quite a few, both in my branch and the other branch, where the attorneys will allege factual insufficiency on these fact pattern alpha cases. Well, this is time-consuming because, you

1 know, if I just allege just say, I don't know, a
2 suppression issue or something like that, well,
3 in the Government Division, that's the only part
4 of the record they need to read and respond to.
5 But if I allege factual insufficiency, then they
6 are required to go through and respond with every
7 single fact.
8 Now, again, the court, they have an
9 independent duty to do that. But I would say
10 that the amount, the number of cases which have
11 factual insufficiency that are pled as an error
12 at the appellate level, has increased, and
13 they're made in good faith because you really
14 look at these records and you think I don't know
15 how the members could have convicted. And the
16 one thing it would add to that is some of the
17 sexual assault convictions we're seeing, the
18 punishments absolutely do not fit the crime.
19 I've got a case, I've got many cases right now
20 where you see forcible rape convictions where
21 you've got bad-conduct discharge and three months
22 or six months. And it sort of defies reason to

1 think that members can sit there and say, "We
2 believe this marine or sailor forcibly raped
3 somebody, and we're going to give them 90 days."
4 So something else is at work there.
5 And, no, you can't penetrate the members'
6 thinking, but it seems to suggest that they see
7 the accused as sort of assuming the risk of,
8 "Well, you had drunk sex and we're going to kick
9 you out, and we're going to give you a slap on
10 the wrist." Not only is this a miscarriage of
11 the accused, but this is a serious problem for
12 the victim because she's going to walk away --
13 and I use the pronouns of he and she, again,
14 because this is our fact pattern alpha. It's not
15 to suggest it doesn't switch roles or there's
16 even same sex, which there are, but, again,
17 that's just the pronouns that I use. You know,
18 she's walking away from that process saying,
19 "Well, they convicted him, but they think so
20 little of what happened to me that they gave him,
21 you know, what amounts to, say, three times a
22 summary court-martial punishment." So no one

walks away happy from results like this. Again, that comes from really having problems with the definitions of the granularity of "incompetent" and what exactly that means.

The second part of that is, if we want to have -- and that was the goal of the middle 120 --- is we want to have offender-focused litigation. Well, it does because if you don't have any idea of what incompetent is or what impairment is, then you're forced to litigate sort of on the totality of the circumstances and then you get into evidentiary issues under 404(b), 412, 413, 513, and, again, you necessarily focus the litigation back on the victim, which was not the goal. So that is incredibly important, and it seems to be a running theme of: Can we figure out how to define "consent," how to define "incompetent," how to define "impairment," because there's not just a notice issue, but that seems to shape the entirety of the court-martial.

And as far as should the statute

define offenses, the second question, you know, the office, when we got together, said no because they'll mess it up because, you know, they're already resident in 916. And as I said, that's, you know, the affirmative defense, it's not going to go away. Even if you take it out, the Supreme Court, I promise you, will put it back in if we're talking about an offense of touching and the issue of consent.

And, yes, there are circumstances Lieutenant Colonel Thielemann talked about; he was a military judge in the Howard case. That is definitely an outlier. Most of the time, in fact I would say 99 percent of the time, the defense is going to get instruction of mistake of fact.

So that is an outlier. Nonetheless, if we're going to see a trend where military judges are not going to get that because they're needing more than just, you know, some evidence or however they want to describe it, then that would be a problem because it does no good, it does almost no good to an accused who served,

say, two years in jail while his case is being appealed and he successfully wins an appeal. Yes, he doesn't have a conviction anymore, but he's still given away two years of his life because of, you know, want of instruction.

And just, I suppose, one last thing because I don't want to take up too much time, but the JAG instruction, it was brought up before about special duties of the prosecutor. In the Navy, it's JAG Instruction 5800.13. I can't remember if it's delta or echo, but it's 5800.13, and it parrots the Model Rules -- the ABA's Model Rules. And in the special duties of the prosecutor, that's Rule 3.8.

The one difference between the Model Rules and the rules for Navy and Marine judge advocates is that in the ABA's Model Rules it says, you know, "Thou shall not bring a case that isn't supported by probable cause." Well, we have different requirements in that it's the convening authority bringing the case. However, it tells a Navy or Marine judge advocate that you

have to inform the convening authority in writing that you believe these charges are not supported by probable cause. I've had to play that card a couple of times in some uncomfortable discussions, you know, by the way, that memo that he writes to a convening authority is discoverable.

The other option is that you can tell the convening authority it's a summary court-martial and it doesn't have to be a judge advocate. You can find your adjutant, and he can try this case.

I think a lot of the problems that we see in some of the bad cases, quite frankly, convening authorities, this is coming from my trial-level experience, do feel like, well, you know, a complaint was made and this has got to go forward. And, you know, I'm sure it's well known to this panel that, you know, Congress has held up promotions and that sort of thing for general officers because of -- whether it was clemency -- that does trickle down. And I think the default

setting of commanders or convening authorities is that, if it's a sexual assault case, it's going to go forward.

That's troubling because it's almost a self-fulfilling prophecy because you have bad cases that go into court and then there's more acquittals, you know, that should be acquittals. And then, you know, the spotlight is back on the military of, you know, why are all these cases resulting in acquittals? Well, they're bad cases.

Many times, these cases, they've been, you know, if they happen out of town and the civilians had first shot at them and they said, no, you know, we can't -- I have a case right now where Palm Springs investigated, and they said, "We don't see any evidence of crime." Yet, it went to court-martial and, because it's on my desk, that means it was a conviction. And this individual -- I can't remember if he got 60 days or 90 days but the same sort of situation.

And I wanted to comment on something

that the Lieutenant Commander Federico said about -- this was his case at Parris Island and how it was charged. And this had to do with: Is the definition of sexual act/sexual contact too broad? And I think we've been over, you know, the toothbrush rape or the dodgeball. And to me, that's the significant problem with that language. I'd ask the panel to look at the Model Penal Code or, as Colonel Zimmermann said, any of the states that are actually dealing with this on a day-to-day basis, but they don't have anything like Part B of our sexual act or Part B of our sexual contact.

Well, here's where the problem of that is is that it's not enough to say, "Well, you know, all the judge advocates and the commanders, you know, we're all pretty good guys and, you know, we wouldn't charge that." Well, that's not the point. The point is, if it gets charged, it becomes an amazing leverage point for the government to use against somebody to plead guilty to some other offense. And when you get

in front of a military judge, I mean, it's extremely rare that you're not going to have a punitive discharge be awarded, and this becomes the issue.

Secondarily is that the, you know, under the sexual assault registration or the sex offender registration, that varies from jurisdiction to jurisdiction, as well. And most judge advocates -- and I assume this goes across the Services --- you're required to provide a memo when you're in defense that says: "I really don't know what your jurisdiction's sex offender registry policy is going to be. This is what it is right now, but it's subject to change. I just have to advise you that, you know, under the DoD and Navy instruction is that, you know, you could be required to register."

So there's a lot of confusion, and so marines, nobody wants to have to register for a sex offender, so that becomes a huge chip for the government. And here's the problem with that is that, let's say in the example that Lieutenant

Commander Federico had, any time I hear a marine or sailor talk about a case, I have this case, I think, "Oh, is that one of mine," right? Well, this came out of Parris Island. I actually don't know about this case, but there's a reason I don't know about this case is because, if it turned into a guilty plea, then it had a very thin record and there was probably little to nothing wrong done during the guilty plea that would get it to my desk. It would get to a Reserve counsel desk, and we have what are called merit submissions because, again, the CCAs have to do a full independent review. And so if you just say, "I don't see anything wrong with this case," and you send it up.

So the injustice that occurred was that the government was able to use this statute, this part of the statute that everyone agrees is just ridiculous. But the accused does not want to risk everything going wrong at trial and end up being a sex offender, and so he will plead to something else, and then his case will never get

any real substantive appellate review because there was really nothing wrong when he pled guilty to, you know, merely sexually harassing, you know, this young lady at the PX.

So that is probably, in my mind, the most critical thing is that's corrupting the process. And if everyone agrees that Part B of those two need to go or need to be amended to show that it's a crime of sexual violence, then you can probably do that by just putting the word "sexually" in front of abuse to describe the rest of the terms there. That needs to be done because no one is having contested cases over dodgeball or toothbrush rape or anything like that, but it's still a possibility that it can be abused. You should never have to sit next to an accused when you're going through providency and you have to drag them across the finish line, hey, look, just get through this because, yes, sometimes they are not being totally honest with the military judge and saying, "Well, yes, I did this." Well, they feel like they have no choice,

and that's not something that should happen. The Supreme Court -- Justice Kennedy, on a couple of opinions -- has talked about, you know, federal prosecutors abusing the cost of litigation and the danger to someone that's accused as a cudgel, and I don't think the military system wants that.

So I don't have really anything else to say, but I'm happy to answer your questions.

CHAIR JONES: Thank you very much, Major Stephens. Major Payne?

MAJ PAYNE: Thank you, Madame Chair and distinguished members of the panel. Thank you very much for having me here today. I am currently serving as appellate government counsel with the Air Force. Prior to that, I served as a senior trial counsel, a defense counsel, and as just a basic level --

CHAIR JONES: Can I ask you to just move that microphone a little closer?

MAJ PAYNE: Sure. Is that better?

CHAIR JONES: Yes, thank you.

