The Subcommittee met in Room 850 of the Daniel Patrick Moynihan Federal Courthouse, New York City, New York, at 8:30 a.m., Hon. Barbara Jones, Chair, presiding.

PRESENT:

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

Dwight Sullivan
Brigadier General Charles N. Pede
Lieutenant Colonel Christopher Kennebeck

STAFF:

Colonel Kyle W. Green, U.S. Air
Force – Staff Director
Lieutenant Colonel Kelly McGovern – Deputy Staff
Director
Maria Fried – Designated Federal Official
Lieutenant Colonel Glen R. Hines, Jr., U.S.
Marine Corps – Staff Attorney
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MS. FRIED: Good morning, everyone.

Thank you for being here today. This is the third meeting of the Subcommittee. The Subcommittee was established by the Secretary of Defense at the request of the Subcommittee's parent Panel, the Judicial Proceedings Panel.

Since Fiscal Year 2012 Amendments, also known as the JPP.

The Chair of the JPP is the Honorable Elizabeth Holtzman. The Chair of the Subcommittee is the Honorable Barbara Jones.

Additional information on the Subcommittee membership is available on the JPP website at http://jpp.whs.mil.

With that, I would like to turn it over to the Chair. Thank you.

CHAIR JONES: Thank you, Maria.

For the morning session, we are going to continue to hear more information about Article 120, and also we have Mr. Dwight Sullivan
here again, and I'm very happy that he is here again, to discuss the executive order process and try to explain it to us.

In the afternoon, since we have had a lot of information given to us, and have had the opportunity to give it some thought, we are going to begin to discuss and to deliberate on the issue of whether to make -- whether we should recommend or shall recommend any changes to Article 120 or not.

And we hope to be able to continue our examination during deliberations and our analysis. And if we are able to arrive at some consensus with respect to any issue, that will be a building block for further deliberations.

This is a complex statute. We have heard lots of opinions in many different directions about how we should approach it. And so one thought that I wanted to just mention now before we go to deliberations this afternoon, and before we hear from Mr. Sullivan, is that I think whatever we come up with, because it is a statute
that is complicated, and we might not know what
we have wrought by the time we suggest -- if we
do suggest any changes -- that we then send our
suggestions to the Joint Services Committee so
they can take a look at it.

They are the practitioners. They may
see something we hadn't even -- that hadn't even
occurred to us. Possibly to the military justice
section of the ABA. But I think we should send
it out for comment -- not for approval but for
comment.

All right. So with that, yes, Glen?

LT. COL. HINES: Just real quick.

Ladies and gentlemen, I apologize up front.
You've got some hard copies of materials in front
of you. And so before we get going, I just want
to make sure that everyone is on the same page.

So I'll start with -- I passed out
hard copies of Mr. Sullivan's presentation. He
is going to be doing what I'd call a tabletop.
So I've given you basically note pages. So the
packet with the three slides on each page, that's
going to be his presentation.

The next document is this document that says "Article 120 Slides", and that is Lieutenant Colonel Kennebeck and General Pede's slides. They are going to be going next. In your blue folder -- and that's the blue folder -- I just want to make sure you've got everything that we've given you. There is a one page document of the 11 issues that we are going to deliberate over this afternoon.

And then, Congresswoman Holtzman brought this to my attention. So now you should have an actual hard copy of the actual statute.

In your materials, you have Ms. Kepros' proposed fix. And so there is no heading on that. The way you can tell those apart is Ms. Kepros' proposed fix, if you look down in A, sub A, "with rape," she has inserted the word "knowingly." So "any person subject to the chapter who knowingly."

So if you want to just take that document out and write "Kepros Proposal" on top
of it, that's how you should be able to tell it apart from the document that Ms. Zahn just gave you, which is the actual statute.

Yes, ma'am?

HON. HOLTZMAN: I didn't get a list of the 11 issues. You said it was going to be in our packet?

LT. COL. HINES: It should be on the right side in there.

HON. HOLTZMAN: Oh.

LT. COL. HINES: The 11 issues for the deliberations, and those are the first 11 issues that you all referred to as "sub A."

HON. HOLTZMAN: Can I also suggest in the future that we give these documents headings, so that --

LT. COL. HINES: Yes, ma'am. And I apologize for the lack of clarity on that.

So you have that, and then you have the marked up version, which is Ms. Kepros' proposal, but it's with the markups. And that's the one that has got the red -- I don't know if
it has got red ink on it at the bottom.

    MAJ. GEN. WOODWARD: It's very clear.

    LT. COL. HINES: You've got Professor Schulhofer's document that I forwarded to everyone a few days ago. He's going to be on the phone for the deliberation session this afternoon. And then, on the left side, you should have your agenda.

    If you have any questions before we start, just let me know. Dean Anderson?

    DEAN ANDERSON: I just wanted to confirm with Judge Jones that once we send it out for comments, which I think is a terrific idea, that we would then reconvene to --

    CHAIR JONES: Oh, absolutely.

    DEAN ANDERSON: -- deliberate again and revise on the basis of that. Or choose not to.

    CHAIR JONES: Right. Absolutely.

    DEAN ANDERSON: Great. Thank you.

    LT. COL. HINES: Thank you, Judge.

    Sorry for the interruption.
CHAIR JONES: Oh, no, no, no. That's fine. Thank you, Glen.

And, actually, what I should have said at the beginning, and I'll say it again when we have Professor Schulhofer on the phone, is I want to -- I am going to thank him because I think he has sent us a wonderful submission, which gives us an analysis with respect to each of the 11 issues, and it is going to be terrific for talking points.

And I also want to thank you, Glen, because I think you have really put together some terrific materials here for us, and it makes it so much easier for us to go forward.

Thanks.

Now, Mr. Sullivan, there you are. And I will make the same comment about you coming again when I get to General Pede. Okay. Go ahead.

MR. SULLIVAN: Thank you so much, Judge Jones. As Judge Jones mentioned, I am a repeat offender, and so I am speaking today, and
Kyle asked me to come and talk to you about the executive orders, and particularly about what -- how the military courts use executive orders and what can be done with an executive order versus what must be done by statute.

But you may recall that the last time I spoke with you, I said I feel like a fingerpainter in a room full of Rembrandts and Van Goghs, and I certainly still feel that way, so I'm subtitling this talk "The Return of the Fingerpainter."

And so to provide you with a road map of what I plan to talk about this morning, first, I want to talk about the authority to issue executive orders that revise the Manual for Courts-Martial, and from that authority flows certain implications about what can be done with an executive order versus another type of lawmaking function.

Second, a quick review of the contents of the Manual for Courts-Martial, and then zeroing in on Part 4 of the Manual for Courts-
Martial, which deals with the Punitive Articles.

And then, we will talk about the level of judicial deference that the courts give to what is in the Manual for Courts-Martial.

And then, finally, time permitting, the President last week issued a new executive order amending the Manual for Courts-Martial, so, time permitting, I will very quickly review with you what is in that executive order, including some provisions to carry out recommendations of the RSP. So some of you may be particularly interested in those provisions.

So, as some of you may recall, when I was growing up we had Schoolhouse Rock! on TV, and we learned basic civics from watching Schoolhouse Rock!, and you had the "I'm just a bill, I'm just a bill, sitting there on Capitol Hill." Do you remember that song?

General Schwenk is here; perhaps we could get him to sing it for us.

(Laughter.)

And so this morning we are supposed
BRIG. GEN. SCHWENK: Are you trying to get out of your presentation by running everybody out of the room?

(Laughter.)

MR. SULLIVAN: So this morning we are supposed to have a multimedia presentation, and I was going to show you an updated version of that, but we couldn't get the PowerPoint to work, so you have these slides instead.

But as my old command Staff instructor, Colonel Trout, used to say, "If you have a plan that counts on everything going right, you have a bad plan." So hopefully we have a backup.

So everyone recall that song with the little bill sitting there on the Capitol steps and "I'm just a bill"? Well, Saturday Night Live very helpfully recently updated that song to address executive orders. So, hopefully, I will be able to play for you -- hopefully you'll be able to hear this. I brought on tape this thing,
in case we had a snafu, which of course we have.

So let's see if everyone can hear this. This is that song updated for executive orders.

(Audio playing begins.)

VOICE: I'm an executive order, and I pretty much just happen.

(Laughter.)

That's it.

(Audio playing ended.)

MR. SULLIVAN: Okay. So there we have it.

(Laughter.)

So you can contrast that with the old song --

CHAIR JONES: I'm sorry. You're going to have to come back again after that.

(Laughter.)

MR. SULLIVAN: So there we have the executive order song. And, as we know, it's rather more complicated than that. Presumably, we would have guidance for Article 120 if that
was it. But there is certainly not the same constitutional formality with the way the executive orders are promulgated compared to the way the statute is adopted.

So let’s look first, you know, going back to the Constitution, what provides the authority for the President to issue an executive order? And, in specific, an executive order to set out the Rules for Courts-Martial, military Rules of Evidence, and guidance for the Punitive Articles.

So we start, of course, with Article 1, Section 8, Clause 14, of the Constitution, which provides to Congress the power and responsibility to make rules for the regulation of the land and naval forces.

Now, Congress, acting pursuant to that authority, passed the UCMJ in 1950, and President Truman signed it into law in ’51. And included in that provision are certain rather broad delegations of authority. So Article 36 is a broad delegation of rulemaking authority to the
President.

So it delegates to the President the authority to prescribe pretrial, trial, and post-trial procedures, including Rules of Evidence. And, as we know, there is a further caveat that said the President, to the extent practicable, should follow the rules -- the same rules that would apply in trial of criminal cases in United States District Courts.

And then, additionally, Congress delegated to the President the broad authority for sentencing purposes. So almost every offense that the UCMJ sets out -- almost every punitive article -- says that it shall be punished as a court-martial may direct. And then, the President, under Article 56, is authorized to institute limitations on the particular punishment that a court-martial may direct.

So if you just look -- for example, a lawful order violation -- if you just look at the statute it says, "A violation of a lawful order shall be punished as a court-martial may direct,"
which sounds like life without eligibility for parole might be the sentence for that. But the President steps in and imposes the two-year limitation. So, again, there's a rather broad delegation of authority.

Now, beyond that, of course, we also have independent constitutional authority for the President in this area. So we have Article 1 -- Article 2, Section 1, which of course says that the President shall -- the executive authority of the United States is vested in the President. And then, of course, we also have Article 2, Section 2, Clause 1, the Commander in Chief clause. So we have independent congressional recognition of the President.

And so in Swain v. United States, for example -- I have a picture of the eminently forgettable George Shiras, the author of the Swain opinion, in the handout. In Swain, you had the President acting as a convening authority in a case for which there was no statutory authorization, back in the late 1800s. The
President acted as a convening authority. No statute authorized the President to convene a court-martial.

The Supreme Court had to assess whether he was authorized to do so, and they said yes -- that the inherent authority as Commander in Chief carried with it authority over the military justice system, including the authority to convene a court as an exercise of the President's own constitutional authority, not as an exercise of delegated authority under what would then have been the laws of the Articles of War.

So now let's fast-forward to 1951. We have -- Congress has passed the UCMJ, and the President is going to prescribe a Manual to help carry that out. So you'll recall that before then, we had the Elston Act, which covered the Army and the Air Force; we had a separate statute, the Articles for the Government of the Navy, which hadn't changed a lot since the Civil War, that cover the Navy and Marine Corps.
So there was a publication called Naval Courts and Boards that was like the equivalent of the MCM for the Navy and the Marine Corps, and then you had the Manual for Courts-Martial U.S. Army, published in 1949 for the Army, and then you had the U.S. -- you had the Manual for Courts-Martial Air Force. So you had these three different publications before then.

So the UCMJ was adopted to make a uniform system. And so President Truman then promulgated the Manual for Courts-Martial that covered all of the Services. And he did so by executive order.

And, interestingly, that executive order said that it was executed "by virtue of the authority vested in me by the UCMJ, and as President of the United States." So it seems that he is suggesting an independent authority as President -- not just a delegated authority, but also the authority as President of the United States.

Then, of course, in 1968, Congress
adopts a major revision of the UCMJ, and the next year President Nixon promulgates a revised Manual for Courts-Martial -- the 1969 Manual for Courts-Martial. Once again, does it by executive order. And just as President Truman before him, President Nixon indicated, "By virtue of the authority vested in me by the UCMJ, and as President of the United States, I am promulgating this."

Okay. Now, fast-forward to 1983, Military Justice Act of 1983, another fairly significant rewrite of the UCMJ, although far less significant than the '68 revision. But, in 1983, a major rewrite, and then we have a new Manual for Courts-Martial promulgated by President Reagan in 1984. And, once again, it is promulgated by executive order.

But this executive order takes a different form than that which had been instituted -- that which had been adopted by Presidents Truman and Nixon. President Reagan began, "By virtue of the authority vested in me
as President by the Constitution of the United States, and by the UCMJ, I promulgate." So it was giving a more prominent place to the President's independent authority.

And as I mentioned, just last week President Obama instituted -- signed an executive order further amending the UCMJ, and he indicated, "By the authority vested in me as President by the Constitution and the laws of the United States, including the UCMJ." So we have the President's emphasizing their independent constitutional role in the system as one authority for the Manual for Courts-Martial, not limited to simply their delegated authorities from Congress.

Okay. So let's talk for a little bit about the case of Loving v. United States, which was a Supreme Court interpretation of presidential authorities in the Manual for Courts-Martial. So you'll recall that in 1972, of course, the Supreme Court in Furman v. Georgia came out with a result that pretty much
invalidated all of the death sentences -- all of
the death penalty systems in the United States.

And then, a number of systems revised
their death penalty systems. The basic holding
in Furman, every Justice wrote separately, so
it's difficult to come up with what is the actual
holding. But Furman has come to be understood as
meaning that you -- that it is constitutionally
required for a death penalty system to satisfy
the 8th Amendment, that it channel the discretion
of the sentencer. You can't have unconstrained
discretion of the sentencer.

And so a number of states came up with
different ways to constrain the discretion.
North Carolina said, "Okay. Everybody convicted
of premeditated murder dies." Supreme Court
said, "That's not okay."

You had Texas which said, "We are
going to ask the jury to answer three specific
questions that will help guide their discretion."
The Supreme Court said that was okay.

You had the Georgia system where there
are certain aggravating factors that make -- that
are required to make a system death-eligible.
The Supreme Court said that was okay.

So by 1976, you had the Supreme Court,
in Gregg v. Georgia, endorsing a number of
systems that had been revised. But Congress
didn't change the UCMJ's death penalty system.

So just like before Furman, for a
court-martial, if an individual was found guilty
of premeditated murder or felony murder, the
members of the court-martial were simply told,
"Decide whether he gets death or life." At that
time, those were the only two options, life --
confinement for life or death -- and the
discretion was unconstrained.

So there was a Soldier over in
Germany, killed a taxicab driver, sentenced to
death. Matthews. His case goes up to the --
what was then called the Court of Military
Appeals, now the Court of Appeals for the Armed
Forces. And so the Court has to decide, does
Furman apply to the military? And if it does,
then that is going to invalidate not only
Matthews' death sentence but the death sentences
of all seven Service members then on death row.

And the Court held that it did; the
Court held that Furman constrained the military,
and so we needed a new system.

So President Reagan came out with an
executive order adopting a new death penalty
system that adopted what were called "aggravating
factors." So in order for a case to be death-
eligible, it has to not only be a death-
authorized offense under the UCMJ, but also it
has to satisfy a prescribed aggravating factor,
so more than one murder in the same case, murder
of an officer in the commission of his duties.

And there are a number of them, and
they are set out by the President -- not by
Congress -- in Rule for Court-Martial 1004.

So Loving was another Soldier
convicted of killing two taxicab drivers, tried
to kill a third, and he -- in Fort Hood, Texas --
and he was sentenced to death. And his case ends
up going up to the Supreme Court. The Supreme Court grants cert on the question of whether President Reagan had the authority to adopt these aggravating factors in order to make the military death penalty system work, or whether that was an inherently legislative function.

And so, in Loving, the Supreme Court addressed three main issues: one, the defense said the President may not adopt aggravating factors. That is a substantive matter. It is a substantive matter that is committed only to Congress in the exercise of its legislative function.

Second, they said even if the President is -- could do it constitutionally, Congress never delegated that authority.

And then, the third argument was: okay, even if the President can do it, and even if you find a delegation, the Supreme Court case law on delegation of legislative functions requires that Congress provide an intelligible principle to the delegate, because if you -- if
Congress just said to some delegate -- you know, some executive agency said, you know, write all the rules that would make misbehavior in a criminal -- in a national park a crime. They said -- the Supreme Court has said that would be an impermissible delegation of the lawmaking function.

So if Congress wants to delegate authority to make some rules for the Park Service, some criminal statutes for parkland, they have to provide an intelligible principle that will guide the delegate in doing that. And that's what keeps it from being an unconstitutional delegation.

So those were the three main issues in the Loving case. And so the Supreme Court said that under Article I, Section 8, Clause 14, Congress, like Parliament, exercises a power of precedence over, but not exclusion of executive authority. So they said the President has precedence over the President in terms of making rules and regulations relating to --
HON. HOLTZMAN: Congress has
precedence.

MR. SULLIVAN: I'm sorry. Thank you
so much. Thank you so much. Exactly.

HON. HOLTZMAN: Right.

MR. SULLIVAN: A former member of
Congress, so of course they pick up on it.

(Laughter.)

Inadvertently putting Congress
underneath. Thank you so much. Exactly as
Representative Holtzman said. So Congress is on
top. The President is -- has independent -- the
President has authority, but it is subject to
congressional precedence.

But the Court went on, "It would be
contrary to precedent and tradition for us to
impose a special limitation on this particular
Article I power." So, in other words, Congress
can delegate other authorities; there is no
reason they can't delegate this authority as
well.

And the Supreme Court went on in an
opinion by Justice Kennedy and said, "It would be contrary to the respect owed the President as Commander in Chief to hold that he may not be given wide discretion and authority." So, once again, emphasizing the independent congressional grant of power to the President as Commander in Chief.

They went on to say, "There is nothing in our traditions or the wording of the Constitution that forbids this delegation to the President acting as Commander in Chief," once again emphasizing the President's independent role.

Then, the Court went on to say that they found a sufficient delegation in Articles 36, 56, and also Article I8, which sets the jurisdiction of a court-martial -- of a general court-martial -- as being the jurisdiction to impose punishments as being subject to limitations prescribed by the President.

So they took that language from 18,
36, and 56, rolled them all together, and said
that was a sufficient delegation.

And then, they got to the intelligible
principle, and then -- when the Court of Appeals
for the Armed Forces had heard this case, they
found that there was an intelligible principle
that had been prescribed by Article 36.

The Supreme Court really sort of
disagreed with that provision and pretty much
found that there was no intelligible principle,
but also found there didn't have to be, and this
language here is particularly instructive.

Regarding the intelligible principle,
they said, "The delegation here was to the
President in his role as Commander in Chief."
Perhaps more explicit guidance as to how to
select aggravating factors would have been
necessary if the delegation were made to a newly
created entity without independent authority in
this area.

"The President's duties as Commander
in Chief, however, require him to take
responsibility and continuing action to
superintend the military, including courts-
martial. The delegated duty, then, is
interlinked with duties already assigned to the
President by express terms of the Constitution.
And the same limitations on delegation do not
apply where the entity exercising the delegated
authority itself possesses authority over the
subject matter."

And then, they went on to say, "Look, we're not saying necessarily the President could
have done this without a delegation." They said,
"We need not decide whether the President would
have inherent authorities as Commander in Chief
to prescribe aggravating factors in capital
cases." But "once delegated that power by
Congress, the President -- acting in his
constitutional office as Commander in Chief --
has undoubted competency to prescribe these
factors without further guidance."

So essentially they do a carve-out of
the intelligible principle requirement that would
otherwise apply and say it doesn't apply here because the President is acting as Commander in Chief.

So something very important to keep in mind when we are assessing what the President may do by executive order, the President clearly is going to be -- have some authority to go beyond what a mere agency could do, because, again, of the independent constitutional grant in Article 2, Section 2, Clause 1.

CHAIR JONES: Can I ask a quick question?

MR. SULLIVAN: Please.

CHAIR JONES: Are the -- is what the President wrote describing what -- or prescribing what the aggravating factors are, is that considered a part of -- is it a part of statutory scheme? Or is it, I don't know, procedures? That's where I am always mixed up with exactly how much the President can do.

MR. SULLIVAN: And, Your Honor, the Supreme Court wrestled with that as well. And
they -- as I mentioned, the second part of the 
opinion was finding that there was a delegation. 
And this is what was particularly interesting in 
there. And the -- I'll give you the short answer 
to your question. No idea. 

(Laughter.) 

I'll tell you how the Supreme Court 
wrestled with it, which may help to -- 

CHAIR JONES: Okay. 

MR. SULLIVAN: -- to guide. And one 
could almost sense the discomfort of Justice 
Kennedy in this part of the opinion when he is 
talking about, where does he find the delegation? 

Congress -- and way after the UCMJ was 
adopted -- Congress adopted a particular article 
called Espionage, Article 106a. So Article 106, 
dealing with spying, applies only in time of war. 
It became readily apparent that we have spies in 
the military not merely in time of war; the 
Walker family would be a prime example of that. 

And so the -- so Congress passed a 
specific death-authorized peacetime spying
statute, Article 106a. And when Congress passed

-- and this preceded the opinion in Loving. And

so when Congress passed that, Congress actually

wrote into the statute that the President may

prescribe -- because this was after 1004. So

this is between 1984 and 1996 when Congress

passed this, and a statute with which General

Schwenk is very familiar. He used that in

espionage prosecutions when he was a Marine Corps

prosecutor.

So in that statute, Congress expressly

wrote that the President may prescribe

aggravating factors for purposes of this new

death penalty statute pursuant to Article 36. So

they actually wrote it into the statute.

And Justice Kennedy kind of looks

askance at that and says, "Does Article 36 really

reach these substantive issues?" But a later

Congress said they did, and "we're going to give

great credence to the interpretation of the later

Congress in terms of interpreting what the

earlier Congress in 1951 had done."
So the Supreme Court essentially says
-- they very strongly indicate in later cases
when they are even more clear -- that those sorts
of aggravating circumstances, aggravating
factors, which are necessary to constrain the
discretion of the jury, are like elements. They
are -- you know, in any other system, they would
be statutory.

The Court very strongly indicated that
that was an inherently legislative function, but
one that could be delegated to the President.
And so you do have the President making
substantive law. So it's not statutory law, and
it's clearly -- you know, those RCMs are in this
Manual. It is -- you know, RCM1004(c) is in this
Manual. So it is clearly a regulatory act, but
it a regulatory act in a substantive area of the
law.

Is that responsive? That's a very
long-winded answer to your question.

CHAIR JONES: No. I think it's a
great answer. Your first answer was "no idea."
MR. SULLIVAN: I can't tell you.

That's right, that's right. So, you know, we could sit here and discuss very profitably for an entire day.

CHAIR JONES: No. I think that's very helpful. Thank you.

MR. SULLIVAN: All right. So I probably should have just stuck with, "Who knows?"

(Laughter.)

So now, having waved around the Manual for Courts-Martial, let's talk about the content of the Manual for Courts-Martial. So there are only five parts in here that are actually prescribed by the President; they make up a relatively small part of this volume.

So when we think of this as the Manual for Courts-Martial, we are really thinking imprecisely. It would be thinking about a Bible that also has a number of supplementary materials and essays and a concordance as all being the Bible, rather than just the Old Testament and New
Testament parts -- or the Old Testament,
depending on whatever one thinks is the Bible.
Okay? So, I'm not trying to be prescriptive at all.

So, but there is a number of things --
of items in here that are not prescribed by the
President and that are not actually technically
part of the Manual for Courts-Martial, even
though they appear between the -- within the
binding of something called the Manual for
Courts-Martial.

So there are five parts: One, the
Preamble; two, the rules for courts-martial,
exclusive of the discussion; three, the military
Rules of Evidence, exclusive of the discussion;
four, Part 4 of the Manual dealing with Punitive
Articles; and, five, Part 5 of the Manual which
deals with nonjudicial punishments. That is what
is the actual Manual for Courts-Martial, and the
President told us that.

So the Preamble to the Manual for
Courts-Martial actually explains to us what is
the Manual for Courts-Martial. And it says it
shall consist of the Preamble, the rules for
courts-martial, the military Rules of Evidence,
the Punitive Articles, and nonjudicial
punishments.

And then, the Joint Service Committee
put in additional language in a discussion of the
Preamble saying, "Hey, the Department of Defense,
in conjunction with the Department of Homeland
Security," which the Coast Guard falls within,
"are also providing additional materials, the
discussion of the analysis, various appendices."
But those technically are not part of the Manual.

So there is things in here that the
President does, and then there are things in here
that DoD and DHS does that are not official
policy; they are simply guidance. As the
analysis says, those are in the nature of a
treatise.

So I mentioned that there are five
parts. Now, for purposes of addressing the
issues that Kyle asked that we address, we need
to zero in on Part 4 of the Manual. So Part 4 of
the Manual is the President discussing the
Punitive Articles of the Uniform Code of Military
Justice.