MAJ PAYNE: So what I wanted to do

today is to talk about a couple of the issues as they relate to caces that we have seen coming through the Air Force appellate system. And so the first issue I wanted to talk about many have already talked about today, but should Article 120 define "incapable of consenting"? And there is a case right now that's in front of the Air Force court, and a decision has not been rendered yet. The parties have submitted briefs. I will not be appellate counsel on this, but I was actually the prosecutor at the trial level.

The appellant in the case was charged with committing sexual assault and abusive sexual conduct while the victim was "incapable of consenting." And during deliberations, the panel members came back and asked specifically for a definition of "incapable of consenting," and this sort of threw the trial into a tailspin. It was late, we were already late at night, and they come back with this question. They had been deliberating for several hours, and it took about two hours of arguing between the trial counsel

and defense counsel in front of the military judge before the military judge came up with an instruction that he was going to give.

The defense was asking for an instruction that was based more on the Benchbook instructions during the 2007 version of Article 120. Major Rosenow gave several reasons why that is not proper for prosecutors, that's not particularly a preferable instruction, so the government was arguing that the military should fashion an instruction merely from the plain language in the statute. And that's what the military judge did. He ended up taking, he instructed that "incapable of consenting" for this case, meaning that level of mental impairment due to consumption of alcohol which rendered the victim in that case unable to freely give agreement to the conduct at issue and that an incompetent person cannot consent.

So that is how the military judge chose to instruct. Right now, that issue is up -- the government's side, I would say I actually

feel like the case law is in our favor, but we just don't know how the other court is going to come down.

So when you don't have a definition of "incapable of consenting," sometimes the members do feel that they're left out to dry to come up with something. And so it does create an issue.

I expect soon we'll have some sort of answer, from the Air Force appellate court at least, as to whether or not that was the right, that would be a right instruction and the military judge instructed correctly. But until then, without an actual statutory definition, we're still sort of operating somewhat in the dark, at least on the trial level.

With regard to the definition of "incapable of consenting," I will say that I did like Lieutenant Colonel Pickands and Major Rosenow -- I thought that both of their definitions had -- there was a lot of merit to the definitions that they did suggest. I do think that it is important that, if we go back to

that 2007 Benchbook instruction that was regularly given, I think that there were issues -- that the whole standard of the words "physical" and the victim needing to be able to be to the extent that she was physically communicating unwillingness to engage in the sexual conduct at issue.

But one thing that I also wanted to add that I think is important about any definition of "incapable of consenting" is that I think it's important to clarify that, when people are consenting, there can be some level of impairment, short of being passed out or unconscious or asleep. And so to trial practitioners, to those of us who are drafting these charges or who are looking at the entirety of Article 120, we see that there is a difference and that there must be a difference because there's an option to charge as the victim being asleep or unconscious.

But to a court member who is in trial and looking at the file listing out what the

charges are, and when they see that it may not be clear to them that the law of "incapable of consenting" that that contemplates the level of short that meets unconscious or asleep. And so I do feel that if some sort of language, "incapable of consenting" is defined and language is included there that would clarify the issue, I think that would be very helpful to the members when they are back in the deliberation room and they are trying to apply the law.

I think defense counsel, I have seen them with the statute as it is now. They'll get, as part of the consent instruction, the members will get instruction that says, you know, "A sleeping, unconscious, or incompetent person cannot consent." And I see defense counsel use that particular instruction in the way that incapable of consenting, it's you know, you're basically asleep or unconscious. And I don't believe that that's what the law wanted. I don't believe that's what Article 120 contemplated or what the draft for 120 contemplated. Yet,

because of the absence of a specific instruction on "incapable of consenting," that's what I believe defense counsel are being able to argue.

I'd like to just switch gears and talk about Issue 8, as well. And the question is: Is the definition of "force" too narrow? And I wanted to address a recent Air Force court, a criminal appeals decision, the United States v. Soto, which came out in September of 2014. And Soto was an en banc decision from the court, and they said -- it got dismissed, a rape conviction or rape by force conviction. Now, this is an Article 120, the 2007 version. But I think it's instructive to compare the facts of this case to what the law is now and ask whether or not we would get the same result or if it's possible that the Air Force court could come back with a similar result.

So in this case, and this is like Major Stephens was talking about, the CCA's ability to do a factual sufficiency review and then potentially set aside the conviction if they

find that the government did not meet its burden factually. And that's what happened in this case.

So this is an MTI -- a military training instructor -- case that was charged as a rape by force. The facts of the case were that the appellant, he had the victim in his room, he hugged her, he kissed her, he brought her to the bed, he pulled down her shorts, and she testified that he had sexual intercourse against her, it was against her will, that she pushed up against him and she said not ready, she said, "No, I am not ready." Then in describing it, the victim said, "I tried to get out from it, but he's really heavy and he was on top of me. So I just quit; my hands just quit because he was heavy, and I didn't think I could do anything."

So those are essentially the facts of the case. The military judge convicted the appellant of rape by force. But the Air Force court found that the government hadn't met their burden of proving force or proving that the

victim in this case could not avoid or escape the sexual contact.

And several of the reasons that the Air Force court gave with the facts in the case were very limited. It sounded in the opinion as if they blamed trial counsel for perhaps not eliciting facts, although it's not necessarily clear that there is more facts that the trial counsel could have elicited from the victim. The problem being sometimes getting these testimonies are limited for their ability to, you know, to testify in great detail to incidents of sexual assault; it's obviously sometimes limited by either trauma or passage of time or alcohol, although alcohol is not an issue in this particular case.

But to the Air Force, the Air Force court's -- they noted that there were limited facts. They noted that there was no testimony on the tone of voice for when the victim said, "No, I'm not ready," or that if that statement was made for the appellant to hear her.

They also noted that the trial counsel did not ask if the appellant used any force -- any restraint or force -- other than the fact that he was on top of her to complete the sexual act.

So the trial counsel, the trial counsel in this case, essentially, according to the Air Force court, didn't elicit sufficient facts. And so they also -- the Air Force court also had the ability potentially to have affirmed a lesser-included offense, such as sexual assault by bodily harm. However, they specifically chose not to do that, again saying that they're just working on facts, because they were working on facts on the record.

So I think, based on the Air Force court's discussion of this case, I think it really raises the question of: Is the Air Force court, based on a current definition of force, are they expecting some sort of resistance by the victim, and should it be clarified in the statute -- as far as force -- if there is no requirements

that the victim exert a certain amount of resistance in order for an appellant to have used unlawful force.

Now, we do see in the definition of "consent" that, the definition of "consent" in the current Article 120 that you cannot infer consent, or it doesn't constitute consent just because someone does not or just because the victim does not resist. But consent is not an element of Article 120 with rape by force as it's currently written. Members in our, in this case, the Air Force court, is there language there to demonstrate that a certain amount of resistance isn't required by the victim?

So I think that the lesson from the Soto case is that we should be looking at the definition of "force" and asking ourselves and maybe crossing into the conclusion that, yes, it is too narrow and it would be important to make its clarification statutory for clarification. I do think that, even though the year Soto was talking about is the 2007 version of Article 120,

I still think that the language is similar enough with regard to unlawful force and it's a statute that we do run potentially the same risks of having a similar type of decision come down in a factual sufficiency case under the new 2012 version of Article 120.

And so I don't have any other formal remarks, but I'm happy to answer any questions if you have them.

HON. HOLTZMAN: Thank you very much, Major Payne. We'll now hear from Major Thomas Smith, U.S. Air Force, Defense Appellate Division. Could you make sure you pull the mic real close to you? All right. Thanks.

MAJ SMITH: Thank you. Good afternoon, ladies and gentlemen. It was a pleasure to be nominated and selected to come and talk with you this afternoon. The comments that I'm giving are on my personal behalf, not the United States Air Force or The Judge Advocate General.

I joined the Air Force JAG Corps in

2007. I served as a prosecutor for three years, and for two years I served as a trial defense counsel. And currently I am in the Air Force Appellate Defense Division; I've been in that office for almost two years now.

As was stated earlier, because of the relative newness of this statute, we haven't seen a lot of cases at this point in the Appellate Defense Division that have been charged under the current version of the statute. What I can say is that most of the things that we see involve -- the types of issues we see are legal and factual sufficiency, issues regarding mistake of fact as to consent. Those are the common things we see in Article 120 cases, as well as arguments about whether the judge got it right in allowing or suppressing 412 Evidence.

I've read through Colonel Grammel's comments, and I think he has many good suggestions. But I was also listening during the previous session, and I heard Colonel Zimmermann's comments regarding the need for a

new statute, and I hope to not misinterpret or misquote her, but I think a lot of the problems that we have are the result of eliminating having to prove consent -- the government having to prove consent as an element. And I think if we add that back in, it will clear up a lot of the ambiguity we have about: What is the appropriate definition of consent? What constitutes inability to consent? It would be -- it's important that our Service members have notice of what is and what is not a crime. And I've sat through training where I've heard the "one drink and you can't consent" line. When I was in processing at Joint Base Andrews, I had to sit through a day of briefing from all the different organizations around base, and one of the things I heard from a representative from the Sexual Assault Prevention Office was someone might not be able to consent after having one drink.