And so most of the provisions --- and
there is some flexibility regarding particular
portions of particular UCMJ Articles. But for
most UCMJ Articles, the Part 4 includes first the
text of the statute. So it simply repeats the
language that Congress has adopted. Second, it
prescribes elements of the offenses. Third, it
provides an explanation of the offenses,
sometimes including definitions. Fourth, it
indicates what is a lesser included offense of
that particular UCMJ provision or offense under a
UCMJ article. Fifth, it includes the maximum
punishment, what we earlier talked about what the
President does pursuant to Article 56 --
prescribing the maximum punishment for each
offense in the UCMJ.

And then, finally, it provides a
sample specification so that a prosecutor has
help in writing up the spec, although sometimes
the sample specifications might lead one astray
as in the Article 134 context, which Dean Schenck
and I were discussing earlier, where some of the
model specifications were held by CAAF not to be
adequate to state the offense.

HON. HOLTZMAN: Can I just ask on
that --

MR. SULLIVAN: Please.

HON. HOLTZMAN: -- so all of these, a
through f, are prescribed by the President?

MR. SULLIVAN: That is correct.

HON. HOLTZMAN: Okay.

MR. SULLIVAN: That is correct.

So Part 4 is one of the parts that the
Preamble tells us is Presidentially prescribed.
So it's not the Joint Service Committee. The
Joint Service Committee, obviously, makes a
recommendation to what the President should do,
but the President actually, by executive order,
promulgates what is within Part 4, including all
of those -- all of that guidance for each
particular UCMJ offense.

All right. So now I think it would be helpful to consider: how do the courts treat what the President has done in Part 4 of the Manual? And, of course, we have already seen -- we have already seen the courts wrestling with how to treat something that is like a substantive law provided in RCM1004.

Then we are actually dealing with substantive law. We are dealing with criminal offenses. How do the courts treat what the President said? So this is really inherently a balance of power issue. You know, what is within Congress' exclusive area? What can the President do? And then, how do the courts treat what the President has done?

So while the courts that do this, unless the case goes to the Supreme Court, are actually courts that are adopted under Article 1 of the Constitution --- not Article III of the Constitution -- and that, for administrative purposes, reside within the executive branch.
And so the line drawing is very complicated.

But you can see the three functions.

Even if it isn't, for the most part, actual
Article III judiciary, you see the three
functions -- the legislative function, the
executive function, and the judicial function --
all interacting in this sphere.

So let's look at how the courts have
treated this. And so let's start with the case
of United States v. Miller. And the issue in
Miller was whether taking indecent liberties with
a child requires that the act be committed in the
child's physical presence.

So the fact pattern in Miller, you
have a Service member who is online engaging in
sexual communication -- explicit sexual
communication -- with what he thinks is a 14-
year-old girl, but is actually a sheriff's
deputy. Okay. That is a scenario we see rather
routinely -- all too often.

And so he -- during this exchange, he
uses a camera to show what he thinks is a 14-
year-old girl, him masturbating, and then he
arranges a meeting, although later says, "But we
can't have sex because you're underage."

And so the issue was: did that
constitute indecent liberties? And so the Manual
for Courts-Martial said that the liberties must
be taken in the physical presence of the child.
So Part 4 of the Manual, in explaining the
indecent liberties offense, gives that guidance.

And so when the Court of Appeals for
the Armed Forces was confronted with that, they
cited that guidance from the President, indicated
that it was not binding, but also indicated that
they would give that great weight when deciding
how to construe that particular statute or that
particular offense.

And so now let's look at the case of
United States v. Mance. Mance was a case by the
great Chief Judge Robinson Everett of the Court
of Appeals for the Armed Forces. And so Mance
was a -- it was a marijuana use case. So
Congress adopted a specific offense -- a specific
punitive article, Article 112a -- to cover
wrongful use, possession, and distribution of
controlled substances.

And so in the Mance case, the Court of
-- then the Court of Military Appeals -- was
considering, what is the knowledge component that
we are going to impose on the government to prove
-- in order to get a criminal conviction for
wrongful use of a substance? Do you have to
prove that the person knew what the substance
was? Do you have to prove that the person knew
the substance was contraband? They were
wrestling with those issues very early in the
Article 112 alpha regime.

And so Judge Everett looks at what the
President had written in the Manual for Courts-
Martial, and he says, "The views of the drafters
of the various Manuals, in writing the provisions
just discussed, and those of the President in
promulgating them, are important, but they are
not binding on this court in fulfilling our
responsibility to interpret the elements of
substantive offenses, at least those substantive crimes specifically delineated by Congress in Articles 77 through 132 of the UCMJ."

All right. So he is saying, "Look, we are going to look at the views of the President, but they are not binding." It is also interesting -- so -- yes, please.

HON. HOLTZMAN: Why not?

MR. SULLIVAN: Well, because normally, of course, the courts --

HON. HOLTZMAN: I mean, if the President can prescribe how you get to the death penalty, the President can't prescribe -- I mean, if he is acting under congressional delegation, why isn't that final?

MR. SULLIVAN: Well, a multi-part answer to that question. All right. So, of course, we have Marbury v. Madison: it is inherently the province of the judicial department to say what the law is.

So the element of -- let's take elements, for example.
HON. HOLTZMAN: But this is not the judicial department. But anyway.

MR. SULLIVAN: So, but let's take elements of the offense. So the elements of the offense, everyone agrees, are prescribed by statute; the elements of the offense are controlled by what Congress says.

So the President says, "Here is what I think are the elements of a particular offense." So the President looks at a particular offense and says, you know, "I think the elements" --

HON. HOLTZMAN: I'm not saying that the President can't interpret. Maybe he is saying, 'This is not what I think Congress meant; this is what I want to do under the rubric that Congress has set up. This is how I think, as Commander in Chief, in order to discipline the military, this is what you have to have.'

MAJ. GEN. WOODWARD: In exercising his delegation.

HON. HOLTZMAN: Correct. In
exercising both the delegation and the power as Commander in Chief.

MR. SULLIVAN: And we will see some development where, after Mance -- also note that Mance was before Loving -- but we will see some development after Mance where the courts recognized some ability of the President to carve out conduct from a statute. We'll see that development.

But the courts have consistently said, "Views of the President for what is an element of the offense, what is the explanation of the offenses, and the sample specification -- those views are persuasive, but they are not binding on the courts." The courts say that essentially, you know, what -- the statement of the elements and the explanation are interpretations of the statute, and the courts have primacy over the President in interpretation of statutes.

And so, again, there is great deference to the President, but it is not -- they repeatedly say it is not binding.
HON. HOLTZMAN: But is this only where the courts think that the President has enlarged the punitive statute?

MR. SULLIVAN: It is.

HON. HOLTZMAN: --- or is it where he narrows it? Or she narrows it?

COL. SCHENCK: Let's look at the Article I0 RCM707 debacle.

HON. HOLTZMAN: Because if it's a question of enlarging, then that is a different story that I can understand, because then the President is not acting within his delegated power.

MR. SULLIVAN: Right.

HON. HOLTZMAN: If it's contracting, I don't understand.

MR. SULLIVAN: We'll see a specific -- we'll see two specific cases where they discussed that very issue. Can the President carve out -- why don't we discuss that now.

So if we go to the case of United States v. Davis, Davis was an issue of aggravated
assault, and so Davis was an interpretation of Article 112 of the UCMJ. We'll go back and later note -- do note that in Mance the Court was saying, "We're limiting this discussion to Articles 79 through 132 of the UCMJ."

So Chief Judge Everett specifically kept Article 134 out of that discussion, which is important. We'll come back to that.

But let's look at Davis; Davis is helpful because it is an Article 120a case. So it's a case about the congressionally-passed statute on assault. And so, and specifically, the case there was a fact pattern where you had the accused with an unloaded firearm. And so the issue was: is the use of an unloaded firearm an aggravated assault?

And so one of the things the Court did was they looked at the Manual, and so the Manual for Courts-Martial said, "An unloaded pistol, when presented as a firearm and not as a bludgeon, is not a dangerous weapon or a means of force likely to produce bodily harm." So that's

And so when Congress was faced with this issue, they said, "We're going to follow that language," but, in part, because they found it was not inconsistent with the statute. So the Court -- even here the Court reserved to itself some function of saying -- or some ability to say, "The President's interpretation is too inconsistent with the statute to be given credence."

But here is one of the very interesting things that they said. So where does this particular authority of the President come from? And they said that it was appropriate for the President, as a matter of prosecutorial discretion, to say, "We will not prosecute the unloaded firearm as an aggravated assault." So you see exactly where this is going.

So it is sort of an executive -- unitary executive type theory. So we say all the prosecutors work for the President. The President ultimately is -- has the control of
prosecutorial discretion within the United States. And so -- and all of the convening authorities in the military work for the President.

So from a constitutional perspective, where does the Court find this power in Davis? And in an earlier case called Guess, which we will also mention, where do they find this power? They find this power in the exercise of prosecutorial discretion. And so that is what -- that is the carve-out that you have there.

And then, interestingly, so you have this other case called United States v. Guess. Guess -- you have a particular UCMJ offense that deals with writing bad checks, writing checks without sufficient funds. And, once again, you have an early case construing that statute where the particular accused in that case steals someone else's starter checks and then writes -- you know, purchases items with those starter checks.

And so the question is: was that an
example of the statute that prohibits the use of a check without sufficient funds? And the accused said no. The accused said, "Look, the statute presumes that it be my account, and I am overdrawn." That's what the statute is about, where I am deliberately writing an overdrawn check.

But when you read the actual language of the statute, it said that the person knew that the maker of the check knew that the maker did not have sufficient funds in the account to cover the check. Well, the maker of that check didn't have any funds in the account from which the check was written, ergo he didn't have sufficient funds.

So the defense was saying, 'Look, as a matter of statutory construction, Court, you should say this is limited to the context where the maker of the check is the same person that has the account -- is the account holder.' And the Court said no, and here they use almost the flip side of Davis.
In the course of saying no, they said, "The President hasn't construed the statute that way." So the explanation of the statute doesn't have that extra account holder requirement. It is not an element set out by the President, and it is not in the explanation. So they use the absence of executive authority -- the absence of the exercise of executive limitation there -- in order to construe the statute in Guess.

So you had the Court rather robustly construing what the President does, but each time doing so making clear that the Court is not -- does not think that they don't have the authority to decide the case differently if they think the President's interpretation is inconsistent with the statute.

Yes, ma'am?

DEAN ANDERSON: I apologize for going back to the basics. But as I understand it, the President has not issued an executive order on the updated 120. Is that correct?

MR. SULLIVAN: That is correct.
DEAN ANDERSON: So the import of this dialogue is what? In other words, I understand we are going through kind of the minutia of under what circumstances the President is granted authority, but there is no executive order here.

MR. SULLIVAN: Right. So as -- I mean, as an interested outsider, I don't purport to tell the committee what it should do or shouldn't do, but just the perspective of an interested outsider is that one thing that I would think the subcommittee would be interested in deciding is if the subcommittee decides, as is widely believed, that more guidance is necessary for the statute, so right now, for example, we have --

DEAN ANDERSON: Yes. Yes.

MR. SULLIVAN: -- we have -- there is an issue with the Court of Appeals for the Armed Forces in a case right now pending decision on whether sexual contact requires direct touching or can be done with an object; in that case, a stethoscope.
So I think everyone agrees that more
guidance on that question is -- more guidance on
"consent" may be helpful.

DEAN ANDERSON: Right.

MR. SULLIVAN: More guidance on what constitutes "incapacity" may be helpful. So I think that one question for the Subcommittee is, if it decides that any of those areas should be further developed, should the Subcommittee recommend that that further development come via executive order, or should the Subcommittee recommend that that come by statute?

DEAN ANDERSON: And I take it that the upshot of your presentation is that the President could have the authority to make a tremendous number of substantive recommendations, and we might want to recommend that, or we might want to recommend a change in the statute itself.

MR. SULLIVAN: And I am -- I came in here with absolutely no intent to try to steer that decision either way.

DEAN ANDERSON: I understand you are
agnostic on that question.

MR. SULLIVAN: Right. Exactly. I'm just hoping to give you information and citations that may be helpful to the Subcommittee in deciding which is the optimal way to go. So --

DEAN ANDERSON: Got it.

MR. SULLIVAN: So one thing to -- so I think it's important to understand how the courts treat what the President does in the various things that he does in Part 4. You know, what will -- how much deference will the Court give to the President saying, "Hey, I think this -- I think that this is an issue that -- you know, I think sexual conduct can be accomplished in this way."

You know, we have already had the -- we have already had a divergence of judicial opinion. We had an Army trial judge say it requires actual contact, you know, direct contact from the accused. And then we had the Army Court saying, no, it doesn't. So they are both construing that language.
And to give you a suggestion of just how wonky my existence is, you know, right now for fun, outside of work, I am actually writing an article on the use of Chevron deference in interpretation of the Manual. So what I would suggest is that, really, what we have here is a sort of heightened Chevron deference to the President.

So if you had a statute like this -- please don't write that article before I finish. Okay. So you have -- so I think you have an instance here where -- so Chevron deference is -- probably everyone in the room knows -- Chevron deference is a doctrine in administrative law where the courts will generally defer to an executive agency's interpretation of a statute that it has been delegated authority over.

So the courts, you know, the FCC interprets the Communications Act. The Court will generally defer to that construction as long as it is not inconsistent with the statute. But you have very specific carve-outs in that area.
The Supreme Court twice last term reemphasized that that does not include substantive law, that the Chevron deference doesn't include substantive law, and the Court has emphasized repeatedly that it will not defer to the Department of Justice.

In one case last term, the argument was made that the Supreme Court should defer to the U.S. Attorneys Manual's interpretation of a particular criminal statute, and the Court said no. The Court said United States District Courts are the entities created to carry out that law, not the Department of Justice.

But I think that -- but here in this area, as we have already seen, the Supreme Court actually has given the President more authority in the substantive arena than in the Chevron. So it is really Chevron on steroids here.

MAJ. GEN. WOODWARD: But haven't you shown that if they don't agree with his interpretation that it doesn't necessarily hold?

MR. SULLIVAN: Yes.

MAJ. GEN. WOODWARD: And so isn't that
a risk if we go the executive order route? Is it
-- if they don't agree with the interpretation?

COL. SCHENCK: They've gone both ways.

I mean, there is really -- I feel sorry for
Dwight, because depending on what the area is,
they can pick that --

MAJ. GEN. WOODWARD: So that gives too
much discretion on --

COL. SCHENCK: You know, we would look
cautiously at recommending that we put -- they
put this in an executive order -- in other words,
because we would believe it would be fine.

Right? But we don't know what the Court of
Appeals for the Armed Forces' view would be.

MR. SULLIVAN: And just like in
Chevron itself, there is a carve-out that says
the statute has to be ambiguous. So the courts
have said, if the statute isn't ambiguous, we
won't defer to the agency because then it's just
a straight judicial function of interpreting of
the statute. So there must be an ambiguity. So
Chevron kicks in when there is an ambiguity.
And, of course, you know, King v. Burwell, which, you know, may be one of the opinions announced in the next 17 minutes. You know, there is an enormous Chevron aspect to that. So, you know, once again, likely to be, you know, a front burner legal issue.

But so the application of Chevron deference is dependent upon an ambiguity. And so here, once again, I think you would have the courts in an area like -- let's take, again, the sexual contact: is it physical or can you do it through an object?

I think that if -- let's say the President had weighed in on that before this case was before the courts now. I think the CAAF would essentially ask -- they wouldn't ask the exact Chevron question, is there an ambiguity? They would be more likely to say, "Does the statute plainly speak to the flip side of the ambiguity?" But the same -- it gets to the same place.

And if they decide that there was an
ambiguity, then the deference to the President is likely. If they decide the statute is unambiguous, then they would not defer to the President.

COL. SCHENCK: But they use -- the Court of Appeals for the Armed Forces has used Chevron itself. In Bartlett, for example, they overturned the Army Court of Criminal Appeals. So they have used Chevron to play with what they want to do.

MR. SULLIVAN: Right. But there is an important distinction there where, for purposes of Article 36, the delegation is clear. So the President's delegation in a procedural context is far clearer than is the delegation of authority in the punitive article context. So the Chevron application is likely to be more robust in a procedural standpoint than in the substantive interpretation of Punitive Articles.

COL. SCHENCK: So is your paper only on the military justice system, or is it focused on the general --
MR. SULLIVAN: Oh, no. It is only on the military justice system.

HON. HOLTZMAN: But then, of course, this could all be overturned by the Supreme Court.

MR. SULLIVAN: It could. It could.

HON. HOLTZMAN: So --

DEAN ANDERSON: "This" meaning what?

The authority of the President to --

HON. HOLTZMAN: The decision that he is talking about, what the military courts do, then it could go to the Supreme Court. So then the question really is: if the statute is silent, and there is no Presidential gloss on it, on the question of whether an object can be now included in something that doesn't include the object, we don't know what the answer is to that is.

MR. SULLIVAN: Exactly. I mean, the CAAF will tell us, and then that decision itself will be subject to potential Supreme Court review. And as I said last time, I am confident
in saying that if the Court were to say that with
an object was -- satisfied the statute, I think
it is very likely that the Appellant in that case
will seek certiorari from the Supreme Court,
although it is very unlikely that they would get
certiorari.

So there has only been statutory
certiorari jurisdiction from the Court of Appeals
for the Armed Forces, with Supreme Court ability
to review directly CAAF opinions, since the
Military Justice Act of 1983. So it kicked in,
in 1984, and since -- from 1984 until today,
there have only been nine cases where the Supreme
Court has granted the review of a military
justice case and had a plenary argument and
decision.

Now, there were a couple of additional
cases where the Court granted, vacated, and
remanded. So for a good example of that, you'll
recall the Ashcroft case, you know, the Supreme
Court resolution of the online indecency statute.
And so in Free Speech Coalition v. Ashcroft, the
Supreme Court, you know, narrowed the scope of what could be prosecuted under that statute.

And so there was a case pending from the Court of Appeals for the Armed Forces at that time that had a similar issue. So when the Court decided Ashcroft, at the same time it granted the O'Connor petition, which was a petition to review a CAAF opinion, vacated the CAAF opinion and then remanded it. And there have been a couple of other instances like that where the Supreme Court was deciding another civilian case at the same time that there was a military petition up there on a similar issue, and it granted, vacated, and remanded.

But, again -- in terms of granting a review, briefing, oral argument -- this has only happened nine times since 1984.

HON. HOLTZMAN: So my question would be -- I'm sorry, maybe this is repetitive, but if people have said to this panel, the Subcommittee, "Oh, you can solve this problem by amending the Manual for Courts-Martial, or recommending that
the President make that amendment," it's not a
guaranteed solution.

MR. SULLIVAN: It is not. But I would
also point out that you also had Prather finding
part of the NDAA for FY2007 version of
Article 120 unconstitutional, so the statutory
fix also isn't a guarantee.

HON. HOLTZMAN: Right. I understand
that.

MR. SULLIVAN: All right. So with
that, I am nearing the end of my hour, and I
certainly don't want to impinge on General Pede's
time at all. What he is going to say is going to
no doubt be far more useful than anything I --
than anything this fingerpainter might say.

But would it be -- oh, yes, please.

MS. KEPROS: Well, I just -- I don't
know where you're going, so I want to ask this
question, and you can answer it later, perhaps
when you're going to --

MR. SULLIVAN: General Pede will
answer your question. Go ahead.
MS. KEPROS: Okay. Or maybe that's what will happen. Well, the point that this has come up often in our presentations is in the availability of affirmative defenses. And so I guess, is that considered procedural? Do we have any guidance on that, whether -- you know, how that might be interpreted, or if we are -- we have a big gap in our statute, if the statute does not explicitly say so or not.

MR. SULLIVAN: Right. Would it be patronizing if I said that's a great question?

MS. KEPROS: I'm okay with that.

MR. SULLIVAN: That's a great question. That's a great question. And, right now, the answer to that question is split. And so I had to do another answer to Judge Jones-type tap dance. I actually came up here early yesterday and took vacation yesterday afternoon and saw a Broadway show. So I feel like tap dancing all of a sudden.

Okay. So --

MS. KEPROS: It's okay if you want to
do that.

(Laughter.)

MR. SULLIVAN: I would, but I didn't wear my tap shoes. So, right now, the answer to that is rather split. So we have Article 120, which expressly addresses affirmative defenses, but generally affirmative defenses are addressed in the rules for courts-martial, which of course are procedural.

So sometimes we have Congress weighing in in the actual statute addressing an affirmative defense. And there are other instances -- lack of mental responsibility -- where Congress weighed in. And then, we also have the President weighing in by procedural rule about certain defenses, and then we also have the courts -- like in a case like Ellis v. Jacob -- the Court weighing in and saying, "Well, sometimes we are going to essentially recognize and affirm the defense through the interpretation of elements," and say, "Okay. If we interpret the element this way, then that gives rise to
this -- to a particular affirmative defense."

So, for example, the Court -- so
Congress essentially trying to get rid of the
partial mental responsibility in the military,
and then the Court said, "Well, you know what?
If you have a specific intent defense, partial
mental responsibility negates the specific
intent." So you had essentially Congress saying
we are going to snuff out that candle, and then
the courts relighting it through the
interpretation of the elements.

So, really, once again, just as in
other areas, we have all three branches weighing
in on that particular question, and we don't
really have any case where the courts have been
firmly confronted with that and said, okay, who
ultimately controls that authority? We don't
have that.

So, right now, we can say that the
President has asserted the ability to recognize
affirmative defenses through his authority to
have procedural rules for courts-martial.
Ultimately, whether the courts would recognize that as trumping something within the statute I think would be unlikely. But, again, it is within that hyper deference role because it is pursuant to the Article 36 authority. At least that is how it is represented by the President.

Yes?

LT. COL. HINES: Sorry. Just a quick question. In trying to help the Subcommittee in their deliberative process, as I go through the issues, they fall into basically four groups. In fact, most of them fall into what I'll call definitional questions. There is a question about defenses that Ms. Kepros just raised. There is a question about elements. And then, the last question is about a substantive offense.

And I guess the last one is an easy answer, as Congress has pretty much got to define those unless they are under --

MR. SULLIVAN: That's all for that caveat, right.

LT. COL. HINES: But I guess my
question is this: since so many questions are
definitional, it seems, based on what you've said
so far, since Congress hasn't spoken to the
definition, the President can define things. But
in our present statute, Congress has actually
defined several different things.

So I guess my question is: when
Congress has actually given us a definition, are
the courts going to be much less deferential to
the President in an EO trying to, you know,
change that definition?

MR. SULLIVAN: Well, the courts
clearly would not allow the President to change
the definition. So, but, again, we do -- as we
have seen in the sexual contact scenario -- we
have instances where there is what seems to be a
clear ambiguity. "Clear ambiguity," how is that
for an oxymoron? There seems to be an ambiguity
in the legislation -- in the language as
prescribed by Congress.

You know, again, we can look at this
instance of the -- is direct contact required, or
can I do it through an object? Reasonable minds have looked at that. Reasonable people have looked at that. Reasonable judges, with no dog in the hunt, have looked at that, and interpreted that differently.

So even where you have the definition prescribed by Congress, the question is: is there ambiguity? And if there is ambiguity, then I think the courts are extremely likely to defer to the President in resolution of that ambiguity. But if the courts find plain language, no ambiguity, the courts clearly will not -- will not defer to the President in that context.

So much like much Chevron litigation, there is the threshold question -- the Chevron step zero of, there is the threshold question of whether the statute is ambiguous or not.

All right. Now, so I thought it might be -- I think I may be overstepping my time.

LT. COL. HINES: I think that clock is actually four or five minutes fast, so you can conclude --
MR. SULLIVAN: Okay. I think by that clock, though, I started an hour ago. But be that as it may, if I can try your patience just -- would it be helpful to hear very quickly what was in the EO that the President promulgated last week?

JUDGE JONES: Oh, absolutely.

MR. SULLIVAN: Okay. And then, I will also mention, because it is responsive to an earlier recommendation of the JPP, an interesting procedural aspect of the EO.

So if you look at the draft EO that was published in the Federal Register, you'll see that the draft EO had changes to Parts 2, 3, 4 in the Manual -- the RCMs, the MREs, and the Punitive Articles -- and it also had changes to discussion, and it had changes to analysis.

If you look at what came out of the President, the discussion and the analysis were stripped out. Okay. So the EO includes changes to the part that the President himself prescribes. And so you'll recall that the JPP
had recommended that there be a streamlining of
the function of revising the Manual.

        So what is going to happen from now on
-- and this will revert back to the system as it
was before 1993. Before 1993, EOs included only
things that actually changed the Manual. The
drafter's analysis, and the analysis, and the
discussion were not in the draft executive order.

        So from now on, the draft executive
order will have only what the President
prescribes, which allows DoD to independently
publish changes to the discussion and the
analysis.

        So this will have two effects. One,
DoD now will have the ability to publish
discussion and analysis much more quickly than in
the past because it doesn't have to go through
the interagency process; it doesn't have to be
signed by the President, and it doesn't have to
be tied to that cycle, so the Pentagon could push
it right out.

        And, secondly, we also expect that
this will make the EO itself go through the
process more quickly. So, General Pede, you were
probably involved in the production of the 2012
amendments to the MCM, and so you will recall
that it included a number of revisions to Article
120. It also changed the way that the Manual
deals with lesser included offenses, which
essentially -- so you'll recall that one of the
things in Part 5 of the Manual are the lesser
included offenses.

So essentially that change required
that the Part 4 discussion of every offense be
changed. Of every offense. Because it changed
the manner in which LIOs were dealt with.