So there is a lot of information out there that defendants are having to deal with from an ambiguous definition of "consent" and

what is not consent. They may not understand what exactly consent is. Bystanders may not understand exactly what is and what is not consent. Investigators may not understand what is consent and what is not consent. And in a lot of these cases, one of the tactics used by investigators is let's call it a pre-textual phone call, where they call the alleged perpetrator and they have the alleged victim on the line, and the alleged perpetrator doesn't know that the investigators are listening in. And that person has been coached on what the definition of "consent" is, but the accused person has not. And that also, I've seen that in my cases where you have somebody on the other end of the line that doesn't know the investigators are listening and says, "Well, I didn't realize that you didn't consent, but I guess if you say that's what 'consent' is, then I guess that I sexually assaulted you. I'm sorry." And that becomes a great piece of evidence for the government, when that may not exactly be what

that person really did or believes they did.

So I would just, I guess, piggyback on the theme that I think putting a burden on the government to prove lack of consent will fix a lot of problems and create a more fair and just system. And I am happy to answer any further questions.

HON. HOLTZMAN: Thank you very much, Major. Our next presenter is Captain Jihan Walker. Have I pronounced your name correctly, ma'am?

CAPT WALKER: Yes, ma'am. Thank you. Ma'am, members of the panel, as she said, my name is Captain Jihan Walker. My current position, I'm an appellate attorney for the U.S. Army Government Appellate Division. Prior to that, I served as a prosecutor for two years, and then I've served as a defense counsel and a senior defense counsel.

The comments that I'm going to give are my own personal opinion; it's not an expression of The Judge Advocate General for the

U.S. Army or the U.S. Army.

I've reviewed the initial report and I've been here all day listening to the testimony that's been given. And I'm prepared to answer all of the issues that have been identified, but I did want to focus in on some of the things that have been recurring throughout the course of the day.

And so the first issue is Issue #1, whether or not the definition of "consent" is clear or ambiguous. And I believe that my answer is also interrelated to Issue #3, which is whether or not there needs to be further clarification on the definition of "incapable of consenting."

So when you look at Article 120, my answer is going to be similar to what you heard from Lieutenant Colonel Pickands and even Colonel Grammel, which is that some further clarification I think would be useful -- not an overhaul of the statutory scheme, but clarification on what it means to be a "competent person." And I think

that providing that kind of clarification, like what Colonel Grammel suggested -- relying on the 2007 version -- is the victim unable to appraise the nature of the sexual conduct at issue? Is the victim unable to communicate an unwillingness to participate in the sexual act or to decline participation? Those things get towards whether or not that particular victim is capable of consent.

So when you look at the definition of "consent," what you do know is when you look at the subparagraph B, "a sleeping, unconscious, or incompetent person cannot consent," so that draws at least some clear line in the sand that if you're sleeping or if you're unconscious then you're definitely not capable of consent.

But the issue falls into what if you get into these close calls where the victim's level of intoxication could be impairing their judgment? That happens, but there's, at some point, a line in the sand where we decide, despite your level of intoxication, you're still

capable of making decisions, even if it's a poor judgment. So somebody who is heavily intoxicated gets in a car and starts driving, that's a poor decision, but it's still someone who's capable of making a decision.

So further clarification of where Congress is wanting to draw the line, something short of asleep or unconscious, that would be of assistance.

Now, from the appellate perspective, there is one case, United States v. Brown. It was decided by the Army Service Court of Criminal Appeals, I want to say in December of last year, and it dealt with the definition of a competent person under the 2007 version. But what's important about the court's analysis in there is that the military judge gave an instruction on competent decisions, a competent person, that was very similar to the language Colonel Grammel suggested: unable to appraise the nature of the sexual conduct at issue, unable to communicate an unwillingness or decline participation. And that

withstood that constitutional attack.

So if a recommendation going forward is that we insert pretty much a similar definition from what was in the 2007 version, that is something that is workable that will provide at least some parameters for panel members to make that kind of close call. The only two cases that I've seen so far dealing with this current 2012 version are two Navy Court of Appeals cases that have been recently decided, and I'm not aware of CAAF -- the Court of Appeals of Armed Forces -- making a decision on it yet. And it was referenced earlier, Unites States v. Corcoran, if I'm pronouncing it correctly, and United States v. Torres. And in both of those cases, the accused lodged a fair notice constitutional attack on "incapable of consenting," that he wasn't placed on notice that this was some criminal conduct that he would be charged with. And in both of those cases, some of the language that the court used to uphold the statutory language was looking at, when you look

at "incapable of consent," it takes into account that the condition was known or reasonably should have been known by the person.

So that language that's currently in the statute provides some notice because it's going to be a part of the trial or litigating it is the government has to show, to some extent, that it was the accused in that particular case knew that this victim was incapable of forming that consent or the ability to make a decision or should have known it was reasonable under the circumstances. And so that was part of the reasoning in the court on that issue.

But what my recommendation is is that whatever line that Congress decides to draw in the sand, the further along the spectrum you go -- my apologies -- the further along the scale that you go, you're going to get into a situation -- and toxicologists will talk about this -- where a victim could potentially be a blackout phase, where their blood-alcohol content is high and the portion in their brain that records long-

term memories just shuts off, but the rest of the part of the brain that involves making decisions and things of that nature is still functioning. And so you could have a victim that honestly testifies later on, "I don't remember what happened," but at the time that accused is watching what's going on, he's seeing someone who's walking, talking, able to perform some functions. And so that goes into the mistake of fact as to consent.

And so my point being is that, wherever the line is drawn, the farther up you go away from asleep or unconscious, the closer you're going to start to encroach upon that particular accused's potential mistake of fact as to consent defense. And so that's something that certainly should be taken into consideration. The reason why I like Colonel Grammel's recommendation, or even Colonel Pickands' modified variation, is that it leaves the fact finders with some additional factors to take into consideration in trying to get at what that

victim's capacity level was.

And so then moving on to Issue #2, I don't recommend -- other than making the changes for consent, I believe that the Article 120(f), a section that says, "An accused may raise any applicable defenses available under this chapter or the Rules for Courts-Martial," I believe that that is sufficient to cover mistake of fact as to consent and to put consent at issue still.

So when you look at a case like United States v. Neal, and it analyzed removing consent as an element, what was key to that court's rationale was that -- even though consent had been removed as an element because we were trying to have a statute that was more offender-based oriented and less victim-based oriented -- the statute did not preclude the admission of any relevant evidence on consent.

And so, to the extent that you make recommendations to clarify the consent or mistake of fact as consent from the defense, I would be very cautious about trying to limit the

circumstances in which this evidence can be admitted. It's better to allow for the admission of the evidence, and then the military judge can make the call depending on the evidence that plays out at trial whether or not some evidence of consent or mistake of fact as to consent has been raised.

And then I just wanted to briefly touch upon Issue #5 because we've seen some cases at the Army Service court level dealing with the definition of bodily harm. United States v. Moellering was recently argued this past February, and we have not yet received a decision from the service court on it, but the ultimate issue in that case dealt with bodily harm being charged as a sexual act, which has been a source of conversation throughout the day. And so in that particular case, the bodily harm was the penetration, and the military judge had to give an instruction before the Military Judges' Benchbook had been issued for the new 2012 version.

And so what he did is is he basically just instructed on consent, but he did not instruct consent as an element of the offense. But we defended his instructions because, again, consent was still at issue and the military judge was clear to instruct on consent as it related to whether or not the government had met its burden beyond a reasonable doubt to show that offensive touching had occurred.

So as long as the military judge has instructed on keeping that burden of proof on the government, once some evidence of consent has been admitted, I believe that bodily harm, as it's charged in that way, is still constitutional. And it's important to keep that avenue of charging still available because you have victims that are sometimes taking aside whether or not they are impaired by alcohol or drugs or something like that. You could have potentially a victim who, due to the passage of time or trauma, has waited a long time to report, and the only clear thing she really remembers is

that some penetration occurred, but she doesn't necessarily remember how it happened. This still gives the government a way to charge that offense, and it still provides the defense with an opportunity of presenting, again, proof of failure, on whether or not the government has shown beyond a reasonable doubt that an offense of touching has occurred.

And then the last issue that I did want to touch upon briefly was Issue #9 dealing with the definitions of "sexual act" and "sexual contact" because we recently dealt with a case, United States v. Schloff, and we're still waiting on an opinion from the Court of Appeals of the Armed Forces. But I do agree or echo the comments from earlier today that the definition for sexual contact is too narrow as it's currently drafted because it does not include an object.

And going through the oral arguments at the Army Service court level and, recently, in front of the Court of Appeals for the Armed

Forces, we received a lot of questions on sort of the absurd results that could come, like from the dodgeball example, and things like that. And the two touchstones that we came back to each time in trying to argue about this is, one, is that the exercise of prosecutorial discretion, and we just simply have not seen dodgeball being charged but then, two, also relying upon that specific intent. Specific intent, unless you have an accused that just straight-up says, 'I admit I intended to do X, Y, and Z,' it's normally going to be inferred from the entire circumstances.

And so when you have a situation, especially if you tie inserting or an object to the specific intent to sexually gratify or arouse, then you've really sort of limited the circumstances in which he could be charged to the kinds of harms that Article 120 is seeking to aim. The use of the stethoscope, as that doctor used in United States v. Schloff, a more gruesome and disgusting example that did come up in oral argument is a guy who ejaculates on a woman, that

you can't get better evidence of a sexual gratification than the ejaculate itself, but it's not a body part. It could be charged as using an object connected to that specific intent.

And so one of the recommendations that I would say is we tried to argue, and we'll see what the Court of Appeals for the Armed Forces actually says -- the Service court certainly agreed with us -- is that whether an object is specifically listed, the wording itself "touching may be accomplished by any part of the body" is permissive. And when you look at Article 120, in connection with Article 128 in the overall congressional intent, it certainly lends towards an interpretation of including the term "or an object." But by inserting that in there, it would remove any doubt about that.

And then, again, if we connect it to that specific intent for gratification, I think it would avoid a lot of the potential absurd hypotheticals that have come up.

But I would cede the floor back to

Colonel Jamison and answer any questions that may come up. Thank you.

HON. HOLTZMAN: Thank you very much.

COL(R) SCHINASI: Captain Walker, I can identify with you. Forty years ago precisely, I was a captain at Army Government Appellate Division too, and so I understand what it's like to be there, to be doing the important work that you're doing.

When I came away from that assignment, I realized that there was nobody in the military who understood military justice more than the lawyers at the appellate divisions. You live with these cases; you live with these issues. They're not just names, they're causes. They're very important, so I appreciate that.

So let me start with you. In the average rape case that you would see, is 120 a cause célèbre? Is the statute a problem? And the second question, a follow up to that would be: In the average rape case, what would be a bigger issue for you: Article 120 or Military

Rule of Evidence 412 or 413?

CAPT WALKER: So to answer your question, I think that Article 120, as it is, is not the issue. There's ways to charge it, and then it really is a trial process and that fact finder having to make that decision --- that tough call in some cases.

412 I have more of a defense perspective on, to be honest, because I did a lot of litigation when I was defense counsel trying to get that evidence admitted. And the way that it's structured right now is that it places a burden on the defense to truly articulate the relevance of that evidence. There's nothing wrong with that because that's really the goal --

HON. HOLTZMAN: I'm going to interrupt for a minute because we have very limited time, and we have a lot to get through. So could we limit the questions to 120 and not 412?

COL(R) SCHINASI: What I'm trying to do is put 120 in context.

HON. HOLTZMAN: I understand, but

we're going to get a disposition on 412. It's just going to take time. I'm just suggesting, please.

CAPT WALKER: Yes, ma'am. To make the answer short, I think that Article 120, the way it is right now, and 412 is serving the purpose that it was supposed to serve.

COL(R) SCHINASI: Thank you.

MAJ SMITH: Sir, I think it's -- you asked if Article 120 was a cause célèbre. I think it's a combination of both; I think it's the climate that has produced a statute that now shifts the burden in a lot of cases on the accused to prove a mistake of fact by a preponderance as a defense. And that's why I stand by my position that I think you would solve a lot of problems and it would be a more fair and just system to put that burden on the government to prove lack of consent.

MAJ PAYNE: Sir, I think, from an appellate perspective, when we get these cases, they've been successful. So a lot of times we're

looking at where the charging works well, the government charged it appropriately in a way that they could achieve a conviction.

Not to say that there still aren't ambiguities in there, so I think it's an appellate defensive challenge because they do. I think the biggest challenge is probably the fact that, at the base office, when they're charging, they're operating without, still operating without model specifications and elements because the President has not promulgated those yet. I think that that causes confusion as to how the laws apply by the judge at trial and how the members are instructed. I think that is what is getting appellate defense counsel a lot of room to make arguments that what was used at trial is not correct.

COL(R) SCHINASI: Thank you.

MAJ STEPHENS: I don't think the statute is a problem. I mean, it is problematic in a couple of the instances -- specifically that I addressed with the overbroad definitions for

sexual contact and that sort of thing -- and the lack of definitions are troubling. But it's the administration of the statute. Simply put: Bad cases don't belong in court, period. We have so many cases that the civilians, both federal and state, have rejected these cases. They're not saying, 'I don't think we can get a conviction,' but there's not even probable cause or 'I don't see anything here,' but our commanders will take those cases into court.

You know, I just remind the panel that we only need two-thirds to convict. That is unique. And, you know, some of the cases don't belong there. So you can have a statute that may have minor problems, but if you're poorly administering it --

And the secondary issue is that you have the very aggressive and often incorrect SAPRO instruction and that the members bring those biases into court with them. And I see that in some of the sentences. Again, I don't see how on earth you can have the idea that

somebody is forcibly raped by another Service member and only give them 90 days and a bad-conduct discharge. They clearly believe that they assumed the risk of having drunk sex and they're a problem and they need to go away. And that's probably the correct answer to some extent. This is not what we want, you know, our service members doing, but it's not a crime of sexual violence.

MAJ GEN(R) WOODWARD: Couldn't you interpret that sentence the other way around? Are you sure you're not putting your bias spin on that and it could be interpreted that that sentence is because of their other biases that they convict him and they believe in that conviction that they're giving him a lighter sentence?

MAJ STEPHENS: General, that is a thought, and I think maybe four or five years ago that would be probably more of a fair assessment is that, you know, it's sort of an old boys' club kind of thing. But when the charge sheet

specifically has, you know, forcible rape and that's the case that is described, but there's alcohol involved, I think the members are making different conclusions now.

MAJ GEN(R) WOODWARD: Yes. Well, I just say that because I know of a specific case at Andrews where a woman was assaulted by someone while she was sleeping. There was actually a witness there, and he was only convicted to six months and that was set aside by the commander. So it doesn't necessarily mean that they don't believe it. There was no alcohol involved in that case at all, so I just caution against making that interpretation.

COL JAMISON: Also, if I may, to your point, General, the other possibility may be that the way our system is set up, if you have two-thirds and maybe you have one outlier who does not believe beyond a reasonable doubt, you go into sentencing, and the way our system is set up, the lowest sentence, once you have a majority vote, that's what happens. So that could also be

a possibility. Of course, for good and cogent reasons, we don't look behind the curtain of the members' deliberation.

To answer your question, sir, I don't see the statute as a problem. What I see, again, I agree with Major Stephens, it has to do with we're hamstrung to a certain extent by the fact that the President has not yet articulated the elements. He hasn't explained some of the definitions. So that makes it a little bit difficult to figure out what the theory is and what the lesser-included offenses are as well.

So as a result, what happens, oftentimes, is a trial counsel may charge multiple theories, not knowing what is and what is not a lesser-included offense. And that leads to some notice problems.

Also, with regard to the statute itself, there are some definitions -- I just argued a case, United States v. Pease, on 2 May, last Friday, where the question was: What is the definition of the word "competent?" In that

case, what happened during members' deliberation, one of the members asked the military judge, "Is there a legal definition for competent?" which then started a back and forth between the trial and the defense counsel. The defense counsel suggested a "competent" definition from Black's Law Dictionary, but that was more akin to kind of a mental infirmity to be competent to testify.

So then the trial counsel came back, "What about the dictionary definition?" It went around and around. Eventually, what the military judge said, "Use your common understanding and your ways of the world to ascertain what the word 'competent' means." And, of course, it comes up in the first sentence of consent.

So that's the issue now before the appellate court. The appellate defense counsel, of course, are maintaining that the military judge erred by not giving the defense-requested instruction.

So to the extent that I think the statute could be helped from a clarification on

some of these, particularly the word "competent" because it does have a legal definition that means different things, depending upon a factual scenario -- competent to enter into contract, competent to testify, competent to be an expert witness -- if you want competent in the definition of "consent" in the first place.

But I think you have to ask yourself that threshold question: Do we need that in the definition in the first place? If yes, then I think it should be defined. I would submit that it would probably be better defined by the President as an executive order rather than the statute.

HON. HOLTZMAN: Any further questions?

MS. KEPROS: Colonel Jamison, why would it be better to have the President define it?

COL JAMISON: I'm almost looking in a statutory construction. And if you look at the UCMJ, I have a fondness for simplicity and elegance, if you will. And after World War II,

when the UCMJ came out, the statute was simple, and then it's up to the President to further implement it. For example, Article 134. When Congress had put in the terminal element -- either conduct prejudicial to good order and discipline or service discrediting conduct -- those simple words, the President then went on to further define what that means. It makes it usually easier. I would say, historically, it's much easier to get a presidential executive order through. Of course, the situation I find myself in right now, that, of course, proves the reverse position.

But that way, the President, as the executive, can then define in his way how this thing gets implemented in the proper way. And that's just the way we're used to dealing with it.

MAJ GEN(R) WOODWARD: Then how do you defend the gap that you're dealing with where you're waiting on the executive order?

COL JAMISON: Well, General, I don't

see a gap at this particular point in time. I believe that congressional intent, moving from the 2007 statute that obviously had some problems to the 2012 statute, the goal, I believe, of Congress was to try to make this offender-based, to go back to this whole concept of what force is, to focus on the actus reus of the offender, as opposed to the victim herself.

So Congress, I think, sought to remove, at least as an element, consent or, in this case, lack of consent. And because that's not an element, at least consent appears, I think, three times -- 120(a)(5), 120(b)(3), and then, of course, 120(g)(3), which we've talked about with dealing with bodily harm.

If the Subcommittee wants to remove "consent" from the statute to kind of finish the job that Congress had in mind and not make it part of the elements, this Subcommittee can certainly do so. There have been some suggestions to define, for example, "incapable of consenting." And what I found interesting is

"incapable of consenting," that then gets defined in the consent portion in (g)(8) per the suggestion of Colonel Grammel. Well, I would prefer, if that's where the Subcommittee is looking, we're not really talking about, at least I would submit, a capacity problem to consent. What we're talking about at bottom is an inability to perceive and appraise what's happening to the victim -- to him or her -- similar to how the federal statute is.