And then, finally, it included the
drafter's analysis for the 2013 changes to the
military Rules of Evidence. So the military
Rules of Evidence have already been signed by the
President. The drafter's analysis was separated
from that, and the idea was that that would
follow in their wake. It was -- that, in and of
itself, was more than 100 pages.
And so you have this enormous EO trying to get through the White House. It has the 2012 changes, but it also has this LIO, and it also has more than 100 pages of drafter's analysis. So now when something like that tries to go through the system, and the system gets caught -- much like the old squad automatic weapon, there is a lot of stuff to get caught when you're trying to take that through the system.

So when you strip all that out, you are going to have a smaller document to try to get through the White House and try to get through the interagency process. So we think that that will be responsive to the JPP's concerns in a couple of ways. One, with DoD being able to push out guidance much more quickly than in the past; and, two, hopefully, the draft EOs themselves going through the process more quickly than in the past.

That said, the draft EO that the President signed includes provisions that are
responsive to the NDAA for 2015. So Congress passed the NDAA for 2015 in December. The President, in the draft EO that he just signed, already has measures that are responding to provisions from there.

So I think we see some sign that certainly the recommendation of the JPP was heard and considered, and we are trying -- and I think we see some signs that -- some signs of progress.

BRIG. GEN. SCHWENK: So when you publish it, will it be published in the same book all together when you publish the analysis and discussion?

MR. SULLIVAN: So the Department of the Army is the executive agent for the -- for this book. And so what --

BRIG. GEN. SCHWENK: The stuckee, is that another word for --

MR. SULLIVAN: That's the highfalutin word for stuckee. Exactly.

And so what we -- so what will happen is the Army will take at some point, probably in
2016, all of the executive orders that have been
signed since this one, and all of -- what we'll
do is we'll publish those new DoD guidance in the
Federal Register -- by Federal Register Notice,
and the Department will take both the EOs and the
Federal Register Notices and put them all in
here.

BRIG. GEN. SCHWENK: So it will always
stay together like it has been?

MR. SULLIVAN: Well, let me also
mention something else that I am very excited
about, although you have already seen --

BRIG. GEN. SCHWENK: It doesn't take
much to do --

(Laughter.)

MR. SULLIVAN: You know me too well,
General.

So, but I am really excited about
this. I really am. So you know how the Federal
Acquisition Regulation is an online document? We
are going to do that with the MCM. So we are
going to -- so right now, the most recent edition
of the MCM is 2012. There have been three EOs published since this, and then soon we will have the Federal Register Notice publishing even more changes to the discussion and the analysis.

So this is grossly out of date. We actually saw a case from the Coast Guard Court where the Judges of the Coast Guard Court relied on an RCM in here when it wasn't the current rule, and they expressly relied on it. This isn't a good situation.

So we are working very closely with the Army, and Lieutenant Colonel Deb Pike is doing great work with us to have -- to put online a constantly up-to-date version of this.

And so, again, we anticipate and hope that in 2016 we will have a new published version, but I think much more significantly -- especially for the younger generation of litigators -- we are going to have an electronic version of this online at all times.

So, am I right in thinking that is exciting?
BRIG. GEN. SCHWENK: If the Judge is excited, I am excited.

CHAIR JONES: I am excited.

(Laughter.)

MR. SULLIVAN: It's just like the Federal Acquisition Regulation. Yes.

All right. So shall I -- I'm cutting into your time, General. I feel really bad about it.

I'll do a real quick rundown on what is in the draft of the EO?

CHAIR JONES: Yes, please.

MR. SULLIVAN: So it adopts -- and this is in your handout, too. So you all can review this at your leisure. It puts the jurisdictional limits on what certain penetrative sexual -- you know, that penetrative sex assault offenses and attempts to commit them, can no longer go to special or summary courts-martial.

That is captured in here.

When someone is put into pretrial confinement, if they are retained in there, there...
has to be a hearing within seven days in front of an officer to review that. A new change indicates that the victim has the right to be -- right to notice of that hearing, attend that hearing, be heard at that hearing, and be heard at that hearing through counsel.

The victim has the right to notice and release -- notice of release of the alleged offender from pretrial confinement. They have the notice -- they have the right to notice of the escape of the potential offender -- of the alleged offender from pretrial confinement.

So once charges are referred, and a judge comes into the case, then the accused who is in pretrial confinement can go to the judge and say, "Hey, Judge, please order my release from pretrial confinement; I shouldn't be confined."

The rule gives the victim the right to notice of that hearing, the right to attend that hearing, the right to be heard at that hearing, and the right to be heard through counsel at that
COL. SCHENCK: Victims of all crimes? How is a victim defined?

MR. SULLIVAN: There is a specific definition of "victim" in the --

COL. SCHENCK: Some personal injury or --

MR. SULLIVAN: It is someone that is adversely affected by -- some of the rules --

COL. SCHENCK: But it is not restricted to sexual assault?

MR. SULLIVAN: It is not restricted to sexual assault. But some of the rules -- and I'll have to look up -- and I'll get back to you, but I'll have to look up whether this is one of them. But some of the rules in the EO define "victim" to include only a person named in a specification.

Now, obviously, for purposes of pretrial confinement, that isn't the definition of "victim" because there is no specification, or there often is no specification at that time. By
now, there will be a specification, so I'd have
to review the rule to see whether that requires
identification of the individual in the
specification. But it is expressly defined as it
is in the pretrial confinement context, because,
again, there you can't use the spec to narrow.

All right. So the rule -- the new EO
includes a complete -- complete rewrite of Rule
for Court-Martial 405, which governs Article 32
proceedings. A complete rewrite.

It also adopts a new rule to provide
some pre-Article 32 disclosure requirements on
the Government to the defense. And then, at the
32, the rules are completely rewritten. I
believe it was the JPP, though I may be mistaking
it with the RSP, but I believe it was the JPP
that had previously opined that the
constitutionally-required exception should be
removed from the -- at the Article 32. Am I
right that that's the JPP?

(Simultaneous speaking.)

Oh, that was the RSP? Okay. I'm
confusing them.

Okay. That recommendation was followed, so the President said that the -- there will no longer be a rape shield exception for evidence that is constitutionally-required at the 32, the reasoning being that the 32 is not constitutionally required, and the accused does not have a 6th Amendment right to present a defense, or a 5th Amendment due process right to the 32; therefore, there is no -- you know, if you were to interpret that language as it should be interpreted, we believe, it wouldn't allow in anything. However, that is not how Judges were -- that's not how 32 IOs were interpreting it.

So the President now has said, "The Constitution required the provision for 412 for rape shield; and 514, victim advocate, victim communications. Neither of those apply at 32s. And, of course, the constitutionally-required exception for purposes of the psychotherapist-patient privilege is gone for courts-martial and 32s now."
Also, the new provision says that the preliminary hearing officer, the presiding officer at the 32, has no authority to compel the production of either psychotherapist-patient privilege records or victim advocate-victim privilege records. No authority to compel those.

If one of the parties happen to have those and wants to put them in, they can, but the -- subject to the exceptions that already apply.

However, there is no authority of the PHO to require their production.

Maria, you had something?

MS. FRIED: Yes. I think just to backtrack, these recommendations tended to be regarding constitutional requirements.

MR. SULLIVAN: Oh, good.

MS. FRIED: And then, we have still got medical records?

MR. SULLIVAN: Yes.

MS. FRIED: And that was for, okay, Recommendation 11.

MR. SULLIVAN: Yes. So -- okay. So
that was the JPP.

MS. FRIED: Yes.

MR. SULLIVAN: So a couple of things that are responsive to JPP recommendations.

Next, the draft EO, this is something that was recommended by the Defense Legal Policy Board that Jim Schwenk works so closely with. The DLPB was concerned about whether the UCMJ was functional in a wartime setting. And they said, "Look, one problem with the way we use the UCMJ in wartime is when our people offend in a foreign country, we tend to bring them back to the United States to try them." And that is bad for a lot of reasons, one of which is the host country doesn't see the trial to see what happens. And, you know, it is also not conducive to good order and discipline in the deployed environment. For a lot of reasons, that's not good.

So the DLPB suggested that one way to help with that would be to say, "Look, when one unit is deploying out of the area, and another unit is deploying in" -- and they are comparable
units, so 1st Marine Division coming home, 3rd
Marine Division coming in -- the CG of 1st Marine
Division ought to be able to hand off the case to
the incoming convening authority.

So the President adopted a rule to
provide for that, to provide for handing off
cases between what the RCM now calls "parallel
convening authorities."

Next, the President imposed
limitations on ordering depositions. Following a
revision of the UCMJ provision, on point, the
President provided that "depositions will be
limited to exceptional circumstances where it is
necessary to preserve the testimony of a witness
for use at a 32 or at a court-martial." And it
also says that "a victim who declines to make
himself or herself available to testify at the
32, or a victim who declines to participate in a
defense interview, does not constitute
extraordinary circumstances."

Also, the President revised the
deposition rule to provide that, as a general
matter, the deposition officer will be a Judge Advocate. The President also eliminated the authority of the officer presiding at the 32 to issue subpoenas.

The trial counsel still has -- I'm sorry, there's not a trial counsel at the time of the 32. The counsel for the government still has the authority to issue a subpoena duces tecum to get physical objects or documents to bring into the 32. It can't subpoena testimony for purposes of the 32, but the preliminary hearing officer, or the PHO as we call that person now, cannot -- does not exercise subpoena authority.

Some of you will recall that after Congress modified Article 47 to provide for subpoena duces tecum for 32s, the President gave the IO -- the PHO's predecessor -- the authority to issue those subpoenas. The preliminary hearing officer no longer has that authority.

Both the Rules for Courts-Martial and the military Rules of Evidence were changed to impose strict limits on when a victim can be
excluded from a proceeding; they can only be
excluded if the presiding officer believes that
their testimony would be affected by hearing the
testimony of other witnesses.

The victim was given the right to
confer with the trial counsel. Here is one of
the major changes, and certainly the most
contentious change within the Pentagon. The
President adopted a rule -- and this is also
responsive to a recommendation, this time by the
RSP -- to allow the victim to make an unsworn
victim impact statement in non-capital courts-
martial. And there is a new rule for courts-
martial to provide for that.

The President imposed limits on who
can access sealed materials and the purposes for
which those materials can be accessed. And then
the RCMs were also changed to limit the convening
authority's post-trial powers, consistent with
the changes in the NDAA for FY'14.

The military Rules of Evidence were
changed in response to the military rules -- in
response to the NDAA for 2015. First, general
military character evidence can no longer be
admitted for most non-military-specific offenses.
The rape shield rule, the psychotherapist-patient
privilege rule and the victim advocate-victim
privilege rule were all modified to provide that
where the victim has the right to be heard at a
hearing they can be heard through counsel,
basically, codifying the L.R.M. v. Kastenburg
decision.

A number of changes -- and Maria
brought this up -- a number of changes to the
psychotherapist-patient privilege to make it more
protective. First, the definition of a
psychotherapist was broadened. Second, pursuant
to a congressional requirement, the
constitutionally-required exception was deleted.
There is an enormous range of opinion about the
effect of that.

So there are a number of people who
say that doesn't mean anything. The Constitution
is still there to the same extent the
Constitution was there before. There are others who say, "Well, no one thinks that the attorney-client privilege is subject to a constitutionally required exception."

So if I'm a military lawyer, if I'm a military defense counsel, and my client says, "Hey, you know that offense for which Lance Corporal Brown is being prosecuted, I actually did that." No one thinks that I, even though I'm a government-employed lawyer, have a Brady obligation to reveal that information.

So there is a dispute about, does the elimination of the Constitution required exception just take the language out of the statute but it is still subject to all of the same provisions that would be there anyway?

Or is it more -- we are more like making the psychotherapist-patient privilege certainly not absolute, because there are still a number of exceptions, but more like the attorney-client privilege in that we -- no one would say that there is a Brady obligation that comes upon
the government-employed defense counsel.

   Obviously, we don't have any answer to
that at this early stage, but there is a robust
debate about that issue.

   Next, and very significantly, for both
the psychotherapist–patient privilege and the
victim advocate–victim privilege, there is now
threshold requirements that must be shown in
order for the Judge to even perform an in-camera
review of the documents.

   Basically, it takes the NMCCA case of
Klemick and broadens it, which now applies
certain thresholds for in-camera review by the
judge, and the Navy and Marine Corps makes that
same standard basically apply across the board
throughout the Coast Guard.

   And then, finally, from the MRE
perspective, the MRE -- the victim advocate–
victim privilege was amended to include the DoD
hotline within the communications that are
protected by that privilege.

   And then, finally, three changes to
Part 4 of the Manual, which we have been discussing considering today. First, there is -- the Military Commissions Act of 2006 actually included an amendment to the UCMJ's conspiracy statute to recognize an offense of conspiracy to violate the law of war. That had never been actually brought into the Manual, so now that provision is brought into the Manual.

It is going to be a capital offense as prescribed by Congress, and so the President has provided guidance on this new offense -- not-so-new offense; it's nine years old -- of conspiracy to violate the law of war.

Next, I mentioned the work of the Defense Legal Policy Board. The DLPB recommended that where a dereliction of duty harms someone, you know, imposes physical harm, that it should be -- there should be a heightened punishment available. The President agreed and increased the punishment for derelictions of duty that result in either death or grievous bodily harm.

And then, finally, the President
doubled the maximum authorized confinement for maltreatment of a subordinate from one year to two years.

That is just a real quick rundown of what is in there. Again, there is more that -- I write about that in the slide you have, and then this was also published in the Federal Register, all those changes. The citation is 80 Federal Register 35783.

All right. And, with that, and I am very -- and, again, I apologize for cutting into your time, General. But unless there are any further questions, I will now yield to General Pede.

CHAIR JONES: Thanks very much. Any other questions? I think you did a great job. It is only 10:09, so wonderful. Thank you very much.

MR. SULLIVAN: Thank you.

CHAIR JONES: All right. We are now going to hear from General Pede, and also from Colonel Kennebeck, as soon as Mr. Sullivan is
able to depart.

We could take a break; I think that's not a bad idea. Thank you for the suggestion.

Ten minutes.

(Whereupon, the above-entitled matter went off the record at 10:09 a.m. and resumed at 10:25 a.m.)

CHAIR JONES: I think we're ready to start. And we'll now hear from General Pede and Colonel Kennebeck about statutory construction. And you've just heard from Mr. Sullivan, so you have a hard act to follow.

(Laughter)

CHAIR JONES: Although I understand you guys all go back a very long way, so --

BRIG. GEN. PEDE: We do, yes, ma'am. So I just hope Mr. Sullivan, will hire him and bring him down to our school down in Charlottesville, because I learned quite a bit over there sitting and I thank you for allowing us to sit in today to listen to Mr. Sullivan.

So good morning, Committee. All of
you may know my background, but I'm Chuck Pede. I'm the commander now at our Legal Center and School in Charlottesville, Virginia where we train all of our judge advocates and paralegals. And Colonel Kennebeck and I served together in the Pentagon when I was the Chief of Criminal Law and Policy for the Army. He was our Policy Chief. That just simply means I was the Chair of the Joint Service Committee, which you heard Mr. Sullivan describe, and Colonel Kennebeck was the Executive Secretary. So I was the person who was responsible and he was the brain behind that effort.

(Laughter)

BRIG. GEN. PEDE: So, and that's all very, very true. I do have a short opening statement that kind of describes I think what I'd like the Committee to know about my views on your work up front, if I may.

CHAIR JONES: That would be great.

BRIG. GEN. PEDE: And then I'm happy
to answer any questions.

So I would like to first thank the Committee very sincerely, and the Subcommittee for the opportunity to appear today and to add what I can to your deliberations on how practice of criminal law in the Department of Defense. And I'm fully aware of your important work of this Subcommittee, the Committee itself, the Response Systems Panel, the Defense Legal Policy Board on Justice in Combat. All of those Panels I consider to be important and historic work as a practitioner now of 27 years.

You may already be aware of my background as I've just described. I was the Chair of the Joint Service Committee responsible for publishing the Manual, but also the annual review of the UCMJ and the Manual for Courts-Martial on an annual basis. It's a multi-service and the Chair rotates, but I was responsible for that for two years.

I was the Chair during the period that we revised the 2007 version of Article 120, which
I'll refer to as version 2, version 1 being the pre-2007. So if there's different terminology you'd prefer, I'm happy to adopt that as well. But I'll call version 2 the change in 2007, version 3 the change we ushered in in 2012.

I'll also note that my subsequent assignments following that included the practice of criminal law most recently as the chief judge of our Army Court of Criminal Appeals until just three months ago.

At the outset I would like you to know that I have reviewed very carefully the 11 items of interest of this Subcommittee. I've also reviewed the previous testimony of the various witnesses many of whom I know personally and have practiced with and respect immensely their intellectual rigor and the work that they've done over the course of their careers.

And honestly, I will tell you I applaud the work of this body. And because as a practitioner having worked a lot of these issues over the years, your work really in my mind
becomes the legislative history to any future changes and it's the sort of serious -- what you're doing, it's the sort of serious consideration that in my assessment -- that discussion, that serious discussion of public policy that's often missing in our statutory legislative process now, this kind of discussion.

However, this morning I find myself in a curious position because I'm loath to be the general in a fancy uniform to come in and say don't change anything. That's not what I'm going to tell you. I don't want you to see me that way. I am as vigorous about change and desirous of change I think as anyone either in or out of uniform. But I, having my experience at this point, look to change in other ways. So I want to share that with you.

I would first describe my role as the Chair in '11 and '12. I advocated almost daily during that period of time after version 2 was passed for change, both within the DoD and then on the Hill to the professional staff members and
to members of Congress when we could get an audience to do that. The 2007 statute, version 2, in my view was a noble and progressive piece of legislation, but it needed a lot of work. Our collective efforts; that is, DoD and the Hill, but particularly DoD, were rejected many times, not in a negative way, but just rejected.

Only after CAAF had ruled in the Prather case about the double burden shift and the Constitutional and legal impossibility were we able to persuade members and professional staff members in particular about the need for change. And that took, even after Prather, some very deliberate concerted persuasion on the part of the Joint Service Committee: Colonel Kennebeck and I and others.

With the version 3 changes that we proposed at that time, our primary focus among other numerous changes, as you've now found, was to first reduce the number of offenses to generate simplicity, greater simplicity. It's complicated. We wanted to try and reduce the
level of complication. We wanted to organize the offenses in a more coherent fashion. We wanted to eliminate the double burden shift, which had the corollary effect of eliminating the defense of mistake of fact which had a burden of production on the defense. So we wanted to eliminate that pursuant to Prather.

I note for this Subcommittee that it took us four years of practice, empirical assessment; and by that I mean cultivating empirical data from the field and the case law, our courts, trial courts and appellate courts, and court rulings to fine tune version 2. And I would tell you that as much as I advocated daily and as frustrated as I was at the time with the process, especially dealing with Capitol Hill, cool reflection on my part tells me that there was benefit in that. We all mature. I think we all gain experience through those processes.

And I have found in reflecting on where we are now with this statute that the difficulty that I experienced in trying to fine
tune and make life better in the trenches for
prosecutors and defense counsel were benefited by
the difficulty and the friction that I 
experienced in trying to change the statute. I
think there's goodness in some measure of
bureaucracy. I would like to think we can all
agree that sometimes process in and of itself
produces some goodness, not necessarily in the EO
process, but --

(Laughter)

BRIG. GEN. PEDE: -- I'm happy to talk
about that.

So today I am in a curious place in
recommending to the Subcommittee, having listened
to most of your witnesses, read about most of
your witnesses, that instead that I recommend to
you that we allow the law to work as it has truly
through the ages, that we allow the common law,
our courts and the Manual for Courts-Martial
process that Mr. Sullivan outlined so eloquently;
that is the president's rulemaking authority, to
develop the law that we think we need now.
In very broad outlines I do not find the statute creating the issues or the level of confusion that we experienced in 2007 and '8 and '9. I simply don't. And that's at a couple levels of work. I would tell you I've not prosecuted a case under these statutes, but I dealt with a prosecution function. I'm dealing now with the defense function. I was a judge. So I've kind of been around. I just don't see the level of confusion right now. There may be anecdotal stories of confusion, but systematically the courts that are empowered to deal with this are doing I think what you'd hope our trial courts would do, and that is sort out these issues, which is what courts do with statutes.

Version 3, I also acknowledge, is not perfect by any measure, but I still find it immensely progressive, nuanced and workable. It has had in my view an extraordinary effect on crime reporting and on prosecution. I'm happy to discuss its effect on the defense community
should you be interested in that. It is, as you
know, having listened to Major Bateman, who I
know very well and have received instruction from
and who worked with me at the school house, and I
respect immensely, it is being aggressively
taught just from people like Major Bateman,
trained and executed in the field. It is not
perfect by any stretch, but it's a worthy
statute.

So then more generally, in my mind as
a practitioner over these years dealing with
statutes on a daily basis, I don't believe they
should change in my view unless for substantial
and consequential reasons. The public should not
have to guess what the law means, nor
practitioners should not be concerned; the
public, that is, that it means something
different year to year.

I think of equal moment practitioners
on both sides of the bar, and I now include
special victim counsel, must have a measure of
predictability in their practice to do right by
their client, which includes: the public; our communities; the accused, who sometimes I would acknowledge gets lost in our discussions; and the victim.

The only matter I would raise and suggest the Committee seriously consider is the matter of defenses. I do in fact find it interesting that there are questions on whether defenses are available under 120, when in fact the Manual states clearly in the statute that the defenses are available in Rule 916. But I also note, having talked on both sides of the bar, that practitioners, after version 3 was passed, viewed that the defenses were deleted and that that was a conscious decision to communicate that they were not available, despite the language that all defenses are available. The dangers of statutory construction and interpretation and the dangers of statutory change.

I've yet to see an Army case where the defenses were not permitted to be raised by some evidence. I talked to the trial judges as
recently as yesterday, although I do not speak for the judiciary, either the trial or the appellate. I speak to the appellate judges.

However, having said that, in the interest of clarity, the area of defenses is one where I would argue for the Subcommittee that we could make the applicability of available defenses clear to the bar. That could either be done through statute and it could be done most easily through the president's rulemaking authority as it has historically been done.

I would tell you -- and I note recently the; and Mr. Sullivan mentioned it, the stethoscope issue. Is that a contact offense? We had good trial practitioners think that it was. They tested the law, as trial practitioners do. I always have told my counsel, make law. That's why we're here. They tried the case. It's up on appeal.

The courts are doing what courts do. What are the furthest reaches of this statute? What does "competent" mean? Just last week a
judge was asked what does "competent" mean in 120? He opened up the dictionary. This is Webster's definition of "competent." That's what in my practice, over -- that's what trial courts -- that's what we expect them to do, fill the gaps, as courts will do.

So I say this in a context; and Mr. Sullivan's summation at the end is a good example of that, where the NDAA had no less than 34 changes to matters relating to sexual assault. Mr. Sullivan just outlined a breathtaking list of changes in an executive order.

At the school where I serve we already teach three versions of Article 120. I'm loath to ask a professor and a student to learn a fourth. The velocity of change in our law is almost as breathtaking as the velocity of change in our world today, and I would simply suggest to the Committee that our system of justice needs an opportunity to settle in and find itself within the extraordinary changes over the last 8, I would actually say 11 years, since 2004.
Our courts and our practitioners are some of the best in the business, despite what some will say to this Subcommittee. And I've read the testimony. We are not perfect, but I'd be more than happy to elaborate on how we train our counsel and how they practice law and how they compare to anyone in a suit at a state or federal level.

And notions to me of stare decisis are not worn out notions of old. They're important features of a legal landscape. The role of courts, the common law in breathing life into statutes which by their nature cannot predict every collision of human behavior with the law does fill the gaps. The Manual for Courts-Martial and the president's rulemaking authority also fill the gaps and has done so I think for years with great effect.

And so I close in sum by saying I don't think version 3 has reached a crescendo or cries out for an overhaul on the scale that we conducted in 2007 and 2012. We've made a lot of
progress. There is room for improvement always, but I haven't seen anything in the last three years, and mindful that we don't even have an executive order implementing 2012 yet for practitioners to sink their teeth in. So they've been practicing under a statute for three years, and we're doing pretty well without that guidance.

I would commend to the Committee that we allow in large part the normal exercise of the judicial role to remedy some of the ills that we see. And this concludes my opening remarks and I do look forward to your questions. And I can go in any direction you like. And I'll turn now to Colonel Kennebeck.

LT. COL. KENNEBECK: Yes, sir.

BRIG. GEN. PEDE: Thank you.

LT. COL. KENNEBECK: I have just a shorter introduction. Does anybody have any questions based on what General Pede said, or should I just jump in?

CHAIR JONES: I think we all will, but
LT. COL. KENNEBECK: Okay.

CHAIR JONES: -- go ahead and then we'll start all together.

LT. COL. KENNEBECK: Good morning. My name is Lieutenant Colonel Chris Kennebeck. I'm currently the Deputy Staff Judge Advocate at Joint Base Lewis-McChord, which is Fort Lewis, Tacoma, Washington. It's much less humid there.

(Laughter)

CHAIR JONES: This is a good day.

LT. COL. KENNEBECK: This is a good day. But I still felt it walking over here today.