So if this court, I mean, I'm sorry, if this Subcommittee were to recommend a change, I think it can be easily done by just taking "incapable of consent," skipping to the end, and then just putting in the same statutory language that Colonel Grammel suggested, which is largely lifted from Section 2246 of Title 18, because I think that's what we're talking about, I believe. We're talking about the ability for the victim cognitively to perceive what's going on.

MAJ GEN(R) WOODWARD: But in what you're advocating right now is us to recommend

that change, rather than do it through the executive order --

COL JAMISON: Well, no, I'm just saying if this court, I mean if this Subcommittee considers this to be a problem. I don't think it's a problem. I agree with Lieutenant Colonel Thielemann that the members are smart enough to understand that, I think, if you change and you clear up the definition of consent in (g)(8), again, if that's supposed to be --

HON. HOLTZMAN: Excuse me. I don't want to interrupt you. We have to be out of here at 5:00, so can you keep your answer, like, really short, like one or two words? And if we don't have urgent questions, may we go to the next panel? But finish your statement, please, sir.

COL JAMISON: The answer is no.

HON. HOLTZMAN: That's short. But I thank all of you. Really, your testimony and your presentations have been extremely valuable to us, and we really have benefitted from your

experience and your suggestions. Thank you very, very much.

And now our next panel. Sorry, you're going to be -- we'll hear from our next panel, which will be Civilian Counsel Perspectives on Issues 1 to 11.

Thank you members of the panel for your cooperation; I don't know how we'd get through this otherwise.

(Whereupon, the above-referred to matter went off the record at 4:06 p.m. and went back on the record at 4:07 p.m.)

HON. HOLTZMAN: Panel members, thank you for your patience and for waiting for us. I know we're about an hour, two hours late. But try to please abbreviate your remarks if you can so that we can have plenty of time for questions. I think that's what the panel would welcome.

I think we'll start with Mr. John Wilkinson who's an attorney advisor to Aequitas. Mr. Wilkinson, sir.

MR. WILKINSON: Thank you. And thank

you, panel members, for having me back. I testified once before in Washington, D.C., and I appreciate the opportunity to share, I guess, from the civilian world what their perspective is.

I've been listening and it's a great discussion. You forget. I mostly come from the prosecutor's perspective. I work for Aequitas which is the prosecutor's resource on violence against women, and just so we can assist you in any way we can we do have a statutory compilation of all the sexual assault laws in the states that I believe we've already shared with you.

There's some analysis. All the states, the federal, the territories and the UCMJ is in there. There's some analysis on consent and intoxication and the elements of those offenses. We could also probably give you a compilation of statutes that include mistake of fact if that would be helpful so that you can compare that to whether or not you want to do that.

And, you know, as I'm listening to some of the comments before me and we're talking about consent, even when it's not included as a specific element of an offense, I've never tried a case, a sexual assault case, where I didn't have to prove that there was no consent, so to your point. And so I don't know that you're accomplishing much.

As many of the other panel members have said, I don't think necessarily that a code is the problem. I think it's implementation. That's what, you know, are we thoroughly investigating these cases? Are we treating these victims with respect? Are they being believed when they come forward?

The vast majority of these cases are never reported, and so when we get down to those that do get reported are we treating them right so those cases can move forward? Are we strategizing our prosecutions correctly so we're educating our judge or panel members on what victim behavior looks like and why people should

possibly not make false credibility assessments based on certain victim behavior? Are we working them through our cases? Are we focusing on the offender?

All those things, I think, are going to be way more important than what your code says. That being said, I'll just focus on a couple of the things that others have focused on. The definition of consent, I think the definition is fine. It could perhaps be worded better. There are -- knowing involuntary consent, I think, is critical that that be an important element of any statute that is given, define "consent."

Just pulling several statutes from the states, Florida defined it as "consent means intelligent, knowing and voluntary consent and does not include coerced submission." And so they have all three of those in there.

And of course consent is used in the definition of consent, which isn't always great, but you guys use the word "agreement" which I

think could be substituted there. But that "knowing, intelligent and voluntary" reminds me of what we have to establish when we're admitting a confession. It's also, it's that important when someone is consenting to this act that would take care of that.

When I think about "incapable of consenting" and what is an incompetent person I think it's going to be very difficult to give a laser-like definition. I really think it falls into when is someone too drunk to consent. And that's really the issue in these cases, and those are the toughest cases in the civilian world as well is where does that line fall?

And you're not going to be able to, I think, put in a statutory definition that's going to give you a bright-line rule there. It's going to be a factual determination in each case every time and it's really going to depend on that thorough investigation, developing the evidence that's going to demonstrate that this individual actually was too intoxicated to consent.

The language that has been suggested about being able to appreciate the nature of the act and things like that are helpful in defining that and I think that that can be helpful so that you do have something to point to and it's not an incompetent person.

When I think of that term I'm thinking of somebody who's legally incompetent to testify, someone who may suffer from a developmental or cognitive disability, things like that. And those are covered in the civilian world as well but are covered separately.

One sample definition from West Virginia --- and again I'm not suggesting these as models; they're just examples of the way people have tackled some of these issues --- says, "a person is deemed incapable of consent when such person is less than 16 years old; mentally defective;" -- that would be someone with a developmental or cognitive disability -- "mentally incapacitated;" -- that is someone who is too intoxicated to appreciate the nature of

the act -- "or physically helpless." And that is the person who is unconscious for whatever reasons and cannot resist.

And so, and they list those in their definition of "incapable of consent" and then define each one of those, except for under age 16, to get at that issue. So I think those are important things to do and to help folks.

I don't quite get the notice argument. I think people are on notice that they're not to commit sexual assault. There are a range of offenses, and so probably down at the lower range there might be some confusion on what constitutes an offense or not but everybody knows you're not to sexually assault somebody. You're not to have sex with someone who can't consent or hasn't consented. So I don't know about the notice argument so much.

The one last one I just wanted to chime in on is the definition of force. Pennsylvania has a pretty good definition of what they call forcible compulsion that includes a lot

of activity including physical force.

But forcible compulsion is defined as compulsion by the use of physical, intellectual, moral, emotional or psychological force either expressed or implied. The term includes but is not limited to "compulsion resulting in another person's death," it goes on, et cetera, from there.

But it includes many things beyond just physical compulsion which is important because we know that that is what happens in a lot of cases. And I heard the one case where the individual said no and was under a training instructor who forced her down and she felt like she couldn't resist anymore.

And exploring some of what is contained in that definition by an investigator or prosecutor might develop enough evidence where that case crosses the line and they're able to get a conviction in that case or sustain a conviction on appeal because they developed so much additional evidence in those cases. Those

were the ones that mostly stuck out to me.

And again we're here to help you guys in any way we can to provide you with any resources, any research. We have banks of researchers that do this stuff and it's at no cost. So please reach out to us and let us know if we can research any of these issues for you and provide that to inform your decision-making process.

HON. HOLTZMAN: Thank you very, very much for your testimony and your offer of help. We'll next hear from Zachary Spilman, Attorney at Law. Mr. Spilman?

MR. SPILMAN: Good afternoon. Thank you for the opportunity to appear before you this afternoon. Before I start I will note that my comments here are my own opinions and only my opinions. They do not represent the opinion of any organization or of any of my clients.

I want to quickly address three topics -- short responses to the 11 issues under the Subcommittee's consideration, a few thoughts

about issues raised by some of the presenters you've already heard from today, and finally my recommendations to this committee.

For Issues 1 through 11 I want to address the first three together because I believe that all three issues are adequately resolved by an appropriately broad, appropriately broad definition of consent. Consent being words or acts indicating a freely given agreement.

And I'll briefly note that even modern so-called affirmative consent laws or yes-means-yes laws acknowledge that nonverbal conduct may communicate actual consent. Drunk or otherwise intoxicated people can consent. Consent can take many different forms in our diverse society. So there is no kind of simple, somebody has to say yes to get to consent. There needs to be an appropriately broad definition of consent that encompasses the way human interaction occurs in these situations.

Issue 4 appears to address an incredibly narrow set of hypothetical facts that

respectfully I don't believe requires preemptive congressional action.

Issue 5 involves whether nonconsensual sexual activity constitutes bodily harm under the statute. I believe that it's clear that Congress intended to define nonconsensual sexual activity as bodily harm and that this definition, frankly, is uncontroversial.

And to answer a question from earlier today, bodily harm includes any offensive touching including nonconsensual sexual activity but bodily harm need not be nonconsensual sexual activity. It could be any lesser form of offensive touching.

So, for example, if you consider a case where an accused slapped an alleged victim in the face, the alleged victim then lay passively while the accused committed a sexual act upon the alleged victim, ignore consent in this fact for a moment because it isn't an element. The government doesn't have to prove lack of consent.

The slap alone might meet the definition of force required for the offense of rape. It might, for instance, inflict physical harm sufficient to compel submission by the alleged victim. Just slapping them in the face they give up and submit.

The slap might also meet the definition of bodily harm for the lesser offense of sexual assault because it was an offensive touching. Yet bodily harm might also be found in the sexual act itself if, only if the sexual act is proven to be nonconsensual, because consensual sexual activity is not bodily harm in our legal system.

Issue 6 asks if the definition of "threatening wrongful action" is ambiguous or too narrow. Respectfully, I believe that the definition is incredibly broad and presents a uniquely factual question: Was the contemplated action wrongful? This is a question of fact to be determined based on the evidence, and I'll note that I believe that the definition of

wrongful action is adequate to address the issues of coercive sexual relationships and abuses of authority that aren't in these first 11 issues but I know are for the Subcommittee's consideration.

Issue 7 questions whether fear should be viewed subjectively or objectively. Requiring an objectively reasonable fear is most appropriate because it incorporates the defense of mistake of fact regarding whether the other person was actually in fear. It also avoids prosecuting someone for instilling a fear that is objectively unreasonable.

Issue 8 asks if the definition of force is too narrow. I believe that the statutory definition of force is deliberately narrow and sensibly so when considered in context with the statutory definitions of bodily harm and of threatening or placing in fear.

Issue 9 considers the breadth of the definitions of sexual act and sexual contact, and we've heard a lot about that today. With respect

to all the other presenters, the definitions are too broad. Much, much, much too broad. Not every superficially sexual activity needs to be, is, or even should be chargeable as a sexual offense.

And I'll briefly note the question from earlier today that the prosecution represented as whether the text of Article 120 allows prosecution of all conduct that may come within its sphere. With respect to them, I believe that the statute provides no impediments whatsoever to prosecutions. Quite to the contrary in fact.

Issue 10 asks if the government should be required to prove some element of knowledge of an alleged victim's incapacity. I believe it should because some degree of knowledge provides mens rea for the offense.

And finally, Issue 11 asks if the offense of indecent acts should be an enumerated offense, and it should not. Article 134 already provides adequate means for prosecution of

indecent conduct by persons subject to the Uniform Code of Military Justice.

Next, I want to briefly address the issues of the defenses of consent and mistake of fact as to consent, the issue of how training and education affect sexual assault prosecutions, the issue of common sense, and the issue of whether Article 120 is the drafting abomination that so many people say that it is.

I understand that you were provided with a copy of my recent analysis of consent and mistake of fact as to consent as defenses to adult sexual offenses under the UCMJ. I believe that my analysis is an accurate and appropriate statement of the law and I stand by and on that analysis.

I'll note that my analysis includes discussion of the application of the burden and of burden shifting for these defenses. The defenses of consent and mistake of fact as to consent both apply to prosecutions under Article 120, and I believe that their availability are

crucial to avoiding statute that is overbroad, possibly unconstitutionally so.

On the issue of how training and education affects sexual assault prosecutions, I believe that the various iterations of sexual assault awareness training has had a very adverse effect on the military justice system and for two reasons. First, when a service member is trained to an improper view of the law of sexual assault then that service member will inevitably apply that improper view in a way that leads to injustice.

Second, when a service member is provided an improper view of the law, then that Service member may begin to believe that they are a victim based upon the improper explanation. Creating victims is injustice especially when the government cuts them from whole cloth.

Improper training is a cancer on the military justice system. Just as we would not tolerate improper training on how to handle a rifle, we must not tolerate improper training on

the issue of sexual assault.

On the matter of common sense I offer you the following sentences from the Military Judges' Benchbook. The Benchbook is the compendium of model instructions and other guides for court-martial proceedings. It's published by the Army, everybody uses it.

I have Paragraph 2-5-12, the instruction given the members just before they begin their deliberations. It reads, this is the instruction the judge gives, "Bear in mind that only matters properly before the court as a whole should be considered. In weighing and evaluating the evidence you are expected to use your own common sense and your knowledge of human nature and the ways of the world.

"In light of all the circumstances in the case, you should consider the inherent probability or improbability of the evidence. Bear in mind that you may properly believe one witness and disbelieve several other witnesses whose testimony conflicts with the one. The

final determination as to the weight or significance of the evidence and the credibility in the witnesses in this case rests solely upon you."

As you can tell from that, court-martial members are expected to use their common sense and they're expected to use their knowledge of human nature and of the ways of the world when evaluating the evidence presented during the trial. That is to say they use those things to determine the weight or the significance of the evidence and the credibility of the witnesses.

However, members just like civilian juries may not use common sense or knowledge of human nature and the ways of the world as a substitute for evidence or, of significant concern in the context of today's discussion, of incapacity as a substitute for an adequate explanation of the law.

To convict at a court-martial, the government must prove each and every element of the offense by legal and competent evidence

beyond any reasonable doubt. Allowing an amorphous term like "common sense" or vague allusions to human nature and to the ways of the world to operate as a substitute for legal and competent evidence relieves the government of its burden and allows a conviction in the absence of evidence, it is a very dangerous thing.

On this matter I recommend to you the opinion issued to you by the Court of Appeals for the Armed Forces last year in United States versus Frey. It can be found in Volume 73 of the Military Justice Reporter at Page 245.

HON. HOLTZMAN: Excuse me, sir. Could I ask you to wrap up please as quickly as you can?

MR. SPILMAN: Yes. I'll very briefly talk on the rewrite. I don't believe Congress should start anew. I don't believe Congress should rewrite Article 120. It's not the statute I would have written, but I don't believe it's unworkable or indecipherable. I actually believe it's rather straightforward when applied to

facts. And that brings me to my recommendation.

I recommend that the Subcommittee's report include a focus not on changing the language of the statute but on the need for executive action to implement the statute. In Article 36, Congress delegated significant authority to the President of the United States to provide the kind of clarifications and explanations that are raised in the issues that are before the Subcommittee. It's the President as MAJder-in-Chief --

HON. HOLTZMAN: Excuse me, sir. I've asked you to wrap up.

MR. SPILMAN: Yes. Thank you for the opportunity to speak to you this afternoon.

HON. HOLTZMAN: Thank you very much, Mr. Spilman. Our next presenter is Colonel Don Christensen, U.S. Air Force (Retired), from Protect Our Defenders. Thank you very much for your patience and for being here today to help enlighten us.

COL(R) CHRISTENSEN: Thank you.

HON. HOLTZMAN: And please keep your comments short. I don't mean to interrupt but we're going to be out of here at 5:00. So thank you.

COL(R) CHRISTENSEN: They're going to be short. Thank you for the opportunity to speak on this issue today. From my personal experience and from talking with military judges, trial counsel, defense counsel, and I did serve as the chief prosecutor of the Air Force for four years, I believe Article 120 as written is working as Congress intended.

I believe that it effectively criminalizes every penetrative and contact sexual offense that could be invented that puts military members on appropriate notice of which conduct is illegal. I think it would be a mistake to make major changes to Article 120 as it would be the fourth major change within the last ten years.

But it's time to let the experience of practice and the guidance of the appellate courts refine the application of the current version of

120. What is needed now is for the President to sign the executive order that we know is out there to establish model specifications and definitions and the elements of the offenses.

It's been almost three years since this statute took effect and it's needed now. It failed to do this, there is a specter of error that could harm either the survivor or someone accused of such offense.

This information is relied on by military judges, trial practitioners to assure justice is done and to avoid appellate issues. Delay in doing this is bad for justice. The executive branch controls this process. This is difficult. They have thousands of lawyers, get it done.

While I believe Article 120 is working, I'm troubled that certain conduct that traditionally we would consider rape is now labeled as sexual assault. For example, our current version of an accused where he'd have sexual intercourse with an unconscious person,

someone even in a coma, that would not be considered rape. That must be changed.

I'd also recommend that an additional offense be added to Article 120 and that is criminalizing what is commonly known as revenge porn. Currently it is only an offense to distribute images that were taken without the consent of the third party. There is no prohibition of the third party to agree to have their image taken then for someone to later distribute that.

Currently there are 14 states at least that have outlawed revenge porn and the federal government's considering outlawing revenge porn. It is an issue that has started to percolate in DoD.

Finally, I would say that there's been a lot of talk about the definitions, but this is not a new issue. We've prosecuted rape and sexual assault for decades under UCMJ. The pre-2007 version of Article 120 has decades of case law, the fine definitions such as consent and

capacity. I would recommend you look to those definitions.

When I was a trial judge I had the 2007 version and that's what I go to, and that's all supplied. So don't reinvent the wheel if you don't need to reinvent it. Look to the law that's out there. I would say to prosecute Article 120 within the context of what this panel has decided is to recommend to Congress that the DoD be forced to establish military justice tracks to ensure that we have prosecutors, defense counsel and military judges that are steeped in training of history and experience of military practitioners. There is not a case more difficult to prosecute or defend than Article 120 sexual assault cases.

It is beyond belief that we do not take seriously how difficult it is to do, and if you want to change the way we do it make sure the people in the courtroom have the knowledge and experience to do it. Thank you.

HON. HOLTZMAN: Thank you very, very

much for your presentations. Members of the committee, any questions?

DEAN ANDERSON: Are we not to?

HON. HOLTZMAN: We now have a half hour, otherwise we'd have no time.

DEAN ANDERSON: I really appreciate this panel's comments. I also like the fact that you all disagree considerably over fundamental questions. It's always helpful to hear vigorous passion, folk on all sides trying to grapple with very difficult issues. And I'm struck by the fact that despite the differences you all agree that it would be the wrong idea to scrap 120 and to start over. And it's interesting how that has shaken out among the military officers that we've seen, and I think that will be part of our deliberations.

It's interesting. Who advocates radical change? Very few, almost none. Who advocates scalpel-like change to the extent that that's possible, or procedural change but not substantive change to the extent that that makes

any sense, and who advocates no change but then says, oh yeah, but you need to redefine this or clarify that, which ends up kind of falling into a category, I think, of some change but not a lot? So that's fascinating.