I supervise about 45 military and civilian attorneys in my office. We have about 40,000 Soldiers and Airmen on JBLM. And with the 7th Infantry Division at that installation we tried 100 courts-martial last year. We're about the busiest in the Army. So I see a great deal of sex assault cases now as the Deputy Staff Judge Advocate. I'm farther removed because I
have captains who prosecute cases and defense attorneys who work in the same building. Special Victims' Counsel. I have all those people in my office working for me.

So Dwight made the analogy he finger paints. I brought a box of crayons. And that's because I'm far enough away from prosecution to not be able to tell you what it's like in the trenches, but I'm close enough to tell you what my trial counsel tell me.

Much the same, I was in the Joint Service Committee in '11 to '13, 2011 to 2013. The 2012 statute had pretty much already been built and delivered through DoD to Congress. It was basically on its way to being passed by the time I got the job. But I did talk to my predecessor who's now on the bench. He can't speak. He's Lieutenant Colonel Chris Carrier. And I think we have enough intel between the three of us in our notes to talk about why 2012 looks like it does, why it was built like it was.

But again, I'm far enough away from
that where it's been awhile since I've thought
about the Joint Service Committee. However, it's
a committee that I love. I'm thrilled to be here
today. Not quite as excited as Dwight, but
close.

(Laughter)

LT. COL. KENNEBECK: I will try to be
as excited as he was.

I've also read the previous testimony,
and like General Pede I believe my relevance is
really mostly my experience as the Executive
Secretary of the Joint Service Committee. And
Mr. Sullivan explained the role of the Joint
Service Committee, how executive orders are
developed, and he actually stole some of my
thunder talking about the Manual for Courts-
Martial, our bible. I want to just go back and
cover a couple things because he talks fast and I
think it would be helpful at least, because we'll
be talking about this again, to go over a couple
things.

So he talks about the portions of this
Manual that are prescribed by the president under Article 36 in his rulemaking authority. That is a small part of the Manual. This is the first five sections of this book. It's about that much of the book. And then the rest of it is appendices, helpful information. For those of you -- I mean an analogy, this is like the U.S. Attorneys' Manual. It's a prosecution Manual. It has our rules of procedure. It has our military Rules of Evidence in it. And this is our bible.

Any practitioner in any service is going to have two books very close by, and that's going to be this book and the Judges' Benchbook. And the Judges' Benchbook is even thicker. It's gotten pretty thick lately because of trying to fill in the gaps of these definitions. I would suggest that some of that volume in the Judges' Benchbook probably belongs in part 4 of this Manual. And that's the part of the Manual that Dwight spent a decent amount of time talking about.
I think that it would be helpful if you took a look at Article I28, assault, as an example. It would be good if each of these members had an MCM at some point. And perhaps when you deliberate at a later meeting, if you take a look at Article I28, you'll see that what Congress tells us is about a paragraph long. That's all there is for assault. Everything else that we understand about assault was given to us by the president. And so Congress gives us a paragraph. The president gives us about three-and-a-half pages of prescribed definitions, what aggravated assault is or isn't, examples, explanations. And that's been in the book for many years.

And you heard Mr. Sullivan talk about how some of what the president has prescribed has been addressed in appellate courts, but for the most part 98 percent of what's in this book in part 4 of the Manual is essentially law. And that's how CAAF will treat it. At some point if it is incongruous with what Congress prescribed,
then there is going to be a problem. But
generally it's very powerful. And that's why I
think the Article 6 authority probably could
address all of these issues, if not most of them.

But before I say that I wanted to talk
a little bit more about sources of authority. So
we all understand this, but I just want to say it
out loud because sometimes it's helpful.
Congress gives us our statutes. They give the
president the authority under Article 36 to
prescribe the rules. And then we implement
policy in the services through DoD regulations
and Army, Air Force regulation. That's policy.

And then we have pamphlets, other
guides. The Judges' Benchbook is at the bottom
of that list. It's a pamphlet. So it doesn't
have great authority. It definitely is a
practitioner's -- it's a guide. But that
benchbook is very useful and binding. In our
practice it's something that actually has gained
probably more authority than it should have based
on the document that it's in. That's why I would
think some of what's in that benchbook belongs
higher in the hierarchy. The president should
prescribe and define some of those words that
we're uncertain what is meant by Congress. I
think that can be done in such a way that it's
not inconsistent with how the statute is written.

So if we go to the first issue of
consent, you know you heard Judge Grammel and
Judge Grammel says let's use the word "voluntary"
and not "freely given." If we're going to change
consent, let's adjust it. I think that could be
explained what the difference, if there is one,
or the similarity between freely given and
voluntary in part 4 of the MCM without having to
statutorily adjust the definition. And that's
just one example.

If we went through the list, I think
my answers would be similar for most if not all
the rest of the issues. And I'd be happy to
discuss those with you.

CHAIR JONES: Just remind me --

LT. COL. KENNEBECK: Yes, ma'am.
CHAIR JONES: -- what's the title of part 4?

LT. COL. KENNEBECK: It's called "Punitive Articles."

CHAIR JONES: Punitive Articles?

LT. COL. KENNEBECK: Punitive Articles.

CHAIR JONES: Which are the substantive Articles, right? Okay.

LT. COL. KENNEBECK: That's right. So the Punitive Articles of the UCMJ are Articles 77 through 134. Articles 1 through 76 are -- they basically tell us how to do a court-martial and give the authority to the commanders. Those statutes are the procedural aspects of how the Uniform Code of Military Justice functions. And Articles 77 through 134 are the Punitive Articles, those prescribed conduct. And there are a few Articles after 134 as well, just a couple.

CHAIR JONES: And typically in the Punitive Articles what commentary -- you'd see
anything from the president, right, through executive order relating to that particular article. And there's nothing yet for 120. Am I right?

LT. COL. KENNEBECK: That's correct.

CHAIR JONES: Okay.

LT. COL. KENNEBECK: So when I was in the job in the Joint Service Committee, we built that executive order. So I definitely had a hand in that. It will have the sample specifications, how a practitioner should type it out on the charge sheet. It will have the max punishments. It will have all those mandatory paragraphs that would normally occur. But what it lacks is an explanation because --

CHAIR JONES: Well, is that done? Is it allowable? I mean, of the statute?

LT. COL. KENNEBECK: It is done. Oh, it's most of --

CHAIR JONES: I mean, that's what's been done throughout in Article IV, correct?

LT. COL. KENNEBECK: That is standard
practice. That's how we practice. The explanation, it just explains what --

CHAIR JONES: So there could be for instance an explanation of "voluntary" --

LT. COL. KENNEBECK: That's right.

CHAIR JONES: -- Is what you're saying.

DEAN ANDERSON: Or freely given.

CHAIR JONES: Pardon me?

DEAN ANDERSON: Freely given.

CHAIR JONES: Or freely given. Yes.

DEAN ANDERSON: And voluntary or not.

CHAIR JONES: Yes, right.

LT. COL. KENNEBECK: What does "incapacity to consent" mean?

CHAIR JONES: Right.

LT. COL. KENNEBECK: What does "incompetent" mean and the definition of "consent."

CHAIR JONES: Right.

LT. COL. KENNEBECK: All of those things could be explained.
CHAIR JONES: Right.

LT. COL. KENNEBECK: And that's where I would advocate the explanation belongs. I agree, there would be certainty if you statutorily defined those terms, but if you scan through the UCMJ, you're not going to see too many definitions in these statutes. If you look at 18 U.S.C. 2241 for the federal version of sex offenses, you're not going to see definitions. Congress typically doesn't give us definitions. And I would advocate that that's probably a good thing. If you talk about statutory construction, less is -- keep it simple.

CHAIR JONES: Yes.

LT. COL. KENNEBECK: And that's probably what I would advocate. That's not probably. I would advocate that here. Let the president give further explanation and definition.

I would love to say that it could be more easily edited and remedied if there were a mistake or if CAAF said, oh, no, this -- the
president is wrong here. The explanation needs
to be amended. Ideally in a perfect world, if
Dwight is right and we can streamline the
executive order process, then that would be true.
We could update it in a year or less. If this
Subcommittee were to take a look at a statute
that needed attention, then I would --

CHAIR JONES: That what?

LT. COL. KENNEBECK: A statute, a
statutory amendment that --

CHAIR JONES: Yes.

LT. COL. KENNEBECK: -- could be made
that might help. Article 36 might be a good
statute. Tell the president he's got a year.
Tell DoD you must build a Joint Service Committee
that has the resources to require it.

CHAIR JONES: I think Ms. Holtzman's
going to write that one.

(Laughter)

LT. COL. KENNEBECK: And I'm not
speaking for the Army, obviously. This is Chris
Kennebeck.
CHAIR JONES: No, no. Of course not.

LT. COL. KENNEBECK: I think that would be helpful because the Joint Service Committee -- I'll tell you a little bit about that. That committee is basically comprised of two people per service. You have a colonel from each service and a lieutenant colonel or a major or a captain, depending on what they have available. So the Army typically has a lieutenant colonel, the Air Force typically has a lieutenant colonel, and the other services, you know, it depends. All of the members of the Joint Service Committee have other jobs. It's not a 24/7 job.

So this was my job. I got to do this book and AR 2710 needed to be amended and we had to build the executive orders. We built two-and-a-half, some of which are still not through yet because the statutory amendments that happened in the middle that stopped some and we had to go back to the drawing board. So it's busy.

And I think that it would be helpful
if it were a full-time dedicated Joint Service Committee with the appropriate personnel on it to help, especially at times like this. As General Pede made reference to the volume and the velocity of statutory change in the last seven years. If you added up the number of statutory changes related to sexual assault, I think we're almost at 200 now in seven years. That's a lot to try and account for and make changes in this Manual.

So at least now we can have a Joint Service Committee that's --

BRIG. GEN. PEDE: I would tell the Subcommittee when that Manual went to paperback, the notion was we'd publish every year. It used to be in this enormous binder and we'd send updates. And we wanted to make it like the U.S. Attorneys' Manual. And so the intent was to go every year. It doesn't cost a lot to produce. But because of the difficulty in getting -- not the publisher, but to get the executive orders through, it's now every three or four years. So
instead of an annual cycle, it's a four or five-year cycle. So that is a big challenge for practitioners.

I would also note that they're not flying blindly though. So for example, a draft EO that we might create that has sample specifications, that's available but with "draft" watermarked on all of the documents, right? So a practitioner would see it, use it as a guide knowing that it's not finalized and not signed by the president, but it's available for their education and their use and their practice. That's the way we practice in this kind of interim ghost period where we don't have the actual law passed or signed by the president.

LT. COL. KENNEBECK: The other thing that unique about the MCM is it's not authority. We cite this as if it's authority. Really this is just a reflection of executive orders, a giant pile of executive orders. And it's important for practitioners to remember that the changes that are made to the rules exist from the power of the
president within the executive order. This
document to be useful does need to be updated
annually and probably should be required that it
be updated annually.

MAJ. GEN. WOODWARD: Yes, I've got a
question. As we were listening to Dwight and he
talked about the limits, especially the
interpretation in here in the use of the EO, and
what I hear you talking about is we need -- you
know, you even said the public should not have to
guess at what the law means, getting to that
ambiguity that everybody is afraid of, if we do
that through interpretation in an executive
order, don't we still risk the fact that it's --
you know, that isn't necessary? It's an
interpretation in the EO. What Dwight said was
it doesn't necessarily stand the test of the law.
So aren't we risking it if we're trying to
clarify it in an EO versus the actual law, that
that interpretation cannot hold up in a court?

BRIG. GEN. PEDE: Yes, ma'am.

MAJ. GEN. WOODWARD: But you still
would recommend it that way. Why?

BRIG. GEN. PEDE: Well, because

whether you make a statutory change or whether
you make the change through the EO process, it's
always going to be subject to interpretation.
The court will have to examine -- so for example,
the statute changed the word "substantial
incapacitation" last time. The reason we deleted
"substantial incapacity" was because the field
didn't understand it.

So the outcry over three or four years
about a term in the statute was such that it was
not useful inside the courtroom and it was
causing confusion. So we changed it hoping that
the new term would solve that problem. And so
five years of litigation changed it. We can
probably expect another three to five years of
litigation over the current version of the term.

So whether it's a statutory term we
inject or a presidential EO, you're always going
to get courts trying to -- and counsel contesting
the meaning of words, as we would want counsel to
do, and making an issue of it. And so my point
is there are simply no guarantees in the drafting
of legislation or EOs. In my view there's less
danger and there's more alacrity I think in the
EO process. Even as hard as that is, it's easier
than statutory change, most of the time.

And it's more flexible and it's more
nuanced, because it's not statute and we can have
a narrative discussion of what something means
like "voluntary," whereas the statute is a fairly
Spartan summary of the term. But the discussion
that you find in the Manual can be very lengthy
and give examples. And that's what as a
practitioner when I was trying cases I used a
great deal and my trial judges did as well.

And so my experience, often I would
get suggestions from counsel, anecdotal
suggestions and I'd say, well, where have we seen
that as a problem? What case prevented you from
making that argument? And the answer would be I
wasn't prevented from making an argument. That
was my interpretation of the term and either the
court adopted it or it didn't. Okay. So where's the problem? Well, it would be better if it was better defined. But the resolution of the case resulted in the definition of the term, did it not? Yes.

And so, I have tremendous confidence that our courts wrestle with these. Just like the conversation I had yesterday about the term "competent." I could easily have counsel say we need that term defined. The trial judge defined the term, which is what our trial courts do. He looked in the dictionary. If Congress didn't define the term, they expect that the term will be used in common understanding. That's our rules of statutory construction. The judge provided the definition to counsel and they moved on.

I don't mean to oversimplify, but I think that we should have some confidence that our courts can handle it and that if there's one that rises above the water and is routinely a problem and the appellate courts get it for
resolution, then that's when we take notice of it. And it's not resolved through the appellate process, the circuit's sorting it out, can't resolve it, then perhaps it cries out for statutory change. That's kind of my threshold now. Again, having it seven, eight and nine argued day and day, we've got to change the statute. We've got to change the statute.

COL. SCHENCK: I understand your perspective in the no-change theory, but I'm just wondering about the Panel Members. Not the counsel. The counsel are in pretty good shape because they have the great JAG school. It's the Panel Members who are line officers. And my concern -- and I've spoken to some trial judges who've seen a number of acquittals, and counsel when I was on this task force that visited the field. My concern is, yes, we can rely on trial judges who rely on the benchbook, which may or may not be right, right, on the definition, or we have some trial judges who are hesitant to create a definition, right? Because there's a bunch of
trial judges out there very hesitant to make any new law. And then you have Panel Members who get a bunch of stuff and rather than sort it out, they're maybe acquitting accused. You see what I mean?

BRIG. GEN. PEDE: Yes.

COL. SCHENCK: So I'm wondering if there's any feel in the Army JAG Corps for that factor? So where we could recommend an executive order defining something that would not only help counsel, which they may or may not need, but it would really help the Panel Members.

BRIG. GEN. PEDE: Well, I was afraid you'd describe my comments as arguing for no change, ma'am. And that's not the gist of my --

COL. SCHENCK: Well, except for the one you --

(Simultaneous speaking)

BRIG. GEN. PEDE: Well, defenses.

COL. SCHENCK: Defense. Sorry about that. Yes.

BRIG. GEN. PEDE: No, no. That was my
concern that you'd interpret my remarks that way.

I'm all about change. So I believe in a living law. And as I've said, 2012 is not perfect by any measure.

My argument is the method, the vehicle that this Subcommittee recommends. For the defenses I would recommend the Subcommittee seriously consider amending the statute, but oh so carefully.

COL. SCHENCK: The statute? Not --

BRIG. GEN. PEDE: The statute. But you wouldn't need to use the statute. You could do it through 916 again and just indicate that we meant it when we said all available defenses in the discussion.

COL. SCHENCK: Right.

BRIG. GEN. PEDE: Right?

COL. SCHENCK: Right.

BRIG. GEN. PEDE: You wouldn't need to amend the statute. You'd just -- say under the part of the statute that talks about all defenses in 916 are applicable, you'd just put under; and
I say this colloquially, we really mean it. Right?

COL. SCHENCK: Yes. Right. Yes.

BRIG. GEN. PEDE: That's what practitioners need. But consent.

CHAIR JONES: Are you saying that would be the recommendation through executive order?

BRIG. GEN. PEDE: Yes, ma'am.

CHAIR JONES: That's what --

(Simultaneous speaking)

BRIG. GEN. PEDE: Yes, ma'am. But you could comfortably do a statutory change as well and make sure --

CHAIR JONES: Yes, I mean, it's --

(Simultaneous speaking)

BRIG. GEN. PEDE: -- the consent is there --

CHAIR JONES: -- minimum, yes.

BRIG. GEN. PEDE: -- mistake of fact. Because I've talked to counsel and I say, well, what do you think this means?
CHAIR JONES: Yes.

BRIG. GEN. PEDE: And they say, well,

I read what it means, but you deleted it.

COL. SCHENCK: So there's people arguing the facts that you --

(Simultaneous speaking)

BRIG. GEN. PEDE: It's the optic --

(Simultaneous speaking)

COL. SCHENCK: -- intentionally, which means --

BRIG. GEN. PEDE: -- of it. And I can show you my briefing slides to the HASC in 2011 that says we're deleting the double burden shift, but consent remains a defense as does mistake of fact. So it's very interesting how things, actions are interpreted.

Yes, ma'am?

HON. HOLTZMAN: General, I just wanted to first of all thank you very much for coming and for enlightening us and for sharing your expertise and your thoughts with us. I'm personally very grateful.
I just wanted to follow up on what Colonel Schenck said because I think you may be right in the sense that after time judges and trial counsel and defense counsel sort of figure out where the statute is going, but we're not 100 percent sure. And we're worried about messages going, for example, to the Panel, and also the fact that the statute is something that Soldiers are supposed to understand and learn from, not always so clear on the thing.

So for example, I have some issues with the implication -- and I'm not sure this was really thought through or what it was, but there's an implication in this statute that the victim has to resist. And you see it a couple of places. And I'm not sure whether that's something that you eliminate.

For example, on the definition of "consent," C8, paragraph 8 and subparagraph C, it says "all the surrounding circumstances are to be considered in determining whether a person gave consent." That's fine. But then it goes on to
say "or whether a person did not resist."

Resistance, that kind of implies -- I'm not saying it requires, but it kind of implies that we expect resistance. And that goes back -- I mean, I had to fight a New York State -- I had to change a New York State statute that said a woman had to put up earnest -- what was called earnest resistance, otherwise it wasn't rape.

I mean, so what I hear in this, when I read this; maybe it's just me, so this could be completely idiosyncratic, but this just brings up to me echoes of the old, old, old stereotypes of what rape was and what a woman had to do -- or I guess there wasn't the idea that a man could be raped in those statutes, but what a woman had to do.

And so I am concerned that by keeping language like this in the statute we could be sending the wrong signal and confusing the Panel.

And along those lines I also have a big problem with the term "bodily harm," because to me normally, I mean, I speak English, "bodily harm"
means I'm getting hurt in some way. Somebody
punches me or kicks me or drops something on my
head or whatever. But we don't mean that by that
in this statute. We mean the slightest touching
that's offensive. What's a Panel going to say
when they ask for a definition and the judge
reads that? They'll say, well, I don't get it,
but bodily harm has got to mean something like
bodily harm.

So I go to the point that she's raised
and the colonel has raised is that while people
aren't telling us that they're confused
necessarily, not all trial counsel are coming
forward saying I'm confused or the judges aren't
saying they're confused or defense counsel aren't
saying they're confused, we don't know what
impact this is actually having on creating
acquittals that shouldn't take place or -- in my
opinion shouldn't take place by confusing
language; it's not intended to be confusing, I'm
not blaming anybody here, or by language that
resurrects these old stereotypes that makes it
harder to have convictions. So I just throw that out to you for your thoughts.

BRIG. GEN. PEDE: Ma'am, I think it's an excellent point. I can tell you that in 2007 when the change -- so let's say version 1 was changed, the great emphasis, the entire principle behind that change was to draw attention away from the victim and to focus everything on an accused. And so in doing that, in removing "consent" for example, it's your exact point, exactly what we were intending to do.

In the '12 changes we wanted to further that effort and by providing greater definitions to what is not an element. Okay? So we recast consent to try and get after the most subtle forms of lack of consent, which is no affect at all, no resistance, no nothing. So the goal was to do exactly what you've described in the '12 and to try and make that a little bit better.

And so for example, if you with your experience are tripping over that sentence, that
certainly was not its intent --

HON. HOLTZMAN: Right.

BRIG. GEN. PEDE: -- as you pointed out. The intent really I think would be better reflected -- and the response perhaps to that is an expression of lack of consent through words or conduct meaning there's no consent. It was the totality of the circumstances. And of course we train everyone that it can come in many different forms.

Can it create confusion? Yes, ma'am. I can see that, absolutely. Do our Panels -- does it result in confusion to our Panels? I'm not aware of that, but that doesn't mean it's not happening because empirically we'd have to try and sort out some way does that language result in confusion in the Panel arena? And I would simply offer to you that that's not crested above the discussions we might have in this setting that were anecdotal examples that people might be concerned about it. But that doesn't mean it's not worth looking very carefully at and
suggesting that perhaps there are better terms,
or maybe a further explanation, statutory or
through EO, that would clarify for practitioners
and there then in the judges' instructions to the
-- that is exactly the point.

LT. COL. KENNEBECK: Can I chime in
before we change or is this a continuation of
that?

MS. WINE-BANKS: I have a continuation
or perhaps it's a question. I agree with her
comments, but want to go a little step further.

I'm concerned about how trainees --
how Soldiers hear the training they get so that
someone knows and has adequate notice of what
crime is and how a victim of the assault might
think, well, this is not exactly that. Or that
the victim thinks they have to endanger
themselves by resisting because of how this
reads.

So then it's more than -- I think it's
more controllable for the Panel because you have
lawyers who are going to argue and present the
definitions to them and they supposedly will
focus on that and make their decision on that,
but it's that training part and the victims and
the defendants who I worry about not really
understanding it.

MAJ. GEN. WOODWARD: If I could --

MS. WINE-BANKS: So that's --

MAJ. GEN. WOODWARD: -- the number one
reason why victims report not reporting is
because they don't think it was serious enough.

MS. WINE-BANKS: Okay. So that's --

MAJ. GEN. WOODWARD: And I think that
gets to the bodily harm --

MS. WINE-BANKS: Right.

MAJ. GEN. WOODWARD: -- piece. Right?

MS. WINE-BANKS: So that's -- I guess
that's my question as to whether we need to do
something to clarify so that when the training
happens, and when someone looks at it, they can
say, oh, I can understand that.

BRIG. GEN. PEDE: Yes, ma'am. I would
point out, I guess in response to that -- and I
agree with you that we would be concerned what's going on in the courtroom and then what's happening in the training environment.

Of course, recruits aren't reading a statute, but derivative of the statute is the training slides that are used --

MS. WINE-BANKS: Right.

BRIG. GEN. PEDE: -- and so forth.

MS. WINE-BANKS: Exactly.

BRIG. GEN. PEDE: I've been intrigued to learn recently, and it's been going on for a while, that in some of our training, trainees walk out, and this shows in our Panels through voir dire, that they're being instructed that if you have one beer --

MS. WINE-BANKS: I've heard that one.

BRIG. GEN. PEDE: -- you cannot consent.

MS. WINE-BANKS: Right.

BRIG. GEN. PEDE: And so what's happened culturally, I would just argue or suggest to the subcommittee, that we've truly in
a way turned the culture on its head in terms of
the consent issue.

And so, the notions of, do I have to
do anything to show lack of consent, I think
we've come an awful long way, certainly since
2007, by law, but as well by culture.

And so our training is -- even though
that's wrong, one beer is not enough. The
culture is such now that our concern isn't that
the trainees aren't aware of the subtleties of
these environments, but that we may have gone a
bit too far in their understanding of their
responsibilities.

I don't know if that makes sense, but
we have to -- to me, we have to be very careful
how we balance that. So why don't I pause there?

LT. COL. KENNEBECK: And I'll add my
comment at the end and say I agree that, that
language does resurrect old notions of how we
perceive consent, and I don't like it really for
that purpose.

I do think though that the concern is
an implication. An implication that could be
corrected with an explanation. You could also go
in and statutorily change it. I just -- what
corns concerns me about statutory changes is there is
no laser focus.

The concept of laser focused change to
Article 120 is, I think, unrealistic because what
is open is open. If we change commas, we're
afraid of how many things could be changed. So I
would go back to if you are considering
recommending a statutory change, I would ask for
us first to determine, is there an ambiguity,
first, warranting a statutory change?

Of course, you're going to do the
analysis on that, and I would go back to the
testimony that I read here. I think if each of
those persons who testified, this is how I would
change consent, this is how I would change
inability or incapacity, et cetera, et cetera.
If we added language explaining the statute,
under the statute, in Part 4 -- if it was in the
Manual now, would you have the same concerns? I
believe that most of them would say no.

I've talked to Colonel Grammel three days ago and asked that very question, and he said, yes, my concerns could be addressed in an explanation in Part 4 of the Manual. He's another firm believer that the Judges' Benchbook shouldn't be any thicker.

If we're going to put guidance in the field, it should be in Part 4 of the Manual when it comes to the application of this statute. I think that your other folks who testified, Pickands and a few others, would also agree. The changes that we're talking about and the potential inferences and implications can be addressed and satisfied with the explanation, and it would be definitive. I think that the true understanding of what consent is matters most when the judge explains it to the Panel.