I'm interested in something that came up in the last two speakers who fundamentally disagree on core matters but agree on the question of motivating the executive branch to take action on further definitions that are within its purview. And I'm wondering how you think that we could be useful in facilitating that.

MR. SPILMAN: Yes, thank you, Dean Anderson. I think that that is a great question and I know that I think the Military Justice Review Group is looking at how to streamline the JSC's process and the executive order process.

It's kind of inexplicable, and the question was asked, I think, of Colonel Jamison, how do you explain the delay in getting an executive order, interpreting and giving us a

Part 4 of the Manual for Courts-Martial for the statute that was enacted on December 31st, 2011. It's inexplicable why we don't have one.

Certainly the Joint Service Committee has drafted this material and it's out there. There are model specifications which are kind of the templates for how you charge one of these offenses out there. There are model elements out there that were put out in like a public notice, but they have not made it into an executive order.

And when you talk about whether or not we should scrap Article 120, it's not a perfect statute but I don't think any statute is. I mean not long ago the Supreme Court had to analyze Sarbanes-Oxley to determine whether or not it applied to a fish. In that statute, the result of lots of lobbying and lots of debate and lots of political tension had that element in it, had that problem in it, how can we expect perfection from the Uniform Code of Military Justice?

We rely, I think we all rely on

executive interpretation and judicial analysis in the course of reviewing cases either in interlocutory postures or on appeal to tell us what the law is and what it means. And we're sitting here in a courtroom trying to analyze it on our own without really the benefit of either of those. And if we scrap the current statute and start over, we are really starting over in that entire process.

COL(R) CHRISTENSEN: I would, by analogy, put this into your perspective, for your perspective. The time it has taken for this statute to be passed by Congress to today is basically the equivalent it took from Pearl Harbor to raise the flag at Iwo Jima. And yet we were able to defeat two foreign enemies in that time and we can't get elements to a statute to be coming at seven months, that went into effect, into committee.

The executive branch controls this. It has to be priority, for this panel to say, you are failing, Mr. President; you are failing DoD.

They control this process. The Joint Services Committee took too long to get it out and then it's taken too long to get to this process. If you really take sexual assault seriously then you have to get it done.

COL(R) SCHINASI: Mr. Wilkinson, I'm interested in your very generous offer to do research and help. One of the nice things about being a professor as opposed to a practitioner is you get to look at things just for the sake of looking at them. I just wonder where this goes? And so you do some research.

It seems like the conversation we're having and we've had all day is about defining some of the most important concepts in the statute. Consent, for instance. It would be fascinating to know how various states have dealt with the concept of definition in the statute as opposed to as in the military we have the statute as you know, and then the President or military officers write the comments and analysis of that. So we have the statute and then we have a very

lengthy conversation about what the statute means.

And so I'm kind of wondering, have other states treated these issues by putting the definition in the statute as opposed to putting it in the commentating or the legislative history of the statute, and what the practical application is of those, or those various two ways of doing it. Obviously if you put it all in the statute, the statute gets to be voluminous. If you put it in a shorter statute, the statute's easier to deal with and then the comments although non-binding help define the terms. Do you have any sense about that?

MR. WILKINSON: So I couldn't say specifically, but I guess my sense from just looking at the laws in general is that different states do it differently of course and some define it statutorily. But generally it's driven because they didn't used to do that and then the case law weighed in so many times, and so that they decided to define it specifically in the

codes so that everyone would be aware of it.

But it's also driven because of problems that we see. It's usually what is not consent. Those definitions are driven by the challenges we face in court that, you know, provocative dress does not indicate consent or a prior relationship is not necessarily indicative of consent, even though that might be admissible evidence and relevant evidence to try and determine what consent is.

But sometimes it gets driven by the case law. I don't think everybody comes up with the statutory definition of consent. Not every state, I think, has a statutory definition of consent, and you do look to the case law. But those that do, I think it was driven by case law and then also driven by the problems that we've had.

COL(R) SCHINASI: So when you put that all the terms are more in the statute that lend themselves to difficulty in interpreting is there a preferred way? Is there a sense of whether we

should put that in the statute or we should put that in the analysis of the statute?

MR. WILKINSON: I guess when I look at these statutes I do like it when those terms are defined so I don't have to track down case law. It is a much quicker process. You're not going to have completely specific definitions that are going to cover every possible circumstance, but I do like having a definition of what a mentally incapacitated person is, what a physically helpless person is.

That's a common scheme now in many of the states. Mentally incapacitated, physically helpless, things like that. And so that helps me. And then it also drives whatever research you want to do to find similar fact-specific cases that are similar to yours when you can look at the statutory definition.

COL(R) SCHINASI: So you would prefer in the statute as opposed to, let's say, the legislative issue.

MR. WILKINSON: Yes, that's what I --

now that might just be because it makes my job a lot easier, and I don't know that there would be an impact if you have a definition that ends up being too narrow or too constrictive or a definition that ends up being way too broad that's going to scoop up potentially legitimate--

So you'll have a, a common exception is "except for legitimate medical purposes," because your definition ends up too broad so you end up doing it that way. I guess that's my preference. I don't know what you guys think.

MR. SPILMAN: You know, Colonel, I'd offer that Article 120(g)(8) has a fairly comprehensive definition of consent already in the statute. My problem with it is that it is fairly narrow. You know, it starts broad, "a freely given agreement to the conduct at issue by a competent person," but then it goes on and on for a number of sentences getting more and more narrow.

And then we heard Colonel Jamison talk about the case where the word "competent" is now

being used in ways to narrow the definition of consent. What is a competent person? I think it undeniable that Congress intended a legally competent person, but you see arguments of a factually competent person. Somebody too drunk to be competent, whatever that means.

And, you know, there are no standing courts at courts-martial. Every court-martial is a new court. So there's no standing courts. There's no precedent to look at, at that level.

And when you talk about terms of art, in the absence of the executive explanation that we normally see in Part 4 of the Manual for Courts-Martial and is there for every other article, every other punitive article, in the absence of that you have creative prosecutors and sometimes deliberately trying to be creative. You know, young prosecutors trying to be creative. I was one once. I've been there making creative arguments.

And there isn't, you know, until it happens and somebody's convicted and they spend

time in a brig somewhere or time as a sex offender and then that conviction gets reversed on appeal, there's no case law to say don't do that in the absence of that, you know, that executive order. So I think there's a balance there. I think you can have both if that answers your question.

COL(R) SCHINASI: Yes.

COL(R) CHRISTENSEN: Yes, I agree you can have both. Obviously Article 120 it's different than every other punitive article we've had. I'm looking at the Article --

HON. HOLTZMAN: Excuse me, sir. Could you pull the mic a little bit closer?

COL(R) CHRISTENSEN: Sure.

HON. HOLTZMAN: Thank you.

COL(R) CHRISTENSEN: Most punitive articles are only two sentences long. This one is pages long. It's better than the 2007 version. But the great thing about, and you have case law about definitions that it's easy to change when opinions change.

So now we have statutory definitions of case law developed in which we get the conflict between the two often. It's there, I wouldn't change it, and I really don't think this is where justice for sexual assault occurs or not occurs, it's that definition. I just would leave it alone. It works.

HON. HOLTZMAN: Okay. Professor?

PROF. SCHULHOFER: Thank you, all of you for your testimony. I had two quick questions. One, you said that you felt the definition of sexual act and sexual contact was much, much, much too broad. Do you have alternative language to suggest?

MR. SPILMAN: I don't. And I will take a closer look at --

PROF. SCHULHOFER: I think we would be happy to have you submit a suggestion or point to parts of it that you think should be deleted.

The other question I wanted to ask you is you emphasized that you thought that the improper training had had a very, very adverse

impact on the military justice system, but at the same time you don't think that the text of Article 120 as it stands should be changed. That the glitches and the ambiguity of it should be clarified by executive order.

Do you see any connection between the difficulties of interpretation of Article 120 and the improper training that's resulted in explaining it?

MR. SPILMAN: Thank you, Professor. I think that's a very fair question. I would answer by not really answering it but by instead saying that I think that that occurs with most Articles of the Code.

I think that there is much in the law that is difficult for the layperson to understand and it is incumbent on the leaders of the Armed Forces, on the leaders in the Department of Defense to ensure that the training that goes out under the official seal, you know, when somebody stands up to give the annual sexual assault awareness training that training has to be

accurate.

And, you know, when I was on active duty and I sat in the back of the room and heard 'after one drink you can't consent,' I mean you can't sit on your hands but at the same time when you're, you know, the guy in uniform at the back of the room standing up and saying 'you're wrong' to the first sergeant or the major or whoever, the person in authority who's giving that training, that's damaging to the unit as well.

So it becomes a very difficult situation when training goes out inaccurate. And especially in a loaded issue like this.

PROF. SCHULHOFER: So what's causing it and how do we correct it, or have someone correct it?

MR. SPILMAN: I'm not sure I know the answer to what's causing it. I think that we correct it by making sure that folks are being trained accurately. I mean the military trains people for its, for a living. We do train. That's what the Services do. I don't think it's

unreasonable to say that it should be done right.

PROF. SCHULHOFER: Thank you. Thank you very much.

MR. SPILMAN: Thank you.

HON. HOLTZMAN: Jill Wine-Banks.