And I will tell you from my experience —— so I was a Chief of Justice in the 2007 version, I had eight prosecutors prosecuting for me and I suffered through substantial
incapacitated with my prosecutors and now I’m the
deputy and I see it from this perspective here.

I think that what happens with the
Panel is we have a progressive statute and we are
dealing with humans in our culture who go home
and watch -- oh, what’s that show? The three
men, I can’t remember the name of -- shows like
that. "Two and a Half Men."

(Laughter.)

LT. COL. KENNEBECK: Those are our
Panel Members. They’re part of America. They’re
just like everybody else. They do wear a
uniform, but they have some of the same
predispositions.

Trying to foist a progressive statute
upon people who don’t necessarily agree
sometimes, that can be difficult in any court, I
think. I don’t think it’s unique to us or anyone
else.

I also don’t think that cleaning up
statutorily the definition is going to shorten
the instructions given to the Members of Panel or
make it clearer to the Panel. I do think that
the changes we make to the statute will affect
practitioners the most.

And the instructions that we shape to
the Panel, we are I think as a practice trying to
make those as digestible and brief as we possibly
can. The instructions now, they take about 90
minutes in a sex assault case. They take about
45 minutes in non-sex assault cases. So that is
an impact, and we pay very close attention to
that because how the Panel receives that
information matters the most.

I don't think anecdotally that those
Panel instructions are having an impact on
whether there's an acquittal or not. I just
think it's the underlying facts of the case that
-- we try cases that other people don't try.

We will try cases that -- obviously we
have sufficient evidence, but we try cases that
are difficult. That I would suggest -- that I
would put that -- and I have no evidence of this
either, but I think some offices would say, no, I
can't do that case here.

BRIG. GEN. PEDE: Well, we do have evidence. So Chris probably does it at First Corps at JBLM. We at the Army -- you've probably seen the data. We will take cases from jurisdictions because they don't want to try them.

It could be a money thing. It could be a resource thing, but most often, in my personal experience and in our collective experience, it's they don't typically try those cases because there's no physical evidence. They're he said, she said, and we're willing to try them.

So our acquittal rates are going up. It could be they're just tough cases. It could be our advocacy was substandard. It could be the defense did an incredibly good job. It could be this provision, and I could see that. So I don't -- I can't tell you that.

But I can tell you, as far as we've come since 2007 to change the focus to the
offender, it could be as you've highlighted this vestige still creeps itself in and might affect --- I admit that, that could happen. I just don't know that, that's happening. So --- yes, ma'am?

MS. FRIEL: I can see as we're talking about which things would be better changed by different things that the consent, for instance, the definition perhaps by explanation and executive order, could work that way.

I'm wondering what your thoughts are on defining incapable of consent? Because I was a civilian sex crimes prosecutor and I can tell you there are real varied definitions of that state to state.

New York State's definition is really narrow. You don't understand the nature and consequences of your action. The minute the defense could show you understood it was a sex act and what sex was and you could get pregnant from it, that was it, we were done and we lost cases.
Go across the river to New Jersey, they had a much broader definition. One that we all as prosecutors wanted to have. There were other things that you could not understand that made you incapable of consent. So that seems to me a very substantive change, whether you're going to go a narrow definition or a broad definition.

If the president were to do that by executive order, you could look at that as greatly expanding the statute and the number of people that will come within the statute. And that seems to be where we become most at risk.

MAJ. GEN. WOODWARD: And is it dangerous if that can change with each year, with each different executive order? Does that create the ambiguity? When you talked about the public should not have to guess what the law means, if we put it in the executive order, is it too malleable? Does it mean we can change it too fast?

COL. SCHINASI: It's been a long time
since I've done this, so I don't know what the
current culture is, but are JAG officers still
providing military justice instruction to units?

BRIG. GEN. PEDE: Yes, sir.

COL. SCHINASI: Okay. So going to
Jill's question and maybe taking a broader look
at it. The same JAG captain who goes into a
courtroom to either prosecute or defend any case,
but including a rape case, is the same JAG
captain who has military justice instruction for
the Soldiers.

And at these sessions, depending on
what the agenda is for this particular part of
the instruction, the very issues that you're
concerned about are being talked about by the
same officer who's going to prosecute or defend
the case.

COL. SCHENCK: But not necessarily,
sir. They have these new briefings on sexual
assault response, the SHARP, Sexual Harassment
and Response Program, within the Army and they
actually have non-JAGs doing that training.
And then it's being wheeled down to
the basic training almost, I think, even the
drill sergeants. They get it when they walk in
the door and they get it at a certain gate. So
it's not the JAGs. That's where, again, that one
beer rule, it's kind of being --

BRIG. GEN. SCHWENK: But it's also
still being done at the unit.

LT. COL. KENNEBECK: Not by defense
attorneys. So defense counsel don't give
classes.

BRIG. GEN. SCHWENK: Only the --

LT. COL. KENNEBECK: It's the
prosecutors because they're assigned to,
associated --

BRIG. GEN. SCHWENK: Okay.

LT. COL. KENNEBECK: -- with a unit,
they do the --

COL. SCHINASI: So --

LT. COL. KENNEBECK: -- training.

COL. SCHINASI: So we could say from a
comparison point of view, I mean, there are lots
of studies of very recent Washington Post-Kaiser
Family service -- study about the culture of rape
in colleges. And about 20 percent of women at
some point -- so there's a very interesting
culture going on.

We have the benefit in our society of
being able to provide instruction to our
population from virtually the first day that they
come on active duty, and so a lot of Jill's
concerns, I think we do as much as we can do to
alleviate.

The other thing -- if we can step back
and look at this. The authority system that we
have is first the UCMJ, a statute. Changing that
statute is a very hard thing to do, as the
General just explained to us.

But we also have the Manual for
Courts-Martial, which is a cookbook. Which tells
the prosecutor what to do step-by-step, and then
we have the Judges' deskbook, which are the
instructions that are given to the Panel.

Now if we want to affect, in a timely
way and in a way that's sensitive to what our
culture's doing and how our culture's changing,
going at the UCMJ is the least efficient way to
do that. As long as what happens in the Manual
for Courts-Martial and what happens in the
Judges' Benchbook is not inconsistent with the
UCMJ, courts don't generally reverse that. And
so, this is kind of --

COL. SCHENCK: So you're saying --

COL. SCHINASI: -- where we left off
the --

COL. SCHENCK: -- going against the
statute per se as opposed to --

COL. SCHINASI: Right. As long as
what's in the Manual for Courts-Martial, aside
from the UCMJ -- it's that book, which is kind of
like a Bible, which was explained.

As long as what we do in that book,
whether it's executive order or whether it's the
Judges' Benchbook, which is the instructions that
are given to the court members, as long as that's
not inconsistent with the statute, it's not going
to get reversed, and it's much easier to change.

    The thought of going in and changing

some portion of the UCMJ, as the General has
explained to us, is onerous.

    COL. SCHENCK: And once they open it,
that's a problem. Once they open --

    COL. SCHINASI: Anything's possible.

    COL. SCHENCK: -- it on the Hill, you
never know what you're going to get.

    COL. SCHINASI: And so, there's a kind
of institutional bias against doing that.

    COL. SCHENCK: Yes.

    COL. SCHINASI: What we'd like to do is
be able to change the Benchbook or change the
executive order or change the Manual for Courts-
Martial.

    So I mean, I think that's where we
carried over from last session. If we want to
make changes, the changes are most effective, the
changes are most flexible, and the changes are
most sensitive to our culture if we do something
other than change the statute.
CHAIR JONES: All right. I think I first saw Dean Anderson's hand up.

DEAN ANDERSON: This is a matter of process. And I apologize if it's already been clarified, but it's not clear to -- do we know where the president is on a potential executive order for 120?

LT. COL. KENNEBECK: So my understanding, based on what Lieutenant Colonel Deb Pike, who's working in the Joint Service Committee now, is that it's at the White House. So it's been through interagency.

DEAN ANDERSON: You mean, it exists?

LT. COL. KENNEBECK: It exists.

CHAIR JONES: All the explanations of 120 have --

LT. COL. KENNEBECK: Yes.

CHAIR JONES: -- been written?

LT. COL. KENNEBECK: Has been --

DEAN ANDERSON: It is waiting for review?

LT. COL. KENNEBECK: -- for years.
BRIG. GEN. PEDE: It's been reviewed. It's waiting for signature at the White House.

LT. COL. KENNEBECK: Two executive orders have been signed since that one was --

DEAN ANDERSON: Right.

BRIG. GEN. SCHWENK: It's at the last stage of review by the Office of Legal Counsel --

CHAIR JONES: So does this mean --

BRIG. GEN. SCHWENK: -- in the Department of Justice.

CHAIR JONES: -- we should hurry up or is it hopeless?

(Laughter.)

DEAN ANDERSON: But I think it's an important question of where that is procedurally.

BRIG. GEN. PEDE: We should get a copy of that.

LT. COL. KENNEBECK: We can get you a copy of that.

DEAN ANDERSON: We can get a copy?

BRIG. GEN. PEDE: I don't think it's going to address all the issues that you're
addressing because it was written three years ago effectively. It's been staffed, so there's a lot of --

CHAIR JONES: When the 2012 revisions came out --

BRIG. GEN. PEDE: Yes, ma'am.

CHAIR JONES: -- there was an attempt to try and issue an executive order.

DEAN ANDERSON: Okay.

BRIG. GEN. PEDE: So, with what Mr. Sullivan said, there's a streamlining to the process. That is huge.

So from a practitioner's standpoint, what he said at the end, that we don't have to wait as long anymore and there's only a smaller piece actually going to the White House, that's enormous. That's -- from a standpoint of efficiency, that's great.

And, ma'am, your concerns about, well if it's too malleable, if it's too subject to change, should we be concerned about that? I wouldn't as a professional in this business
because as hard as Congress is to get something
to change that we think in earnest needs
changing, DoD's not that easy either, or the
President.

(Laughter.)

CHAIR JONES: The next administration
could have a very different view of things, don't
you think?

BRIG. GEN. PEDE: Yes, ma'am. My
experience with changes in administrations means
it takes them probably twice as long to get their
arms around what it is you're asking.

So what I've found is that, just like
a new boss, I need the decision from the old boss
because they've had two or three years knowing
the landscape. If I get a new boss, I know I've
got another year before they actually feel
comfortable making --

MAJ. GEN. WOODWARD: But I'm not
talking about speed, I'm talking about our
comfort level with the fact that the law remains
the same, and we can deal with it.
If we feel that with any given administration coming in, they're going to change it, is that a positive thing? Versus being changed by Congress?

LT. COL.KENNEBECK: It just hasn't been the experience in 50 years though. I mean, these executive orders get after changes that are relevant --

MAJ. GEN. WOODWARD: Okay.

LT. COL. KENNEBECK: -- that are needed in the field. I just --

CHAIR JONES: Ms. Holtzman?

HON. HOLTZMAN: I just want to respond to some statement that was made -- sorry Colonel, that the legislative process is extremely lengthy and difficult and that this other process, executive order, is streamlined and simple.

We've had this statute in effect since 2012 and there's been no explanation. So I can't -- I don't think -- I mean, I can't agree personally that the EO process is necessarily more streamlined than the Congressional process.
In this case. Now, maybe in other cases it is, but in this case, it's not.

Secondly, I think as General pointed out, it may be that some of the concerns that we are raising here right now are not concerns addressed in the executive order. So if we just say, okay people we're just not going to do anything because the President's going to address it and it's on his desk, so therefore it's going to happen sometime real soon, which we don't really know, they may decide they don't want to address it.

That the changes in the executive order, assuming they come out and assuming they even come out this year or next year, assuming, they have nothing to do with any of these issues that we're raising here.

So I think that -- I mean, my own suggestion about how to proceed is that we, rather than deciding the form we want to take, let's look first at what we want to change. And then think about -- I mean, there's no reason
that we can't approach this on a belt and suspender method.

We could suggest that it be approached both through executive order, if the President can act quickly enough, assuming we think any changes should be made, or through Congressional actions.

I mean, I don't think, for example -- just to make a point. If we said to Congress, and that's all we wanted ---- which I assume is not going to be the case, but if we said to Congress, eliminate that sentence that we were talking about in that statute. Just eliminate that because it raises the issue of resistance, and that were the only thing we wanted to do, it might be relatively quick to do that. I'm not saying that's going to be a lot and it wouldn't make major changes.

So I just think we should be a little careful about the assumption that going the Congressional route is going to be a major time consumer and won't happen in our lifetime. Or
that the executive order approach is going to happen in our lifetime. I would just be a little more agnostic about that.

CHAIR JONES: Well and just to -- I mean, we've obviously seen that Congress, when they are interested in a topic, as they have been with this one, can work very speedily.

I don't -- at the moment, I don't know the answer. Did I hear you say that you think you can get us what is in the executive order?

LT. COL. KENNEBECK: It's been in the Federal Register.

CHAIR JONES: Oh, it's in the --- that's right, I thought I heard that.

BRIG. GEN. SCHWENK: But we're just going to get the version that was published in the Federal Register. And so, in the interagency --

CHAIR JONES: I see.

BRIG. GEN. SCHWENK: -- process, there's dialogue back and forth and changes are made and those aren't published anywhere.
COL. SCHENCK: Can I ask a question?

CHAIR JONES: And we don't have any access to it --

COL. SCHENCK: I sat on the Code Committee and we were briefed on the drafts and the Code Committee's a public meeting.

CHAIR JONES: I'm sorry. One at a time. Colonel?

COL. SCHENCK: So I sat on the Code Committee and the Code Committee receives a briefing from the Joint Service Committee regarding pending EOs. It was public meeting, which means it was transcribed and it's open to the public, and it had the draft EOs in the pipeline.

At one of those EOs, which I believe -- we should get those drafts, because one of those EOs has Article 134 amended to include indecent acts. I double-checked with Dwight. I thought it was me. I was thinking, why -- and if that was a public meeting and the drafts were briefed to me and I have the slides and the
public was there, why can't we get them?

    LT. COL. KENNEBECK: I will say a

couple things about that. I've given the
briefing and so I know what you're talking about.
And I'm included in the interagency process and I
don't know what the changes were during this
interagency process and this EO -- General
Schwenk probably does, but I suspect that the
changes that may have been made to the EO since
it was published in the Federal Register aren't
great.

    COL. SCHENCK: Are or are not?

    LT. COL. KENNEBECK: Are not.

    COL. SCHENCK: Are not.

    LT. COL. KENNEBECK: Are not. I mean,
there are some questions that come back in --
this is one that's sort of contentious. I was
surprised at the time that Department of
Transportation wanted to know lots about how we
defined consent, which I found interesting. It
wasn't DoJ, it was Department of Transportation.
But anyway --
BRIG. GEN. PEDE: It was DoJ later.

LT. COL. KENNEBECK: It was DoJ later.

I suspect that whatever version you see will be pretty close to what you see in the end.

And then back to what Honorable Holtzman said, I agree. And General Pede, we're on the same page. Sometimes statutes do get reamended, and we aren't afraid of that. And we're not advocating that it shouldn't be changed.

We should ask, is there an ambiguity warranting a statutory change? I don't know that there is. I don't know that there is. And then if we do change or recommend changes to Article 120, the portion of the Article that matters the most to the practitioner is Sub A and B, rape and sex assault and the varieties by which they can be charged.

Subsection C, D, E -- the rest, those definitions and the application, changing that part of the statute will have less of an impact in the field. It'll have more of an impact on
the field if you change Sub A and Sub B, the
definition of rape and sex assault. That would
be harder because then we'd be teaching four
versions as opposed to three.

In JBLM right now, we have a case that
we have all three versions of Article 120 charged
on the charge sheet, and we have another one too,
because it's an older case. We have three
different statutes.

When that case goes to trial, the
Panel instructions will probably be two, two and
a half hours. Just because you have all the
different statutes to define and to go through,
and that's not helpful.

Now of course, that will subside over
time, but that doesn't mean you shouldn't change
the statute. I'm just putting that out there.
First, is there an ambiguity? Second, what part
of the statute would you recommend changing? And
third, can we solve this with the executive
order?

BRIG. GEN. SCHWENK: Yes. I just want
to say to Representative Holtzman's point, this
is a case, I think, right now where we should
think about putting the cart before the horse.
The horse is the vehicle that we use to take the
things on the cart, which are the changes, and EO
versus legislation.

Well, let's put the cart first. Which
is, do we have anything in the cart to do an EO
or whatever in? Let's figure that out and then
once we get that figured out, we actually have a
vehicle to ask opinions that Judge Jones gave us
this morning. Which is, send out our cart for
views and one of the things we can ask is, do you
think it should go in the executive order? And
then we can worry about the horse --

MAJ. GEN. WOODWARD: I agree. Can I
just ask --

BRIG. GEN. SCHWENK: -- later.

MAJ. GEN. WOODWARD: -- for a
clarification? Because I'm really confused and I
apologize. But why did they just publish changes
to that, but it doesn't include the drafts that
you all are talking about? Do we think they get published --

BRIG. GEN. PEDE: Because it's iterative and because the President receives from DoD an executive order that has, let's say, the rule for 405, our now preliminary hearing rules. Prior to that, we had an executive order just on our military Rules of Evidence.

So we take them in chunks and they're reviewed and staffed in the interagency in chunks as an EO on the Rules of Evidence, and that got through. And then he had sitting on his desk the preliminary hearing EO and all the 120 changes. He signed the preliminary hearing EO and that's now out, and we're still sitting on the 120 because it's just -- and it's taken three years.

LT. COL. KENNEBECK: And part of the reason that it's taken three years is because in the interagency process, time marches on. A new NDA comes out, it's got 34 provisions in it and we realize, oh some of this is more important.

So we actually took an EO back, broke
it apart into two different pieces, and pushed
the EO up with the 405 in it. That's why that EO
was signed. First, because it was chunked off
from the rest, sent up with a foot stomping, we
need this out there now. We've been foot
stomping the 120 as well, but it's voluminous.

BRIG. GEN. PEDE: I think as
Representative Holtzman point out, we've all
lived through, if there's an interest, if there's
momentum, it can go like that. Whether it's --
most certainly in Congress.

The friction that I experienced for
five years was primarily born of, you didn't want
our 2007 statute, so this is the politics of it.
You did not want our 2007 statute, you wanted to
stay with the old version, by force and without
consent. If this was a bar and we were drinking
beer, what I would say to you is, Congress said,
you don't like it, here it is anyway. Now like
it.

So when we started preparing the
changes to refine the statute that was passed to
get goodness, they're view was we're coming back
and trying to go back to an old day and an old
time. So a lot of the friction was, we don't
trust you. You just want to go back to the old
ways.

So there's a trust element, there's a
political element, there's optics, there's all
these things. Just like this counselor I was
talking to yesterday, he was saying, oh yes, you
took the defenses out. Wait a minute. No, we
didn't.

So it's fascinating. Yes, the longer
we live this, the more you learn about the nature
of organizations. EO process can go like that,
if somebody wants it, but it typically doesn't.

HON. HOLTZMAN: General, I just wanted
to make one other point and maybe this would help
your thinking on -- not help your thinking, you
don't need help in your thinking, but maybe this
would clarify a little bit the process.

I think Judge Jones' suggestion that
any changes that we suggest be widely circulated
and open for comment before we make a final
decision, much less going to the JPP and then
ultimately, it goes to Congress.

I think that that should help
alleviate some of the concerns that were raised
about the importance of having some friction in
this process. That it's not just a bunch of
people sitting around a table and making up their
own thoughts, but that they're going back to the
community that's practicing and saying, have we
misunderstood? Have we made mistakes? Is this a
bad idea? And to continue to get that input to
make sure that the work product is not -- I mean,
is as good as it could be under the
circumstances.

BRIG. GEN. PEDE: I think it's a
wonderful notion because I'm more concerned about
people suggesting changes who are not trying the
cases who are identifying an academic disconnect
intellectually.

HON. HOLTZMAN: Yes. Right.

BRIG. GEN. PEDE: But when it hits the
trench, nobody's having any problems with it.

HON. HOLTZMAN: Right.

BRIG. GEN. PEDE: But intellectually, I can say this doesn't make sense. Well, it makes perfect sense in the crucible of a trial.

HON. HOLTZMAN: Yes.

BRIG. GEN. PEDE: That's my biggest concern. So shopping these notions, I would be very interested to see what the defense or any community says about the last sentence of the consent definition.

Because what I would say -- one argument is, our reporting is off the chart now on offenses that we never had reported before. If you looked at 2007, our rape reports were at 500 approximately. We had no sexual assault reports, a lesser degree of violation. 2008, 2009, 2010, sexual assaults creep up. So now I'm twice what I used to have reported. I've got 500 rapes, I've got 500 sexual assaults. Where were those 500 before?

So this statute, even with this
consent discussion, has emboldened, informed, educated our trainees what they can report, what they experience. And so at least on the front-end of the criminal process, it's smoked out all those people who said that I was at fault. And it's emboldened them to say, no, actually that was me and I'm going to report it now.

So it's been incredibly cathartic, incredibly helpful. And that, empirically, I can show you. What I can't show you is, does that -- what's the effect of that in an instruction to a Panel in 90 minutes of instructions? My sense is, having tried cases, probably none.

Because the surrounding circumstances instruction is so fact dependent. And our focus has been so much on the offender and the environment of rank, the environment of alcohol, that I think we've eliminated that kind of vestige of there's got to be resistance, some kind of action.

But I can only say that anecdotally. I would not rely on my view of the world to say
that needs to stay or needs to change. I think shopping it is a great idea because you get an empirical assessment.

CHAIR JONES: Ms. Kepros?

MS. KEPROS: I really appreciate the suggestion about shopping because I agree with you. I think that's what you have to do because you're not going to just buy-in to any change anyway.

But I also agree with the idea of let's decide what, if any changes, are appropriate before we even put these things out there. But I think once that happens, if there are changes we support, there is a political reality to any of these forums.

And I would so much rather that any changes are very thoroughly vetted and thought through than we start having executive orders every year that are being driven by political concerns or the legislature reacting to political events without the kind of thoughtful, balanced approach that I feel like this subcommittee is
really trying to take, with a lot of different stakeholders at the table, trying to get input from the different service branches and the experience of lawyers, judges, and maybe other people as we move forward. So I think that's something we need to be thoughtful about.

One question I have -- because I don't want to characterize what you said as no change, but one of the problems I've had, as a civilian defense counsel looking at this statute, is what I will call death by terms of art. And I mean, there are words here that do not mean what English is. And it's sort of the point that Representative Holtzman made, like, bodily harm, sounds like somebody's body is hurt, right? It doesn't just mean non-consent.

And I wonder if you think there would be value in just eliminating some of this terminology that just adds multiple layers of instruction and redefine words that could just be avoided altogether? And just say, hey, no consent, instead of saying bodily harm, bodily
harm means no consent. And just adding all this kind of words to something.

Is there any value to that kind of process? Or do you see that as just more tinkering that doesn't really assist practitioners?

BRIG. GEN. PEDE: I wouldn't describe it as tinkering, ma'am. I think that -- because we look at that over in the JSC process.

So if we looked at any of these recommended changes, normally my direction as the Chair would be okay, form a subcommittee and spend six months and figure out from the practitioners, the trial judiciary, is there evidence of this being a problem with this term? And do we need to change it? Do we need to adjust it? And then we'd recommend to Congress or the President.

So I don't -- so exactly what you're describing is what we're doing all the time and what this subcommittee is chartered -- I think it's very helpful, first of all.
CHAIR JONES: And let me just take --

BRIG. GEN. PEDE: But --

CHAIR JONES: -- everybody back for a moment. The reason that we're hearing about the horse right now is only because we wanted to be able to understand the options, the vehicle, before we began our substantive discussion later this afternoon. And this has been tremendously, tremendously helpful.

I'm sorry, now I have a lot of people who want to ask questions. I think Dean Anderson.

DEAN ANDERSON: I just wanted to press you, General, on your one area that you may have affirmatively advocated a change in the statute itself, and that is on defenses.

It seems to me that, that's the least necessary change though given the explicit nature of the language in the statute itself where it says all applicable defenses remain. So why would you want to change that language?

BRIG. GEN. PEDE: Because as I have
worked through these issues over the last three years, that's the only part where senior practitioners supervising junior practitioners and junior practitioners have come to me or I've come to them and that's emerged from the conversation.

DEAN ANDERSON: But that's only -- as I understand it, that's only by implication of removal of prior language, right?

And why would that not ordinarily work itself out in the same way that your argument that any number of ambiguities in the statute would work themselves out through the common law process?

BRIG. GEN. PEDE: Honestly, I think it will.

DEAN ANDERSON: Okay.

BRIG. GEN. PEDE: I think it will. So I'm not a no change person, but if -- because there are a number of things you could refine.

Bodily harm might be one of them, but as a lawyer, I always go back to bodily harm
under 128. It doesn't need to hurt you. So
lawyers, in my view, understand the history of
bodily harm. It's anything.

DEAN ANDERSON: And that predates quite
a few versions.

BRIG. GEN. PEDE: And the --

DEAN ANDERSON: The bodily harm one.

BRIG. GEN. PEDE: Yes, ma'am. And we
pull those in to our common understanding and our
application of charging and our defenses.

Why did I pick defenses? Because, to
me, that's the one thing in three years that
keeps coming up above the surface, and I'm
astonished that senior practitioners are still --
-- I'm talking senior practitioners, I'm talking
judges. Not trial judges. I've got an appellate
judge who says, well, you deleted that. So --

DEAN ANDERSON: That must mean
something.

BRIG. GEN. PEDE: -- it must mean
something. So it's for that reason. It's
pragmatic, it's just my gut check after years of
practice. I said, okay, I've got it now.

If I was a Chair, I would have pushed
the subcommittee of the JSC, get out, get us some
empirical data, cultivate the defense community,
what are they thinking? You get that together,
then you make a change recommendation to the
other services and then to DoD and see if it has
traction. I think, frankly, that one would have
traction.

Honestly, we had conversations at the
JAG school after the '12 statute. At least three
just to discuss whether consent was still a
defense. These are seasoned practitioners. So --
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DEAN ANDERSON: So the suggestion you
would make on this language would be for reals.
For what --

(Laughter.)

BRIG. GEN. PEDE: That's it. As
referred in 916.

DEAN ANDERSON: Right. In the same
way, but with the internal reference, right?
Because I think the concern is we don't want something unique to rape and sexual assault here. We want it to incorporate by reference traditional defenses that are given in other cases.

BRIG. GEN. PEDE: Yes, ma'am. That would be my recommendation to the subcommittee. With respect to other definitions, I think identifying what they are and all your experts have come in, whether there's a tweak to the consent discussion, incapable of consenting.

Again, I just simply remind you, we adopted that term because of the difficulties with substantially incapacitated. So we found the second term we thought would work. If your sense is, it ain't working either, we have to find a third term, recognizing that third term could generate three to five years of litigation.

So I'm not sure we've actually accomplished anything with certainty because I think our current litigation will shape what our current definition means. That's all. To me,
that's just pragmatism. It's not an intellectual argument necessarily.

It's just -- I now have three years of litigation figuring out what this means, I'm going to go with this. Because it again, for me, hasn't risen above the surface of outcry and outrage and unjust results. At least on one side of the bar. Maybe going back to your point, acquittals are hard to assess. Sir?

COL. SCHINASI: Again, not to go back and make the same point, but if we explained it in the Manual for Courts-Martial and if we explained it in the Judges' Benchbook, we could leave the statute the way it is because what's going to happen is every time you make a change, including a word or taking a word out, counsel is going to challenge that.

As they should, but if we explain what we wanted to do in either the Manual for Courts-Martial or in the Judges' Benchbook, we minimize the challenges. There are going to be challenges for sure, but we minimize when we explain it.
CHAIR JONES: Lisa, did you have a comment?

MS. FRIEL: Yes. And the comment was, well, our concern about does the statute need to be changed because we're using it as a teaching tool too. And I just wanted to say that I definitely think when you write statutes, you consider that. You want them to be clear because that's another purpose of them.

But I'll just tell you what's going on on college campuses with the big issue like yours is incapacitation versus intoxication. There are many college policies that could not be clearer in words that intoxication is not enough alone. We are talking about a state of intoxication that reaches incapacitation.

And they teach it that way in orientation and they teach it that way here, and then it filters down. And I can tell you, I was at an Ivy League school with all these very smart kids around the table who when we were talking -- we were doing training, and the number one thing
they learned in training was, really? I thought any drinking was -- and I'm like, how can it be, you heard in orientation.

So I think that's a different problem.

That's looking at how does it go from here to here and how do we lose it down here? And I don't think that has to do with statute. I think it is something the Military should look it.

COL. SCHINASI: The studies will say it's the culture of the community that you're part of. It's what they believe irrespective of what the law is, irrespective of what we tell them.

MS. FRIEL: But it means you have to figure out how to do a better job in explaining exactly --

COL. SCHINASI: Yes.

MS. FRIEL: -- what it is to a resistant culture --

COL. SCHINASI: Yes.

MS. FRIEL: -- is I think what we're really talking about.
COL. SCHENCK: And then different than
our culture was, let me just point that out.
Right? I mean, when we were kids, it was a
little different, I think. Of course --

MS. FRIEL: A lot different.

COL. SCHENCK: Well, there's the peer
pressure the other way.

MAJ. GEN. WOODWARD: And I think that's
a bit of passive-aggressiveness, to be honest
with you. I mean, I know when I was a SAPR
chief, I went out and I went to all of -- over 45
bases and sat and talked to everybody from Airmen
through commanders and the SAPR guys.

And the piece about you can have one
drink and you can't -- and so I asked at every
single element, is anybody being taught this?
Where do you hear this? And only one place was
there an actual instructor that taught that and
we corrected her and ended that.

But it becomes the underlying thing.
And I honestly believe there's a portion of that,
that's passive-aggressiveness. That folks are so
angry that we're trying to make this --

CHAIR JONES: Cultural change.

MAJ. GEN. WOODWARD: -- cultural change

that, that's a way that they're passively --

CHAIR JONES: You're making it sound --

MAJ. GEN. WOODWARD: -- ridicule.

CHAIR JONES: Right.

MAJ. GEN. WOODWARD: We keep hearing it

in all this testimony and it drives me crazy

because I go out there in the field and ask about

it and --

CHAIR JONES: It's not really in the

training.

MAJ. GEN. WOODWARD: -- you're not

really hearing it --

CHAIR JONES: Right.

MAJ. GEN. WOODWARD: -- in any of the

training.

COL. SCHENCK: But also I think -- I

was talking to the some of the law students and,

frankly, the men are saying, if you're drinking,

there's drinks involved, just get a phone number
and run.

Because do not -- seriously, because we have cases of friends, they were -- one guy was a Princeton, and they were both drunk and boom, he's gone. He just is gone. And so, as a male -- and I have a son, four sisters and one son, right?

But all of us had boys and we're -- I said to my nephew who just went to basic training for the National -- he's going to go in the National Guard for his free tuition. I said, do not, whatever you do, drink and then do anything with anybody, boys or girls. Do not. Call your aunt and go to bed.

LT. COL. KENNEBECK: I would say somewhat I agree with you, ma'am. And I'd say it's somewhat ridicule. And it's also the paternalistic nature of the Military.

MAJ. GEN. WOODWARD: Yes.

LT. COL. KENNEBECK: So once we decide that something's proscribed, I'm going to hammer it into you as hard as I possibly can, and I'm
going to overemphasize.

    I'm going to say, this is what the
rule is, but more than that, if you even touch
alcohol, it's too late.

    MAJ. GEN. WOODWARD: Yes.

    COL. SCHENCK: Yes.

    LT. COL. KENNEBECK: Right? And

there's some of that as well. The E-5, the E-6
who wants to be --

    CHAIR JONES: General Pede, I think you
had mentioned -- well, we've all heard from a lot
of Panelists and much of it has been anecdotal.

    I think you mentioned that you might
actually have some data, and you're certainly
suggesting that, that's a good way to proceed in
terms of trying to figure out what is confusing
to practitioners. Do you have any data like
that? Or did I mishear you? Or anything you can
share?

    BRIG. GEN. PEDE: I'd have to look,

ma'am. The data that I'm talking about is my
experience talking with judges and counsel in the
three jobs I've most recently --

CHAIR JONES: Right.

BRIG. GEN. PEDE: -- had.

CHAIR JONES: Okay.

BRIG. GEN. PEDE: So I use it as --

CHAIR JONES: Nothing --

BRIG. GEN. PEDE: -- it's more -- to me it's now more than anecdote. But I also use the -- empirically, one of the things we use from '07 to '12 was what is the case law producing? What are the trial courts wrestling with? And what are we seeing pop up as issues that are joined at appeal? And so we use that as well.

CHAIR JONES: Do you have that analysis?

BRIG. GEN. PEDE: Not currently. No, ma'am.

CHAIR JONES: And I guess it would only be '07 to '12 right?

BRIG. GEN. PEDE: Or '12 to '15.

CHAIR JONES: Well, '12 to '15 would be fascinating for us.
MS. WINE-BANKS: You guys maintain doing that?

BRIG. GEN. PEDE: Not as a deliberate product for consumption in a Panel like this, but I think it's something that could probably be asked of the Joint Service Committee.

CHAIR JONES: Well, that might be very helpful.

BRIG. GEN. PEDE: No longer sitting on the Joint Service Committee, I can say that.

MAJ. GEN. WOODWARD: And don't tell them where that suggestion --

BRIG. GEN. PEDE: No.

MAJ. GEN. WOODWARD: -- came from.

BRIG. GEN. PEDE: Hopefully he's not listening.

LT. COL. KENNEBECK: When we derive numbers. A lot of times, we'll use the annual report to Congress. The SHARP report. That's where we get our big numbers.

CHAIR JONES: That's something else we should --
LT. COL. KENNEBECK: Right.

CHAIR JONES: Right.

LT. COL. KENNEBECK: We can see trends in that.

COL. SCHINASI: You said that the sexual assault numbers have gone up. I'm just wondering, has the child sexual abuse numbers gone down? Has it changed any? Do you know?

BRIG. GEN. PEDE: I don't believe so, sir. I think --

COL. SCHINASI: It's leveled off?

There was a time when my docket was 40 percent child sexual abuse cases, and this was in an infantry division.

BRIG. GEN. PEDE: My sense only, I haven't seen the statistics recently, sexual assaults as you know in '07 started to go off the --

COL. SCHINASI: Right.

BRIG. GEN. PEDE: -- chart, '08, '09, '10 reporting. There was incremental rise in child sexual --
COL. SCHINASI: Okay.

BRIG. GEN. PEDE: -- abuse reporting.

I don't think it compares at all to what the adult reporting looks like. So I wouldn't say it's appreciably different from the past, but I couldn't even tell you what percentage it is of the cases tried.

COL. SCHINASI: Thank you.

BRIG. GEN. PEDE: We can get that data. I think that data's available. We just published the '14 crime report for the United States Army, anyway. That should be available on the web. I just received that last week. Yes, ma'am?

MS. WINE-BANKS: In terms of data, I've read conflicting numbers in the newspapers -- of course, the unreliable source, as to whether the victims are exclusively or majority female. What is the percentage of female victim versus male victim?

BRIG. GEN. PEDE: From a reporting standpoint, the lion's share. And I'd probably put it over 90 percent, but we could check that,
ma'am, is female. Reporting.

MAJ. GEN. WOODWARD: But from the surveys -- the anonymous surveys where we believe the accuracy of those, 53 percent of the victims are male.

MS. WINE-BANKS: Okay. So and I also read that the males are not reporting it because of a misunderstanding of what is a crime and believing that it's hazing. Is that an experience that you've had as to why --

BRIG. GEN. PEDE: I --

MS. WINE-BANKS: -- those reports are falling off?

BRIG. GEN. PEDE: That's probably true. I think it has more to do with shame and embarrassment. I think that's the dynamic we've assessed as the principle reason for non-reporting by males.

MAJ. GEN. WOODWARD: The RAINN hotline, the rape and incest network that the DoD contracts to do their hotline outside reporting.

The Director of that told me that about 90
percent of their DoD calls are from males.

MS. WINE-BANKS: Really?

MAJ. GEN. WOODWARD: So it's a huge number. So --

MS. WINE-BANKS: Wow.

MAJ. GEN. WOODWARD: -- those males are recognizing that something wrong was done, but they're just very uncomfortable about reporting it within the DoD system.

MS. WINE-BANKS: Thank you.

LT. COL. MCGOVERN: The Army has published a video, which we shared with the JPP, which we can share with the subcommittee as well, for male-on-male sexual assault.

And the incident in that video was during a hazing event ---- or an initiation event that turned into what was hazing and inappropriate touching and exposure and things like that. So within the culture of the Military, that is one place where they're finding these sexual assaults or offenses are occurring.

BRIG. GEN. PEDE: As a data point for
the subcommittee, again, I think I'd recommend to you the Army crime report, which is available. It gives you kind of nice pie charts and graphs of types of crime, prevalence, and reporting and prosecution. That's very good.

The other thing I think that's very interesting in our practice now, and this is Army, is that the bulk, roughly 60 or 70 percent of our trials now are sexual assault offenses. That's an extraordinary change, and that's occurred over the last seven, eight years.

There's a significant increase in contested cases, those cases that are not pleas. So that a good chunk of the cases -- so when I was growing up, a lot of my trials were guilty pleas. You develop the evidence -- you'd have the allegation develop the evidence, and then you'd have overwhelming evidence that you would plead guilty.

Well, the bulk of those sexual assault cases are contests. Partly, again, because of the kind of cases we're trying. There's not a
lot of forensics, there's not a lot of physical evidence. So I have found it interesting, just in reflecting on it, what does that mean?

What we also find is our general crimes, crimes against property, crimes against person not sexually-related, are not prevalent. But when you look at the Army crime report, they are. As you look at these matters, this is just a data point for consideration.

It's very interesting where we've come in eight years and I think we've come a long way, and I think we still have a lot of work to do. So there's things you can digest and bring your own lens to that might be useful for us to consider.

CHAIR JONES: And didn't the ---- at the DoD, the SAPR report just come out for 2014?

COL. GREEN: I think so, ma'am

CHAIR JONES: So that will have a lot in there.

DEAN ANDERSON: Do we have that on a PDF that could be circulated?
COL. GREEN: The SAPR report? We've got those. They're voluminous.

DEAN ANDERSON: Right. That's what I was thinking that we had.

COL. GREEN: The main report details across DoD and then each of the services has an enclosure where they provide a specific report on sexual offenses as mandated by Congress. And so, again, that's not the broad -- it doesn't reach child offenses or other --

DEAN ANDERSON: Right.

COL. GREEN: -- non-sexual crimes. But it's specific to the DoD.

CHAIR JONES: There's a link on the DoD site.

LT. COL. KENNEBECK: But it's got charts and a break out.

COL. GREEN: Plenty of charts.

CHAIR JONES: It's really helpful.

LT. COL. KENNEBECK: Before we run out of time, we had provided some slides and I thought it might be -- just so you know what --
to give you some context. We talked about them.

So these slides were from 2012. When we talked about the changes in 2012. So they're -- I didn't make any edits. These are three years old. I'll let you find them --

CHAIR JONES: Yes.

LT. COL. KENNEBECK: I think they're in your blue folder, maybe. They're called Article 120 Slides. So the first slide was really just a picture of how we built this Manual.

In 2012, the big push really then was the Military Rules of Evidence, which was in an executive order that the President signed shortly thereafter.

Interestingly, I'll point out that Military Rules of Evidence state that if the Federal Rules of Evidence are amended, the President has 18 months to amend the Military Rules of Evidence or the Federal Rule of Evidence amendment applies to the Military Rules of Evidence.

So it gives a default end-time, and
that drove that EO to signature. So, hence, my reference with respect to Article 36. Enough on that.

Okay, and the next slide was just a listing of EOs that were in the pipe, the changes that were going to be incorporated into this book. Once again, we're in the same boat. We have several EOs and statutory amendments to incorporate.

This is the slide I really wanted to point out. This is how we viewed Article 120. The top half of the slide was the 2007 version. It had all of the varieties in one ginormous omnibus statute. And you don't have **** might not have color versions, but the bottom, the forcible sodomy was a change. The burden shift was an issue. The affirmative defense -- those were sort of standout issues that had to be fixed.

The bottom was our concept of what 2012 did. And that was -- and the rest of the slides talk about the 2012 version, and the
differences. Which weren't great, except to make it easier for practitioners. But that slide --

BRIG. GEN. PEDE: That's what we used on the Hill to try and persuade that this needed to be done for practitioners to get after what we were trying to get after.

LT. COL. KENNEBECK: And then the next slides are all just charts describing the different varieties that -- Slide 5 is the 2007 version, and then Slide 6, 7, 8, and 9, are '12 version with its different definitions.

If you look in the back, Slide 8 and Slide 10. The red language, the highlighted language you see in there, reflected slight definition changes. So we got rid of substantial incapacitation.

You can see that from the left to the right, and then we also have knows or should know that the person was asleep, unconscious, otherwise unaware. That was new language that we added in '12.

MS. KEPROS: We don't have color
copies.

LT. COL. KENNEBECK: Yes.

MS. KEPROS: What particular colors?

LT. COL. KENNEBECK: Oh. Hopefully it's a slightly lighter grey. We can get you the color copies.

MS. KEPROS: Okay. Thank you.

LT. COL. KENNEBECK: Yes. It's number 5, you'll see it in color. The point being this is how we explained the statutory changes at the time and how we viewed them and the purpose behind them.

So ---- because I noticed from some of the testimony there's uncertainty about what was the intent, specifically with defenses. Did we intend to get rid of mistaken facts as a defense? The answer is no.

I don't think that the other changes within the statute, the definition of consent -- I think the amendments that were implemented were designed to be similar and hopefully clearer to the field. Not to -- and maybe a slightly
broader.

BRIG. GEN. PEDE: Well, we were trying to expand definitions to create greater opportunity to identify conduct that was very subtle, very nuanced, very potentially coercive. To equip prosecutors to identify it and to encourage victims to report it, and so I see that as a progressive thing too.

It doesn't end in '12, obviously as we see and you see things, we can anticipate a little bit better. Maybe it's the statute, maybe it's through an EO. And maybe -- ma'am, I go back to your point about the language on consent.

If you'd raised that again with me on the JSC, I would have said, okay, let's figure it out. Let's see if we can find a way to see if it's truly having some impact in the courtroom, and I think there's ways to do that. I do.

I'm intrigued that one of your issues is the definition of sexual act and sexual contact too narrow or is it too broad? Our purpose in '07 and '12 was to broaden it and to
anticipate all potential possibilities.

I think we charted carefully -- very deliberately, very carefully, but we didn't anticipate objects that were an extension of the arm, but we thought we would write a statute broad enough to incorporate such a notion.

One appellate court seems to go down that road, so we'll see, but they were certainly written -- it was certainly written with the notion that we might get it wrong because we got it wrong the first time. We might get it wrong the second time.

LT. COL. KENNEBECK: So that's an example of how it's not broad enough.

BRIG. GEN. PEDE: Right.

LT. COL. KENNEBECK: Another example of how it might be too broad is if you put your finger in somebody's mouth with the intent to humiliate --

COL. SCHENCK: Exactly. That's what I was thinking.

LT. COL. KENNEBECK: -- it might be
rape. So it could be both.

BRIG. GEN. PEDE: I responded to that argument more times than I can count. And I said, well, at some point, you're going to have to trust the responsible people in the criminal justice system to do the right thing.

But they said, but it's too over-broad. Well, okay. Rewrite it and give me a version that you think would allow for someone to do that in a bad way without compromising that compatibility to get after that.

LT. COL. KENNEBECK: Would that case even make it to the Panel anyway? I mean, really it's almost an academic debate.

LT. COL. HINES: Sir, just one more question, briefly for the benefit of the Panel.

Colonel Schinasi brought up a couple statements about the Benchbook, and since that's an Army product, I mean, having been a judge and worked with the Benchbook, I just want to clarify it.

The Bench book is not a product of
statute or even an EO. The judiciary puts the
Benchbook together and the Army does that, but
all of us as judges use it.

The way the Benchbook is refined is
when counsel appeal an instruction that a judge
has been given, that goes up. The appellate
court either blesses that or not, and so that's
how the Benchbook is refined, and I didn't know,
Sir or Chris, if you wanted to just explain that
real briefly.

CHAIR JONES: Can I ask a quick
question before that goes on?

LT. COL. HINES: Yes, ma'am.

CHAIR JONES: Because I was wondering
-- or at least I thought, as the judges' sit to
create their Article 120 instructions, and
there's an -- wouldn't they go ---- obviously
they go to the statute, wouldn't they then go to
the EO for the explanations?

LT. COL. HINES: Yes, ma'am. My
understanding is --

CHAIR JONES: I just wanted to make
sure that --

LT. COL. HINES: -- they would --

CHAIR JONES: -- that would be an --

LT. COL. HINES: -- they have the --

CHAIR JONES: -- automatic --

LT. COL. HINES: Right. They would automatically look --

CHAIR JONES: -- input to the

Benchbook.

LT. COL. HINES: -- to the statute. If the statute doesn't speak to it, is there anything the President has given us? And if there's still a vacuum, like there has been since 2012, the judiciary does the best that they can to put --

CHAIR JONES: Got you.

LT. COL. HINES: -- an instruction together with these definitions and explanations.

BRIG. GEN. PEDE: And all the cases.

CHAIR JONES: Oh, yes.

LT. COL. HINES: But then that's --

BRIG. GEN. PEDE: And all the
litigation.

LT. COL. HINES: And that's why they challenge --

COL. SCHENCK: But the Benchbook has the comments with the cases. When I was on the appellate bench, I actually wrote two opinions that had an appendix to my opinion with the Benchbook instruction, so they could just take it.

LT. COL. KENNEBECK: So the military judges in all the Services have input into the Benchbook. They have a little committee that they manage internally, judges only, that review the changes. And then the Services agree. And then the Army pretty much acts as executive agents, so they put this pamphlet together. But it's a Joint Service product that is -- yes, and it's certainly gotten thicker.

I think if we did add explanation to Article 120, it would be able to reduce the Benchbook a little bit, and maybe simplify some instructions. So explanation would be helpful.
I also agree -- although there's an executive order out there, like I said, it has sample specifications, it has the elements of the offenses, it doesn't have much explanation.

BRIG. GEN. PEDE: Right.

LT. COL. KENNEBECK: So there's much work that --

CHAIR JONES: Right.

LT. COL. KENNEBECK: -- much contribution that could be made to the next executive order because at the time that executive order was built, it was difficult to anticipate what the issues might be, what needs further defining. That's what we need time for.

Now we've had some of that time and, as you know, the Joint Service Committee is very responsive to inputs from Panels like this. It's such a great time. What we miss, in my experience and looking -- reading historically, in 1948 -- 1949, we worked with Congress and over half of Congress were former veterans.

In '69 when we built our appellate
court system, a good portion of Congress had
military experience. Then in the early '80s, we
had another iteration. Once again, there's a
decent number of folks who at least had a decent
amount of trust still. Now I don't know that
that exists. We don't have that liaison with
sitting Members that we used to have.

And that seems to be the missing link
a lot of times. We have Joint Service Committee,
we have Panels like this, but we don't
communicate as effectively as I wish we would
with the Hill, from my perspective.

BRIG. GEN. PEDE: And I would offer as
well, the 11 notions that you have, the 11
questions, I would venture to say are not
delineated in the EO for 120 that's sitting on
the President's desk.

LT. COL. KENNEBECK: Except Number 11,
sir.

BRIG. GEN. PEDE: Except for Number 11,
I apologize.

LT. COL. KENNEBECK: Number 11 is in
BRIG. GEN. PEDE: The subtleties of these questions and whether they've reached a gravity level to necessitate a change, have probably not entered ---- I'm confident in saying, are not in the EO.

DEAN ANDERSON: Well, a lot of these are definitional.

LT. COL. KENNEBECK: Yes, ma'am.

DEAN ANDERSON: And you're saying that the EO as it's currently -- the draft that's currently pending doesn't include clarifications of the ambiguity --

LT. COL. KENNEBECK: Not all of these. It's been a while since I've looked at it. There are, I think, three paragraphs in the -- two or three paragraphs in the explanation. So when you see the copy, which you'll see --

DEAN ANDERSON: Yes.

LT. COL. KENNEBECK: -- eventually, you'll see that there's some explanation, but not much.
DEAN ANDERSON: Okay.

LT. COL. KENNEBECK: I don't think any of these issues are addressed.

DEAN ANDERSON: Okay.

CHAIR JONES: Ms. Holtzman?

HON. HOLTZMAN: So are you saying then that even if we don't think there's a statutory change that needs to be made, that raising some of these issues for the Joint Services Committee in terms of getting clarification of these points, would nonetheless be very important?

LT. COL. KENNEBECK: Absolutely.

HON. HOLTZMAN: Do you agree with that, General?

BRIG. GEN. PEDE: Oh, more than important.

HON. HOLTZMAN: Okay.

BRIG. GEN. PEDE: We are all finely attuned to what you're doing, and as I said up front in my comments, this is our legislative history. We don't get this on the Hill.

That's not a disparagement. It's just
we don't get good public policy discussion like
this on these kinds of issues on the Hill. At
least in my limited experience, ma'am. I know
you're far more experienced than I, but this
level of discussion is not happening.

So what you're doing here -- this
report that you've written -- the committee
wrote, is phenomenal. It's a phenomenal -- I
don't agree with all of it, but it's a wonderful
report. Collective effort to craft this report
is wonderful for all of us practicing criminal
law.

So what you write will be immediately
pushed through the JSC, digested by the Judge
Advocates General and OSD and I'm confident, will
move out.

CHAIR JONES: Any other questions?

LT. COL. MCGOVERN: General Pede or
Colonel Kennebeck, with the EO that's pending, my
understanding is it will contain the sample
specifications. Will those specifications help
practitioners with definitions in any way?
As they begin their deliberations this afternoon, can you just explain the preferral charge process and how to standardize people use those draft specifications, how is the EO going to help?

LT. COL. KENNEBECK: Okay. So a specification is how we describe our charge. So we have charges and specifications and the charge is just the number of the offense. So the charge would be Article 120, and the specifications listed under each would be each iteration of the 120 that was committed -- allegedly committed.

And the specification is generally a long sentence in that Soldier X, at certain date, at certain location did do X, Y, and Z in violation of Article 120. That's a sample specification, and it basically covers the elements.