MS. WINE-BANKS: Two questions for Mr. Wilkinson, one based on your testimony and one based on an article that was given to us from your organization as part of our read-ahead. In the read-aheads it talks about the jurisdictions that punish sexual crimes that are based on sexual arousal, gratification, et cetera. And just as a layperson it's always been my impression, I've always read that rape is really a crime of power, not so much sex. So I'm just wondering about the inclusion of that intent if power is really what it's about.

MR. WILKINSON: That's a really interesting comment and I think you're exactly right. Rape is about power, control, terror, incapacity, that sort of thing. Most of those offenses that indicate for sexual arousal or

gratification are usually the lesser-included offenses that require some, sort of like your offense, what is sexual contact or something like that. And you also have it for sexual act.

But it's usually going to be something that you have to prove. It could be something that's innocuous. Rape obviously is never going to be an innocuous offense. You're doing exactly what you intend to do.

But where there is some activity that might not be criminalized but for the intent that you're doing it for sexual arousal, that Part B of the sexual contact to me is also very broad. People have talked about putting an arm around somebody or other things.

Now how we prove what the intent was is difficult often when you have that specific intent, but that any kind of contact by anything does strike me as rather broad. But that's usually those sexual arousal crimes you have to prove it because it could be something that may not be such a --

MS. WINE-BANKS: Thank you. That helps a lot. The other is when you were talking about the definition of consent and voluntary, intelligent, et cetera, you used some other words as well. And I'm just wondering, for example, if you think there's a difference between freely given and voluntary consent?

MR. WILKINSON: No, they're probably similar or the same and they convey the same idea. We use voluntary in other areas of the law, and so I think you can look to other areas to get a reinforcement of what that definition is.

So "knowing" and "voluntary" are important concepts and you could say "freely given," I think that conveys a similar idea. It's just that those are more common terms that we see used elsewhere as well and would support the same idea that is reinforced by these other areas of the law.

MS. WINE-BANKS: Thank you for answering my questions, and thanks to the panel

for very good comments. Very helpful.

HON. HOLTZMAN: Anybody else --

MR. SPILMAN: If I could very briefly just add to that. I think that the issue isn't so much what is consent as what isn't consent or what makes consent unavailable. You know, when can a person not consent is the question that -- and this is sort of anecdotal and I guess kind of my feeling on the matter.

But a panel comes back and says, well, we want to know if consent's even available here. Were they a competent person? Were they incapable of consenting? And that's where I think, you know, that's why I ended up writing about the defense of consent and the defense of mistake, because I think that's where you really get to the issue of if a person does consent then they could consent.

And so you want to kind of turn that around from a defense perspective and say, well, the question is do you think that they consented? If you think that they consented then they did

consent and they were able to consent and don't get caught up in some sort of bright line in the sand beyond which you cannot consent. I hope that makes sense.

HON. HOLTZMAN: Any other questions? Anybody?

Could I just ask one or two issues that occur to me. Are you recommending that this panel take, that the only action this panel take is to recommend to the President to act on the statute by issuing an executive order, or do you think that we should make suggestions as to the issues that should be covered as well, or do you think we should do anything else? Just any member of the panel.

COL(R) CHRISTENSEN: I think the strongest recommendation is to act on executive order and to utmost fine-tune Article 120. As I said, I obviously believe that we should cover, get ahead of the game and cover revenge porn. People are already reaching out to our organization about that in UCMJ. It'd be a very

simple fix. State statutes look at it that --

And then I also think that this panel should recommend that the DoD force the Services to develop a professional military justice track for defense, trial counsel and military judges.

HON. HOLTZMAN: Thank you.

MR. SPILMAN: I may never have an occasion to say this again, but I think that the Congress has been unfairly demonized on this issue because Congress is not the only one responsible for creating this law. We do rely on the Commander-in-Chief to provide significant input and we're missing that.

And so I think that that is a, from a policy perspective in terms of where's the best way to go to fix what we have now, I do believe that this committee should focus largely on the actions that the President can take. In terms of action Congress can take, I do think there is room for improvement to the statute.

I think narrowing the definitions of sexual act and sexual contact, that's something

that probably has to be done in the statute that the President could try but that might not work because the President cannot create substantive military law. He can only interpret and explain and clarify.

So I'll look at providing the committee with some thoughts on that and there may well be other areas. I don't think it's exclusive.

HON. HOLTZMAN: Well, we would welcome any concrete suggestions you have for any statutory changes or any language from any members of the panel. Yes, Mr. Wilkerson?

MR. WILKINSON: I don't have anything to add that these two didn't say it except that if you want we'll provide you with a statutory compilation of the existing revenge porn statutes that are out there. It needs a better name but that's what people call it.

HON. HOLTZMAN: It's probably beyond the scope of the Subcommittee. But let me just ask one other question that came up today and we

haven't really focused on it in any depth. But some of the state statutes also define as sexual assault the misuse of the authority of a position. For example, a custodial position or a supervisory position or a religious position.

Is that something you think should be in the statute? Some people say no, some people say yes, but we haven't heard a lot about that. And some members of Congress are very concerned that that be part of this. And so I'd just like your reaction to that.

MR. WILKINSON: In the civilian world, and I have zero experience in the military world so I'm reluctant to comment on that, but it works well to have those per se statutes that involve teachers and students and people who are incarcerated and the correctional folks, and there are people on probation and who they report to -- that unequal relationship needs to be kept apart, per se.

It doesn't matter if there's consent. You cannot consent. You're incapable of

consenting when you're in that situation. That works well for us, and the military community may have different dynamics going on that I don't know if that would work well or not.

HON. HOLTZMAN: Mr. Spilman, do you have any thoughts on that subject?

MR. SPILMAN: Well, I think that there are a number of ways to charge things like that under the statute as it's currently written, and so expanding the statute to address that would not be necessary and it would kind of beg the question of why some of the language that's in here is in here.

I look at the "threatening or placing the other person in fear" definition that's found in Article 120(g)(7), a communication or action involving a wrongful action that's contemplated by the communication.

So, you know, you threaten to do something to somebody unless they, you know, perform a sexual act with you, or you offer to do something favorable to somebody if they perform a

sexual act. I think both of those are wrongful actions, and there are all sorts of bases you can say that denying somebody a promotion or offering somebody a promotion is a wrongful action when it's tied to sexual favors, which is why I say the definition is very broad. I think it all falls under there.

When you talk about whether or not a person consented, you know, whether or not a prisoner in a military brig can consent, can give freely given agreement. When they don't consent, when their agreement is not freely given because of that coercive relationship you have the bodily harm that gets you to a sexual assault.

So the statute is, when you drill down into it, it really covers a remarkably broad array of human interactions of human activities. Sometimes I struggle to find a human interaction that could not be charged under Article 120. And by adding additional things to it, I think that risks one day the interpretive question of what did Congress mean when they said these things if

they came back and added those other things. Because generally you read these statutes to avoid any surplusage.

COL(R) CHRISTENSEN: I would say that the readers of the CAAFlog are going to be stunned. I agree with one minor caveat. I think, I agree exactly that the threat language is there to cover the supervisors, superior officers, superior NCO who feels that they are compelled to have sex because it's going to have an adverse effect on your career.

I would say that in the training environment, the basic training environment, there is a basic good reason to potentially have a strict liability that the MTIs cannot have sex with someone during the training period. We really are asking to say don't have sex with these people for eight to twelve weeks. That's probably not asking too much. And if you do, there's going to be severe consequences of that being an Article 120 offense.

The Lackland scandal shows what kind

of impact that has. We've had, I believe, over 40 MTIs prosecuted as we saw sex between trainers and trainees and something that strikes at good order and discipline. And for those who've gone through basic training, it is a scary time and that's not the time for people to be considering whether or not they should have sex.

MR. SPILMAN: If I could very quickly just say that, you know, those types of relationships though are already prohibited and they're already punishable under the Uniform Code of Military Justice under Article 92. These improper instructor/trainer or trainer/trainee relationships are prohibited in all of the Services so far as I'm aware.

Adding them to Article 120, I think, is unnecessary unless we're talking about something that goes beyond punishment at a court-martial. I mean if we're talking about the collateral consequences of the conviction in terms of sex offender registration, in terms of other things that happen outside of the military

justice system, respectfully that's a totally separate conversation and I don't think that we should change definitions in Article 120 in order to get something that is not done at a court-martial in order to cause a consequence that happens elsewhere. I question bringing a prosecution for those purposes.

So, you know, in terms of the improper relationship, I respectfully offer that there is already the ability there to regulate that and to prosecute that and to prevent that.

HON. HOLTZMAN: We have five more minutes.

CHAIR JONES: Why don't you finish?

HON. HOLTZMAN: I'm finished with my questions.

CHAIR JONES: I have no questions. All right. So we have one more panelist or are we done?

HON. HOLTZMAN: We're done.

CHAIR JONES: Well, I heard none of this then. I apologize profusely. All right.

Then I guess you'd like to close the meeting, right, Bill?

MR. SPRANCE: The meeting is closed.

CHAIR JONES: Thank you. Thanks, everybody.

(Whereupon, the above-entitled matter went off the record at 4:56 p.m.)

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C E R T I F I C A T E

This is to certify that the foregoing transcript

In the matter of: Judicial Proceedings Subcommittee

Before: DOD Judicial Proceedings Panel

Date: 05-07-15

Place: New York, NY

was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate record of the proceedings.

Court Reporter