Notice pleading. So the specifications lay out notice to the accused as to what he or she is being charged with, and those specifications won't necessarily help with
definitions. The elements though -- it spells out the elements for each offense.

So each of the version -- the varieties of rape and varieties of sexual assault that exist in Article 120 will have the elements, one, three, four, five, six -- however many elements there are. Those elements will help practitioners understand, okay, this is what I must prove beyond a reasonable doubt, these six things, before I'm guilty of this offense, before I can prove this offense. That will help.

I don't know about definitions because we're going to use the same words. So I suspect you're not going to get much definition help, but understanding of what was meant can be applied when you see it spelled out in the elements sometimes. So I think it would be some help, but not the level of assistance you're looking for here.

LT. COL. MCGOVERN: And we actually were looking through the JPP website and we do have the -- I believe they provided the Federal
Register previously --

LT. COL. KENNEBECK: You probably could ask the Joint Service Committee -- it's a direct question. Is the pending executive order much different from the one in the Federal Register and if it's different, how is it different? And then you'd know.

COL. GREEN: We'll provide that to the subcommittee. We gave it to the Panel at the September meeting, and so the guidance -- which includes the Article 120 information that's been discussed. And it does include a proposed Article 134 offense for indecent conduct. And so the terms of that -- we can get that to the subcommittee.

LT. COL. KENNEBECK: And so just to clean that issue up. So you don't need indecent conduct in Article 134 to charge it. You can charge it in 134 right now, today.

The reason that it is out of the Manual is because in the 2007 prior version -- the original version of Article 120, there was an
indecent acts in 134. When the 2007 omnibus sex
assault statute came to be, it was sucked into
120. So indecent conduct was pulled into 120 to
try and put all the sex offenses together in one
place.

When the 2012 version came out, it
didn't fit neatly in any of the categories. It
didn't fit as an adult offense or a child offense
or an other. So it was left out with the intent
of adding it back to 134.

And so all along we could have charged
---- regardless of its absence, we still can
charge it today. It's just cleaner for the
practitioner to have it in 134 so that we all
agree what the precise elements are, what the
precise definition is, and what the max
punishment is.

If you don't have that established,
then you have to write it in a way that makes
sense to the accused and makes it through the
judge's scrutiny and then you have to argue about
what the maximum punishment is. If it's in 134
and in the book, then we all know what the
offense is and what the max punishment is.

CHAIR JONES: I want to thank you both
very much. It's been really very, very helpful,
and we appreciate it.

BRIG. GEN. PEDE: Our pleasure. Thank
you very much for having us.

CHAIR JONES: All right. We'll break
for lunch now.

Whereupon, the above-entitled matter
got off the record at 12:12 p.m. and resumed at
1:06

CHAIR JONES: Okay. First I wanted to
thank you so much, Professor, for sending in what
I found to be an incredibly helpful -- can you
hear me?

DR. SCHULHOFER: Yes, I can. Can you
hear me?

CHAIR JONES: Yes.

DR. SCHULHOFER: Great.

CHAIR JONES: Now I'm thanking you for
having sent in an incredibly helpful memo to us
all laying out the 11 issues and giving us an
analysis, and my thoughts for these deliberations
this afternoon were to sort of take these issues
in order and just see what people's general
thoughts were about them.

We had a very terrific presentation
this morning where we were, at least I learned,
and I think I understand it now, you know, what
you can do through the executive order process
versus trying to have Congress amend a statute.

Hello?

DR. SCHULHOFER: Hello.

CHAIR JONES: Yes, okay.

In any event, so -- so that was very
helpful, and I think that that transcript will be
helpful for you.

Let me start --

DR. SCHULHOFER: I discussed this with
Colonel Hines, and I --

CHAIR JONES: Oh, shoot. You know,
now we have you coming in and out, and I -- Dale
is here shaking his head. Are you on a cell
phone, Professor?

DR. SCHULHOFER: No, this is a land line.

CHAIR JONES: Okay, we'll call back. If you can't hear us, you'll let us know, and when you're speaking, if we can't hear you, I'll try to let you know, and we'll play it by ear.

DR. SCHULHOFER: It seems like this may be a criterion --

CHAIR JONES: Yeah. You know, Professor, Professor, I can hear the first few words typically when you begin to speak, and then after that, it's intermittent, and we can't hear you.

We'll keep trying.

DR. SCHULHOFER: You can't hear me --

CHAIR JONES: No, I am -- now, it's impossible to -- we can -- we know you're speaking, but we can't make out any of the words.

It's a bad transmission.

DR. SCHULHOFER: Okay, I'll just listen.
CHAIR JONES: Okay. I think you just said you'll just listen.

DR. SCHULHOFER: Yes.

CHAIR JONES: Okay.

LT. COL. HINES: Professor Schulhofer, this is Lieutenant Colonel Hines. Can you hear me?

DR. SCHULHOFER: Yes.

LT. COL. HINES: It may have something to do, if you -- do you have your cell phone on speaker?

CHAIR JONES: It's a land line he said.

LT. COL. HINES: Oh, okay. You're on a land --

DR. SCHULHOFER: Can we try it on speaker?

LT. COL. HINES: Right, well whenever you're on, if you could try to --

DR. SCHULHOFER: Is this better?

LT. COL. HINES: Okay, I am sorry, go ahead?
DR. SCHULHOFER: Is this better?

CHAIR JONES: Yes.

LT. COL. HINES: Yes.

It's probably inconvenient for you, sir, but we can hear much clearer however you have it. If the phone is up to your ear right now, it's much clearer.

DR. SCHULHOFER: Yes. Is that Colonel Hines?

LT. COL. HINES: Yes sir.

DR. SCHULHOFER: Okay, do you understand what I was trying to say that I'm afraid the system is going to be --

LT. COL. HINES: Professor, you're breaking up again, so here is what I would suggest. I guess it's a problem, a transmission problem maybe on this end.

If I give you my cell phone number, could you -- could you text, or do you want to just send me emails when you want something reflected on the record?

DR. SCHULHOFER: Yes, I'll email you.
LT. COL. HINES: Okay.

HON. HOLTZMAN: Well, I have a cell phone that's got speaker on it, if you wanted -- if you wanted to try that.

LT. COL. HINES: Well, Ms. Holtzman said she has a cell phone with a speaker on it.

HON. HOLTZMAN: Why don't you call into that, see how that works?

LT. COL. HINES: All right, and what --

HON. HOLTZMAN: (Number redacted.)

LT. COL. HINES: Okay, Professor, we're going to try this backup. If you will hang up and call back Ms. Holtzman's cell phone.

DR. SCHULHOFER: Yes.

LT. COL. HINES: And she's going to put it on speaker, and I'm going to read you the number. Are you ready?

DR. SCHULHOFER: Yes.

LT. COL. HINES: (Number redacted.)

HON. HOLTZMAN: Professor?

DR. SCHULHOFER: Yes.
HON. HOLTZMAN: All right. It's not loud enough. Maybe if we put it on the microphone right here.

Professor, talk please.

DR. SCHULHOFER: Is this better?

HON. HOLTZMAN: We need to get you -- yeah, it's on our side.

DR. SCHULHOFER: If I could just talk --

HON. HOLTZMAN: Perfect, perfect.

DR. SCHULHOFER: -- can you hear me?

HON. HOLTZMAN: Yes, now we're okay, and when mine runs sort of out of battery, we'll put someone else's phone up.

DR. SCHULHOFER: Okay. Well I was just saying that I really think this -- despite good intentions, I think this approach may wind up being more disruptive than helpful, and I will just listen, and if I'm moved to jump in, I will send an email, but I really don't want the entire afternoon to be disrupted with this.

HON. HOLTZMAN: Professor, we've
solved the problem. Professor, we've solved the

problem.

CHAIR JONES: You're coming in --
you're coming in loud and clear, so this is
great.

DR. SCHULHOFER: Great, terrific.

CHAIR JONES: All right. I'm not
going to thank you again, though, but thank you.
It was a wonderful memo, and I intend to use it
to order our deliberations.

I guess, if I didn't say this already,
we start these deliberations without any
preconceived notions that we intend to offer
changes, whether statutory or explanations, to
the -- for an executive order.

We're -- we really want to do an
analysis from scratch, if you want to call it
that, with respect to each of these 11 issues,
and see on the -- on the merits, what we want to
do, if anything.

And I think if we reach some sort of
consensus that we might want to do something on
one or more of these, then I -- several Members
of the Subcommittee have suggested to me that I
ask two or three of the Panel of Members of the
Subcommittee to actually work together and come
up with a proposal after these deliberations for
circulation to the full Subcommittee and for
further deliberations, but let's see how far we
get.

I don't have any particular design in
mind for how we do these, so I'm -- other than to
go in order, the order that the issues have been
presented to us in, and then ask for your -- your
basic general comments.

I will say this: Ms. Kepros has
submitted her -- her version of what she believes
would be a terrific substitute for the current
120, and I've spoken with Ms. Kepros, and she has
graciously agreed that we are going to table that
until we've had a chance to talk about the 11
issues that we have in front of us, so I thank
you for that courtesy, Ms. Kepros.

I am going to ask General Schwenk
because I happen to know he has some strong views on this to kick off the discussion, and why don't we go from there? General?

BRIG. GEN. SCHWENK: Okay. I'm not -- well, I guess my strongest view is that I would like to put myself on the side of no change at the moment, so Chuck Pede didn't want to be the no-change person, so I'll be the no-change person, and put the burden on everybody who believes change to one of the 11 needs to be made in the near-term to justify what's broken -- if it ain't broke, don't fix it, justify what's broken -- and if it's not broken but there is some other reason why it needs to be changed, then whatever that is, and then propose the change, which we may do through working groups or whatever.

And then evaluate that other saying besides "If it ain't broke, don't fix it," is "Beware of the unintended consequences," and so we want to make sure that we give ourselves plenty of time with whatever we think is a great
idea to do what Judge Jones said earlier and get it out for comment and find out whether it was such a great idea or not.

As far as this afternoon goes, some other ideas I had is it would be interesting to know at some point, and maybe after we all get, you know, five minutes each to go around the table, whether there is anyone on 1 through 11, we could just go down quickly, that nobody thinks ought to be changed, so we have a quick kill right away, that, you know, everybody agrees no change is needed to number whatever, then we could eliminate those.

And then we could have a discussion of of the remaining ones, which ones are complicated? Like obviously, 1 is complicated, you know? Some of the others don't seem to be as complicated. Those could be quick fixes, and maybe we could sort of get an idea of one or two, just, you know, language today, and then the working group people could be left with the ones that are more difficult, and it needs to be
thought and battled out.

So the reason that I am an if-it-
ain't-broke-don't-fix-it person is I didn't hear
any compelling reason from anybody that this
statute is in such need of repair, imminent
repair, that we are -- justice is at risk in the
short term.

I did hear there is a lot of
confusion. I did hear that it would be a lot
better if things were clarified, and those are
good reasons, but I -- and I think those are
reasons that you can wait a while, you don't have
to jump.

On the other hand, I am happy to be in
a working group and work out language of
proposals, but I'm sort of in the if it ain't
broke, we don't need to fix it camp at the
moment. Thank you.

CHAIR JONES: Can I just ask if any
other Panel member would -- or Subcommittee
member would like to discuss that particular
issue, like let's not change anything, or is it
the general consensus that we should at least 
explore each of these and see whether or not we 
want to make changes?

I am seeing nod -- yes, Ms. Kepros?

MS. KEPROS: I just think we should go 
through issue-by-issue since that's what the JPP 
asked us to do. I think we owe them a response, 
even if it's fairly cursory.

CHAIR JONES: Right, okay. Well I 
think that makes perfect sense, and I like the 
way you've thought it through, General, because 
we might have some that -- we certainly have some 
that are easier than others. Whether we'll get 
to a quick kill, I don't know, but we'll see.

All right. Glen has provided us with 
11 issues as well, and the first one is whether 
the current definition of consent should be 
modified. Is it unclear or ambiguous? And that 
-- I am happy to open up the floor to anyone who 
would like to discuss that.

Yes, Dean Anderson?

DEAN ANDERSON: Okay.
We're all trying to still use these.

CHAIR JONES: I think that's probably still --

DEAN ANDERSON: Okay.

CHAIR JONES: -- a good idea.

DEAN ANDERSON: Yeah.

CHAIR JONES: Professor Schulhofer, you're there, and you hear us?

DR. SCHULHOFER: Yes, I can.

CHAIR JONES: Great.

DEAN ANDERSON: Okay.

So I think that I would have written the definition of consent differently. However, that's not what's at issue.

And the question posed I think is posed correctly by General Schwenk, and that is the presumption should be against changes unless it's clear that the change is necessary. That's just sort of the burden should be on the status quo.

I like Stephen Schulhofer's definition better, but I am not sure, I am not yet
convinced, that we have enough evidence that
there is a problem around how consent is defined
that it's sufficiently ambiguous or has a lack of
clarity.

Nor am I convinced, although I
completely agree with the argument that
Congresswoman Holtzman puts forward, that there
is a problem potentially with the residual
reference to resistance. It's not clear that in
the field, that -- we haven't been presented with
evidence, it seems to me, that in the field, that
that leads to problems, and I'd certainly be open
to hearing that evidence.

So I do agree with the revisions. I
think they're -- they're clearer than the status
quo, but I am not sure that the revisions rise to
the level of unnecessary change.

CHAIR JONES: Ms. Holtzman?

HON. HOLTZMAN: Yes, I -- I am not
sure that I understand exactly how Professor
Schulhofer wants to revise the statute.

I -- I should begin by saying that I
am not sure that I agree with the formulation of how we should proceed. I don't know that there is a burden one way or another on us that we have to overcome in terms of making a suggested change. I think that if you heard the comments of the General and his associate, the suggestions, even if they are not statutory, could be very important in terms of clarifying language in an executive order.

So if we start out saying we -- the burden has to be to show that there needs to be a statutory change, I think that that is a misconception, and I would not agree with that approach at all.

I think we should look and see, at the statute, whether the -- whether the concerns are legitimate. I think the question you asked is appropriate. Do we know that this makes any difference in the real world? I am not sure that we do.

And then the question is what do we do about it? My own approach would be basically to
recognize that if there is an issue here, it could be an abstract issue, or we could have evidence that there is a problem, as the General pointed out himself with regard to the issue of defenses, I think we should raise it. If we think it's a legitimate concern, we should say it's a legitimate concern.

And then the question is based I guess on further discussion whether this needs correction in any way, or whether it needs correction through an executive order, through some explanation, or through a statute.

But I think to start off and say we can't do a -- if this doesn't require statutory change, then we don't want to do anything, that's not what I heard the General saying, but maybe I misunderstood what the General was saying. My understanding was that --

CHAIR JONES: Well I agree that we don't -- we should not just say well, we can't do a statutory change, therefore we're not going to do anything. No, I agree completely with what
you just said. Actually, I didn't understand
that to be what General Schwenk said, but I may
not have heard --

HON. HOLTZMAN: If I misunderstood --
CHAIR JONES: -- him --
HON. HOLTZMAN: -- you General, I
apologize.

BRIG. GEN. SCHWENK: That's fine.
HON. HOLTZMAN: Did I?
BRIG. GEN. SCHWENK: We'll have plenty
of discussion time.
HON. HOLTZMAN: Did I misunderstand
you?
CHAIR JONES: But the bottom line is
that's not going to be our burden. I couldn't
agree with you more.
HON. HOLTZMAN: Okay. So I'd like to
address the definition of consent issue, if
that's okay, because I do think that there is a
-- and I don't know if ambiguity is the right
word, but the language in the statute pulls in
two directions.
On the one hand, it wants to say -- in the definition of consent, I like the term "freely given." I don't like the change, suggested change to "voluntary."

But, you know, it does suggest in the last paragraph that -- where it says all the surrounding circumstances are to be considered in determining whether a person gave consent, I would put a period there because I think if you say or whether a person did not resist or ceased to resist only because of another person's actions does suggest to me that some kind of resistance may be required, and it raises that as a point, and I don't -- to me, it's -- it's just mischievous.

If it -- that's all. I don't know if it's actually harmful, but I would say that -- that if that language could be deleted, I don't know what kind of problem that would create. I think that would be better. There may be another point in the statute, 120, where also, and I think you pointed that out Professor, but I can't
remember now where it is, where the issue of
resistance is raised, and again -- yeah, for
example, (b), in the definition of force, (b),
5(b), and that may raise the same issue.
And so I -- my own preference somehow
would be to address the fact that resistance is --
-- is raising its ugly head in this statute, and
what we -- you know, I am not -- I am not sure
that we need a statute or an executive order, but
to address that to -- to point that problem out
and to suggest that that be addressed.

CHAIR JONES: Yes. Maggie?

MAJ. GEN. WOODWARD: Yes, Professor,
I just have a question.
I agree that I like your input for
redoing the definition of consent, and in my
opinion, I think we've heard a lot of testimony
that shows that it has been a problem for the
practitioners that it's not clearly defined, so I
do think the sense I get from hearing everybody
and also the folks that support the modification,
the number of them that do, that says that we
should look at that, modifying it.

And I like the Professor's suggested one, but except for the very opening half of the first paragraph, or first sentence, where you say "For any offence require proof of penetration."

I don't understand why that phrase should be in there, and I would strike it, but I just wanted to ask Professor, you know, why you have it in there I guess so that I understand.

DR. SCHULHOFER: I think -- can you hear me?

CHAIR JONES: Yes.

DR. SCHULHOFER: The only reason I put that in was because I remain undecided myself about whether affirmative consent is appropriate with respect to contact, and that depends in part on how broadly the definition of sexual contact is couched.

So if it's a kiss on the cheek, then we run into this problem of whether it makes sense to require affirmative permission before you can give someone a peck on the cheek.
I just intended that to reserve
judgment on that issue, not to say that it would
be required the other way, but just to -- just in
my personal opinion, I'm undecided about it.

MAJ. GEN. WOODWARD: I guess I would
ask the question that if you --

CHAIR JONES: He can't hear you.

DR. SCHULHOFER: -- to what

Representative Holtzman said, I think she's
suggesting that we not focus on whether -- that
we focus only on whether there's a problem and
not whether it should be fixed in the statute or
executive order or some other way, and so we get
to the end of the road thinking about whether
there is a problem, and I agree with that. I
think that is very helpful.

I just wanted to add as a footnote
that I believe that -- I am not an expert on this
-- but I believe that if there are to be any
changes by executive order, I think they can go
only in one direction. I think they can only be
ones that make the statute narrower in favor of
the consent.

So for example, if the statute implies that the victim is required, but you have the President say by executive order that it isn't, I think there is issue with whether that can now be precluded by executive order. I don't have the answer to that, but my guess from a civilian context would be that it's provided by the statute.

So if the statute does imply, then it may be that a change, if clarification is needed, it may have to come from the statute.

CHAIR JONES: Well, just generally, from the presentation we had this morning, Professor, the executive order, the President in the Punitive Articles, and it would go to 120, the President is allowed to explain the elements, basically, and so that's the kind of -- now, I'd have to go to very specific language.

You can't change the clear meaning of the statutes, but you can explain the elements if you're the President, and I'm sure that there
will be times when people will debate whether
that commentary is an explanation or -- or it
violates the rule that he can't change the clear
meaning of the statute.

            But which particular provision are you
talking about that you think might narrow
something here? I couldn't hear you.

        DR. SCHULHOFER: I am sorry, can you
repeat that?

    CHAIR JONES: Yes.

        DR. SCHULHOFER: Hello?

    CHAIR JONES: Yes, can you hear me?

        DR. SCHULHOFER: Yes.

            I was thinking of Representative
Holtzman's comment that the statute leaves some
inference that resistance might be required, and
that that -- that's something that she feels the
implication should be resisted and rejected.

            That would be an example of one where
if it's true that the statute doesn't require --
I am sorry -- if it's true that the statute does
allow lack of resistance as to consent, I have a
question whether that can be stated during the executive order.

CHAIR JONES: Well, if we were -- Professor, if there was a consensus that that language is confusing or is causing more trouble than it's worth in terms of making it look as though resistance is required, we might decide to go with the proposal of -- of Ms. Holtzman and just delete that language.

I think you're right that that could not be -- that wouldn't be the explanatory writings by the President in, you know, the Punitive Articles section of the UCMJ.

What it would have to be, and this is just me, my opinion, is that would probably have to be a statutory fix.

But -- but we -- on the merits, we haven't really discussed whether we -- whether we would think that that language there, which is, just to be specific, the last clause in Section 8(c), under Consent, which reads "or whether a person did not resist or ceased to resist only
because of another person's actions," we really haven't discussed among the whole Subcommittee yet whether or not we think that is a problem, is a sufficient problem, or what have you.

But I take your point. I think on this, my opinion would be it probably has to be a statutory fix.

Lisa?

MS. FRIEL: Yes.

CHAIR JONES: Here, sorry.

MS. FRIEL: Okay. It's Lisa Friel, Professor.

I think -- I have a couple thoughts. One is that if we were to go to some form of affirmative consent, that that would have to be statutory. That's a major difference in the way this is written.

I am not convinced even, and I was a sex crimes prosecutor for years, that that is the right thing to do in the military justice system. It's one thing to do it on a college campus where the worst that can happen to you is get expelled.
It's another thing when the worst that can happen to you is imprisonment for a significant period of time.

So I am not even convinced of that, but if you go that way, I think it has to be statutory, so given a lot of things we've talked about, I am more leaning towards what can we do to make the -- the definition that we have here clearer by executive order?

And I -- and my thoughts on that are, one is, perhaps we need by executive order to say what we mean by competent person. We heard that one judge opened a dictionary to look at that, but others apparently are having an issue with what exactly am I supposed to tell somebody is a competent person? I would think that's something we could, for lack of better lingo, get away with in an executive order.

I also think it's interesting, this line that -- that Representative Holtzman is bothered by. I think the problem with the line is just the order it's written in, and tell me if
I'm wrong.

If you were to flip and take the end of the line and put it at the beginning and say, and we -- you can't do that by statute, but you could explain it in executive order -- if it said "There is no" -- it's something like this, but "There is no consent just because of a lack of verbal or physical resistance," and the rest of the line, I don't think there would be any confusion what they are trying to say there.

I actually think what they were trying to do was get rid of this idea that you have to resist, and that is why they used the words "resistance." Take the whole middle of the line out and just do the "lack of verbal or physical resistance does not constitute consent." I think that would be clear, it's just that they add those other things in the middle that -- and by the time you get to "does not constitute consent," you're wondering what they are saying.

Because I did not have a problem -- I did not see that that implied that you had to
resist at all. Now clearly --

HON. HOLTZMAN: (c), I am talking about (c), not (a).

MS. FRIEL: Oh, I am sorry, I thought you were talking about --

HON. HOLTZMAN: No --

MS. FRIEL: -- (a).

HON. HOLTZMAN: -- (c) and then 5(b) are the two issues that trouble me, 8(c) and 5(b). But (c) particularly.

MS. FRIEL: 8(A) you were fine with?

HON. HOLTZMAN: I don't know about fine, but --

(Laughter.)

DR. SCHULHOFER: I do think 8(A) is a problem too because it says "lack of verbal or physical resistance resulting from the use of force does not constitute consent," but that implies a lack of verbal or physical resistance not resulting from the use of --

HON. HOLTZMAN: But the --

DR. SCHULHOFER: -- constitute
consent.

HON. HOLTZMAN: Right. I agree with that. Okay. I stand corrected about that, I am sorry.

I have a problem with (a) then, too. So 8(A) and 8(c) raise -- so, I'm sorry, you were making a point, I don't mean to --

MS. FRIEL: No no no no, that's okay, I was mistaken about the point that you made.

COL. SCHINASI: If we look at what did the drafter of 8(c) intend, it could simply be that in 8(c), the drafter intended that circumstantial evidence is usable to prove consent or a lack of consent materially, meaning anything else.

Because if you compare that with paragraph 8(A), 8(A) talks about a lack of physical resistance. And so the only thing that (c) would add is that this is --

DEAN ANDERSON: So I think I have --

CHAIR JONES: Professor? Yes, that's right, we have a couple.
DEAN ANDERSON: Yeah. So I think I might have -- you know, I tend to be someone who is reticent to try to open up the statute again. On the other hand, I think there are two simple fixes that it's possible that we all agree on, or at least a majority of us might agree on, and that would be two deletions of clauses that are -- I like this idea that they are potentially mischievous.

And that is in 8(A), the clause that says "or submission resulting from the use of force or threat of force or placing a person in fear," so that the sentence would simply say what everyone agrees, which is lack of verbal or physical resistance does not constitute consent.

That is a way of mentioning the consent, but not going into some implication that it has to be -- that it's required unless it's by force -- you know, right?

So that's -- that's one simple deletion. And then the simple deletion in (c), which I think gets to what you just suggested, is
to delete the "or whether a person did -- did not
resist or ceased to resist only because of
another person's actions," so then it simply just
says "lack of consent may be inferred. All the
surrounding circumstances are to be considered on
the question of consent," so it does the least --
the least number of moves in the statute to solve
the problem of the question -- the residual
question of resistance and its effect and
implication on questions of consent.

COL. SCHINASI: If we say we're going
to delete something from the statute, then we
can't do that by executive order.

DEAN ANDERSON: That's right, that's
right, that's right.

COL. SCHINASI: Okay.

DEAN ANDERSON: No, this would be --

COL. SCHINASI: But the question is --

DEAN ANDERSON: -- a proposal for --

COL. SCHINASI: -- the question is
could you, by executive order, explain 8(A) and

8(c)?
DEAN ANDERSON: Well, I thought that in what we're doing, just procedurally, this may help, is that we're not at this juncture in the dialogue asking how we do it, but we're asking what we think would be the -- the -- my preference would be minimal fixes, but what are the minimal fixes that we could do? And then we're going to decide how we would want to do it. Maybe that's academic.

COL. SCHINASI: Well no, it isn't. It's very practical -- the reason why this is important is because once we start playing with the statute, then the whole statute becomes open, you know, to be redrafted, as opposed to saying, okay, this is a problem that has developed, and the interpretation that the President would give it in the executive order would clear that up. That is why the whole conversation about executive order versus the statute.

Now, we may get to the point where we say this cannot be fixed by executive order or by the judges, this has to be changed in the
statute, in which case we might as well change
everything.

CHAIR JONES: All right. We have two
suggestions with respect to the section on
consent, one in 8(A), which is the removal of
everything other than to say "Lack of verbal or
physical resistance does not constitute consent,"
the other in 8(c), which would be to get rid of
the last clause, which would mean that it would
simply read "All the surrounding circumstances
are to be considered in determining whether a
person gave consent."

We are nowhere near the end, or even
the middle, of our deliberations, but I'd like to
just get a sense from everyone, and let's not
worry at the moment, and I take your point,
Colonel Schinasi, about -- and we all understand
the vehicle here is very important, but how many
are generally in favor of those two changes with
respect to Section 8 on consent?

And I say "changes," but it could be
an explanation.
HON. HOLTZMAN: Can I just add one little thing?

CHAIR JONES: Of course, of course, Liz.

HON. HOLTZMAN: Professor Schulhofer made a very I think useful suggestion in his revision of (c), which I don't think needs to be in a statute, but I would suggest if we make any change that we urge that there be an explanation of what we've done here so that it's clear in (c) that when we say all the surrounding circumstances, he has these words "including both words and conduct." I don't know that you need that in the statute, but it would be nice to have that kind of an explanation accompanying it so that people understand what that means given how much confusion there is.

MAJ. GEN. WOODWARD: So they don't do what they did --

HON. HOLTZMAN: Yeah.

MAJ. GEN. WOODWARD: -- and automatically say because you took it out that
you -- that you --

HON. HOLTZMAN: Yeah, right.

MAJ. GEN. WOODWARD: -- you infer why we took it out --

HON. HOLTZMAN: Correct. That would be -- Professor Schulhofer, you missed this part of the conversation, but there was a lot of concern --

DR. SCHULHOFER: I think I heard you, and I did -- I put that in because sometimes people say oh, you required a contract with a -- a notarized signature and everything, or it has to be words, and that's not realistic, so I just put that in to emphasize that this is not saying that it has to be "Yes, I do" in any formalized sense.

CHAIR JONES: So I -- yes, go on.

LT. COL. HINES: If I may just clarify something for the record?

CHAIR JONES: Yes.

LT. COL. HINES: You went around the room and asked --
CHAIR JONES: Yes, and the record doesn't show --

LT. COL. HINES: -- was that 9? I know Brigadier General Schwenk, sir, I don't think you had your hand up, but everyone else said yes to that on 8(A) and 8(C)?

CHAIR JONES: I think.

LT. COL. HINES: I realize you can change your minds, but --

CHAIR JONES: So this is just to get a sense of --

LT. COL. HINES: Right.

CHAIR JONES: -- where we're at, just to get the ball rolling.

LT. COL. HINES: And what about Professor Schulhofer? Did you have an opinion on that one way or the other?

DR. SCHULHOFER: I agree with that proposal, thank you.

LT. COL. HINES: Okay, thank you.

CHAIR JONES: Thank you, Glen.

Yes, Ms. Kepros?
MS. KEPROS: I do not know the most useful way to have this conversation. I do support that suggested change, but I have sort of a broader view of what we should be doing with consent, and frankly, it touches multiple issues here. Certainly, it touches issue 1, 2, 3, I mean, lots of them.

And I guess there is the change to consent that I would be advocating for that affects the entire structure of this statute, and that's sort of what my proposal starts getting to, and I don't care about going into the weeds on that at all, but I just kind of wanted to lay my broader concerns out if this is the right time to do that.

CHAIR JONES: Go ahead.

MS. KEPROS: Okay.

So one of the concerns that I have, I share with the Professor's written comments here, and that is it has to do with the role of mens rea in these crimes, which are really among the most serious crimes that somebody could be
accused of, even in the military context.

And I think that understanding what we
are requiring of an accused, what that mental
culpability is, needs to be very, very clear.
And one of the confusions that I have in
wrangling with this entire Article 120 is that,
you know, there's different perspectives taken at
different points in this statute.

Sometimes, you're looking at
definitions of consent that are sort of
subjective to the alleged victim's point of view.
Sometimes there, you know, are questions around
whether or not the accused would have some sort
of affirmative defense, or as Professor pointed
out in his notes on issue 2, whether there should
be instances where it's a failure of proof issue.

And what I think would be so much more
workable, and I'm going to give you my
justification for it, General, is a scheme that
is really organized around consent, and that the
basic crime is there is no consent, and that we
attempt to capture within the definition of
consent inability to consent, what is or isn't consent, that that is where I think intuitively any member is going to be wanting to go in their own decision-making anyway, and despite the I think completely good intentions of the 2007 drafters, that is like the elephant in the room with these -- with these definitions, with these crimes.

If you make the crime about the absence or presence of consent and the defendant's perception of that, that is I think very cognizable to laypeople, and I really agree with the comments that were made this morning about, you know, numbers aren't lawyers, and they are not sitting there sitting on the case law, and they are not reading the judge's benchbook, and frankly, there are lawyers and judges coming in and out of the military justice system, varying levels of experience and varying levels of, you know, practice, even though we are evidently seeing a pretty sharp learning curve in terms of mastering the sex assault laws because
of the increased reporting.

I don't think that necessarily quiets my concerns that this is just not easily comprehensible to a layperson. I thought there was a really good point made in the read-ahead materials for today under tab 6 from Major Payne, and she points out that, you know, when Members are being instructed on these statutes or the elements of these offenses, they are not looking at the whole statute even, so they don't get to say oh, well there is this whole other provision that speaks to this piece of it, and so they might not be getting things fully in context, and that could make things like defining competent very agonizing for them because they don't know if there is some other provision that makes that seem to mean something else.

And so I think there is a case to be made, and I am trying to make it, for making a fairly dramatic change, not to what behavior is covered so much as in how clearly those behaviors that are prohibited are described and
communicated, and in my draft, you will see if you look at it, I have eliminated all the different subsections under (b) and basically drawn them into the definition of consent and said hey, if you're impaired, you're not -- you cannot consent.

If you have, you know, this kind of problem, if you're intoxicated, whatever that is, you can't be consenting to these things, and sort of trying to tackle everything through the lens of consent and then limit under the offense of rape those special aggravating circumstances that may warrant even more enhanced penalty. Just not consent is certainly a serious crime, but if there is also the addition of physical force, if there is also, you know, these additional aggravating factors, then that would elevate it to the even more serious sanctions.

So I, you know, I don't know how to make that just an answer to one, even though I just said I think we should take these issue by issue, but that is a broader change that I think
we should consider, and obviously, I think we
should do.

CHAIR JONES: I have one reaction to
a part of what you just said, which is that I
think if we looked at the instructions actually
given by the military judge, we would see that
consent is probably in every single one of them,
so it's not something that would be ignored
because no good defense counsel would let it go
through without a consent.

And I would like to see more -- more
of the -- more data. I hesitate to call it that,
but I don't get the sense that -- that -- I don't
think Panels -- I haven't -- I don't -- I am not
really sure, let me put it that way, that Panels
are having any trouble in terms of knowing that
there has to be -- that consent is a defense, and
that if there is no consent, there is a crime.
But I could be wrong. I am just not sure it's a
problem.

And honestly, the amount of change
that your proposal would cause I think would be
seismic, which is not to say it is wrong, but
I've heard enough from people that what's
happened in between pre-2007 to 2007 to now 2012,
that I am just very -- I feel very cautious about
us even -- well, one, about whether it's wise to
do it, but beyond that, whether we -- we know
enough at this point even to take that -- that
belief.

And I actually am not pushing your
proposal aside or away. I would -- I was sort of
hoping to get through these, and then, with all
of this discussion behind us, take a look at it
and see what -- what, you know, either use we
could make of it, or whether it is a viable
approach, but it's -- it would be a new statute.

Fair enough?

MS. KEPROS: Yes, I am not taking --

CHAIR JONES: I know.

MS. KEPROS: -- any sort of comment.

I am not sure if my own feelings will change as
this process evolves. I am really benefitting
from comments from --
CHAIR JONES: Yeah, exactly.

MS. KEPROS: -- you all.

But I guess in terms of is there a problem here, I just started to picture what it would be like to serve as a member, and yeah, you have definitions of consent, but you only get to them because you have a definition of bodily harm. You need to understand what bodily harm is, and then you've got to -- like, there's three layers you have to go through to get to what I think is a very intuitive position as a member of society that we think sex assault is non-consensual, you know, contact that is unwanted, that is, you know, harmful in that sense.

So it's -- it's sort of that mismatch in my brain between this really complicated language and an idea that I think has some intuitive appeal to most of us.

CHAIR JONES: I would rather hear about the statute as a member of the Panel based on the way you just, you know, articulated it, but we do have this statute.
Colonel Schinasi?

COL. SCHINASI: The statute itself is
not written from a -- the statute is not written
for the accused or for the victim. The statute
is written for lawyers and judges.

I continue to believe that our record
is incomplete if -- if we're talking about what
the judge's benchbook may say is an instruction
with respect to Article 120, we should have
Article 120 as part of the judge's benchbook with
respect to Article 120 as part of the material
that we consider.

We should also have those portions of
the Manual for Courts-Martial which discuss
Article 120. Right now, we are making
assumptions based on the quality of information
available that we shouldn't be making.

HON. HOLTZMAN: I think we got those
originally, didn't we, in the prep for the first
meeting?

COL. SCHINASI: But the --

HON. HOLTZMAN: In the much thicker
CHAIR JONES: I'd like to see some actual charges given by judges. I think that would be very helpful. Not just, you know, the benchbook.

COL. SCHINASI: We should be discussing that now --

CHAIR JONES: Aren't there --

COL. SCHINASI: -- let's look at the instructions, see what it says, see if it is sufficient.

CHAIR JONES: All right. Yes --

MAJ. GEN. WOODWARD: I was just going to say --

CHAIR JONES: -- General Woodward.

MAJ. GEN. WOODWARD: -- I like the logic of the way this -- I mean, to me, it's not a sea change, it's much more logically laid out, but I am not sure I understand when you talk about it gets to 2, 3, and some of the other ones, because I think it lays it out more logically, but I am not sure that it helps define
mistake of fact or lay out the defense thing for
defining what's incapable of consent any better
than what we have now.

CHAIR JONES: Yeah, Ms. Kepros?

MS. KEPROS: So the reason it gets to
those other issues is that I kind of made the
definition of consent and what is and is not
consent into more of a subjective victim's point
of view, but I have inserted a "knowingly, mens
rea" to the crimes, as in the accused has to be
aware of that non-consent.

And by doing so, I have created
knowledge of non-consent as an element of the
crime. If that is an element of the crime, there
need not be an affirmative defense of non-
consent, and there need not be an affirmative
defense of mistake of fact as to non-consent,
because it is literally part of the proof, and so
I know that's a super-legalese answer, but that
is the technical reason.

CHAIR JONES: No, that's not -- I
understand what you're saying, but I think the
whole history here has been that -- and maybe
they are confused now -- but that mistake of fact
has always been a defense, and that's a -- that's
number 2 on our list here in terms of trying to
figure out what, you know, if any fixes we want.

It sounded to me like the military has
been using mistake of fact and it understands it,
at least now, as a practical matter, the lawyers
know it, that is how they are using it as a
defense, and this confusion over this, you know,
we all know about it because those two -- two
defenses were deleted even though, if you read
the whole thing, it says all defenses in 916, I
think it is, are still applicable.

It's just, you know, it may be
something we want to try to remedy. I think that
with the kind of history and the practice that
has gone on, I wouldn't -- I wouldn't want to --
I wouldn't change the statute in that manner.

Yeah, Ms. Kepros.

MS. KEPROS: I was actually really
grateful in the written comments we got from
Professor Schulhofer that he mentioned the Elonis case that came out in July, or excuse me, June 1st, where we got the U.S. Supreme Court saying quite strongly mens rea is very important, we really don't intend there to be strict liability crimes and criminal prosecution, and that was --

CHAIR JONES: That was your impetus.

MS. KEPROS: Yeah, that really jumped off the page at me the first time I read this statute, and I was unfamiliar with the military practice of having this affirmative defense, but I do think that is another -- requirements on these issues to be raised by affirmative defense significantly complicates instructional issues, it relies on the specification of defense counsel to identify and raise the issues, I mean, all of these things just make it harder for the Members to understand what questions they are being required to answer, and I think all of that provides opportunities for injustice.

And, I mean, it is sort of an ironic argument for me to make as the defense attorney
on this committee, but I think the more confusing these statutes are, the less finality there is in verdicts because it does create confusion, it does create possibilities for differences among judicial officers in appeals and reversals on appeal, and, you know, we've looked at several -- acquittals -- we've looked at several published appellate decisions in our read-ahead materials over these last few meetings, and certainly, you can't say that this is a settled area or that it is so clearly drafted that there are not questions arising.

CHAIR JONES: No no, I don't think -- we are certainly not saying that. Excuse me, Liz. Yes, Ms. Friel?

MS. FRIEL: I just had a quick question.

So in -- in -- we say here in Article 120 you have all the defenses available to you in 916, a mistake of fact is in 916. Is consent in 916?

LT. COL. HINES: It is not, Ms. Friel.
Rule 916, it mentions the statement of fact, it mentions a couple of other substantive defenses, but it is not an all-inclusive list, and everyone who practices knows that, so consent is not in there.

Mistake of fact is, and that's mistake of fact not just on a sexual assault case, but any mistake of fact. So everyone has always known in military practice that is available. It has been blessed by the appellate courts. They said this is a defense.

Consent, on the other hand, is just something the judges have always instructed on because, as a matter, I think, of due process in the case law, it's available whether you say it's available in the statute or the rules or not, it's always available.

The other point that was raised with respect to affirmative defenses, I just want to follow up on that.

The problem with the 2007 version, and this is -- when you talk about how does the
military view the phrase "affirmative defense,"
affirmative defense, in our rules, has always
been -- it's something the defense has to give
the government notice of, so insanity or
something like that, the defense also has the
burden of raising it and then proving it by the
preponderance of the evidence or whatever the
burden, and then the government has to rebut.

That is what the appellate courts had
problems with in the previous statute, was that
consent, or mistake of fact, is that consent was
made an affirmative defense.

And so I think some of the speakers
have said if you want to put those back in,
whether you put it into the Manual or into the
statute, don't call it an affirmative defense
because that will create all these problems, and
just state that it is another available defense.

HON. HOLTZMAN: I have a question.

CHAIR JONES: Ms. Holtzman?

HON. HOLTZMAN: I mean, I want to
thank you for -- I want to thank you, Ms. Kepros,
for your work on this because I have been
troubled about the statute for a long time. I
think its structure -- it's incoherent, and I
think the bottom harm issue that I have pointed
out and that, you know, is a backwards way of
going to something that should be, you know, at
the front, the forefront, which is the non-
consensual touching and then the level of harm or
force or violence that's used.

My question is really for the Staff,
has to do with -- I mean, number one, this is a
substantial reworking of the statute, whether
it's right or wrong.

But -- and I like a lot of what you
have done. But the problem is, as I see it, just
being practical, putting on a new hat today,
being practical, that a lot of these changes came
about because Congress was furious at the idea
that these cases were looking at the whole issue
of consent because that may put the victim on
trial.

And so these statutes represent a way
of climbing -- of avoiding what the Constitution
I think requires as a matter of due process,
which is that you have to prove consent, and they
get around it in all these kind of weird ways,
and so that's why you have a statute that is kind
of -- incoherent may be too strong, but it is not
logical, is that the word you use? Clear,
logical.

So that is part of the problem here.
Congress didn't want consent to be part of the
story and part of the statutes, so everybody has
been twisting themselves in pretzel form to get
away from consent, even though it's the -- it's
the 100-pound gorilla, 1,000-pound gorilla in the
room --

CHAIR JONES: It's the gravamen of the
offense --

HON. HOLTZMAN: Exactly.

CHAIR JONES: -- it's what it's all
about.

HON. HOLTZMAN: Right, so I -- I
completely agree with you in terms of saying hey,
wait a minute, why aren't we dealing with what is
the essential thing here centrally? Okay.

But then, putting on my practical hat,
I don't know that there's a prayer that if you --
if we were to recommend a change that put consent
right back in the -- in the center of things,
that either the Congress would pay any attention
to it or that the President would in any way do
anything about it.

So I just raise that with you, and
there may be other ways of dealing with some of
the problems raised by trying to avoid consent
when they should really be dealing with it other
than just kind of confronting it frontally. I
mean, that's just an issue I wanted to put on the
table here from that point of view.

CHAIR JONES: Ms. Friel?

MS. FRIEL: One of the things I think
that makes the statute look odd is most of the
statutory schemes for sex crimes have a basic
crime of, you know, some kind of sex act without
consent, and it -- and it's generally some
misdemeanor or lower-level misdemeanor, and then
you have your aggravators that go all the way up
to rape by force.

That's one thing I noticed in the
statutory scheme. The closest thing you have to
just some kind of sex act without consent is the
bodily harm thing. It finally made me realize
why they're saying the bodily harm can be the
harm from the actual contact, because in New
York, under our statutory scheme, the bodily harm
would have to be a separate harm that has nothing
to do with the sex act.

But otherwise, you would have nothing
even close to just a section that says non-
consensual sexual contact, and I think that's
what's odd here. You just have all the
aggravators and not the lesser.

MAJ. GEN. WOODWARD: So in New York,
if somebody has sex with somebody who is asleep
or incoherent, it's not considered rape?

MS. FRIEL: No, it is. What happens
is that the bottom-line crime is some kind of
sexual contact without consent, and then you
would go up from there and lack of consent, for
instance, if you have sex with somebody who is
considered mentally disabled, that would be a
higher-level crime.

And if you have sex by forcible
compulsion, it’s called in New York, we have a
much broader definition than the force that you
have here, if you have sex with somebody who is
physically helpless, which would be defined as
somebody who is unconscious, that is rape one,
that is the most serious.

But what I am saying is the lowest
level of it could be sexual contact, I go up and
grab your butt as I walk by, you didn't consent
to that, I touched an intimate part of your body
without your consent. That is a misdemeanor in
New York.

MAJ. GEN. WOODWARD: Well that's what
the sexual --

MS. FRIEL: Well --

MAJ. GEN. WOODWARD: -- contact is.
MS. FRIEL: -- well that's a -- but that's -- but you also have to have, in addition to the contact, you have to fit with what -- within one of your other subsections here, right? It's sexual contact, either done by 1 through 5, or -- or (a) through (d), and so it -- I think here, that would have to come under bodily harm. What else would that come under, right?

COL. SCHENCK: But our traditional definition -- and this is what it says about the Article I28 referral. When we saw the term bodily harm throughout the Punitive Articles, we always considered it to be offensive touching, no matter how slight. If I have a plate in my hand and you snatch it out, it's bodily harm.

That's just a traditional military justice term that's been -- so what they did, and I think this was in some of the comments of folks that testified last time, whoever did it -- I think General Pede said they took that comment language out of the 128 assault and pulled it in. Because we used to have indecent assault under
128 assault.

When they morphed these two Articles and created 120, they pulled that in. At least that's -- Colonel Schinasi can correct me if I'm not correct, but I think that's my --

MS. FRIEL: You think clearly under what the military understands the term bodily harm that the example I just posited, somebody walks by and gooses you, would fit under bodily harm?

COL. SCHENCK: Absolutely.

LT. COL. MCGOVERN: Ms. Friel, actually, if you look at Subsection D, Abusive Sexual Contact, that's all that -- that's our lowest. Then it builds up to C, B, and A, up to rape. Under D, Abusive Sexual Contact, the JPP and RSP heard testimony that there were cases where someone simply -- a male grabbing a female's bun was considered abusive sexual contact without an intent to gratify a sexual desire.

MS. FRIEL: Right, I see. I think
part of the issue I have what you're saying.

It's different, and it's going to get used militarily, and all us civilians here, when we see the words bodily harm, we expect there has to be a physical injury to the bodily harm, which is why we didn't recognize it as such. But if it's clear to all of you when you use it, then --

LT. COL. MCGOVERN: I don't think there's any bodily injury requirement for D.

MS. FRIEL: No.

HON. HOLTZMAN: My point about that was a little bit different, which is that -- my point about the bodily harm is yes, all the military justice people understand it, but I went to law school, and I didn't understand it.

SPEAKER: Did the troops?

HON. HOLTZMAN: And the troops and the Members of the Panel. That's my concern with the bodily harm, which is that they may come with the same preconception is that bodily harm means some kind of injury, not just --

SPEAKER: Not just, yes, an offensive
touch.

HON. HOLTZMAN: Not just the touching.

LT. COL. MCGOVERN: Again, I just
would like to clarify the structure of the
statute and look at A through D. Those are the
four types of sexual misconduct chargeable here.
Just like General Pede says, this is a very
progressive statute because in the civilian
sector, in New York, I think you're talking about
really focus on A and B being rape and sexual
assault. Here, we also have C and D included as
sexual misconduct. They are chargeable,
registerable, and prevented. Just want to make
sure everybody gets the big concept of the four
and for that last -- for D, there is no bodily
injury requirement.

CHAIR JONES: Professor, are you still
on?

DR. SCHULHOFER: I'm sorry, were you
asking me a question?

CHAIR JONES: No, I was just trying to
make sure you were still there. Did you have any
comments from what you've heard so far?

DR. SCHULHOFER: None so far. I think that this meeting's been very helpful. It's getting a lot at what's been in the back of my mind. There's been a lot of focus on what the judge's textbook says and what the Members of the Panel understand. I think that's a very appropriate and inevitable focus for us, as a subcommittee, as we continue the Panel.

Another concern that's in the background and has been very prominent for me is how these standards of behavior are understood by the recruits and the ordinary Soldier or sailor who is trying to understand what their expectations are when they're involved in a justice situation, and that's somewhat in the background, but I think it's worth highlighting. Inevitably, the statute itself and the way it's written has a role in whether we are successfully communicating to the wider audience what the expectations are in the Manual. The whole way the guide grew up -- for many, many years, we've had
-- the guide does take the initiative and comes pushing until it comes clean back. Are people being properly educated as to what the expectations are? That's in the background of my concern about the guidelines.

CHAIR JONES: That is an issue that's been raised. It was raised this morning, as well. Does anyone have any comments on that? Generally, I don't think the statute is the -- I hope it isn't the primary teaching tool for people in the military because we don't understand it on the first read through. I guess we could take a look at the training programs. We've heard criticisms of them. I think we have to look at this for what it is.

There are lots of other statutes, not just the military ones, that are pretty incomprehensible sometimes as well. I take your point, and it is something that we have talked about. Certainly the training has to be -- the people doing the training have to understand the statute. Let me put it that way. I think the
military is striving very hard to see that that happens (Simultaneous speaking)

MAJ. GEN WOODWARD: I think --

CHAIR JONES: General Woodward?

MAJ. GEN. WOODWARD: That's the key -- yes, whether we understand the verbiage, that we understand the background to it if we're going to communicate to our troops. I think either way, as long as there's a good understanding of what it means, I just think it's easier to follow the logic that way.

COL. SCHINASI: In my background, I was responsible for the course of instruction at the Army JAG school for several years. I've been teaching civilian law school now for 20. I can tell you that the approach that we use at the JAG school to teach this, and to teach everything else, is exactly the same approach I use now in law school. It's what's the statute? What are the rules? What are the cases? How is this interpreted? It's the logical process.

I don't think there's anything
defective in the way that we're teaching this.

We had an example. We've had an Army JAG school
professor come and talk to us. I think it was
last time we met. I think she did a remarkable
job. If you look at the code, the code is
written from the point of view of explaining to
prosecutors and defenders what the elements are.
That's why it looks like it does. It's very bare
bones. It's in an outline form. Then the
president has provided a model specification,
which mirrors this, and it demonstrates to the
prosecutor, to the defender, and to the military
judge exactly what has to be done to get past the
motion. It's not very flowery. It doesn't
contain a lot of extra material.

A through D is aimed at making the
case. This particular statute goes on to add
definitions. I think when we look at the 11
issues that we have been given, it's largely
about these terms. I'm not sure that the
question that we've been given is actually the
right question. Is the current definition of
consent unclear or ambiguous? That answer would be yes irrespective of who drafted the statute and when the statute was drafted.

The real question is does it need to be improved? So far, I haven't heard anyone come up with a viable alternative, present company excluded, that says this thing is so defective -- and I asked several people about that when we met last time. No one said this thing was so defective that we can't use it. My sense was, let's give the statute a chance. Let's see what's going to happen. What will happen is the common law judges will flesh it out.

MAJ. GEN. WOODWARD: How long do you wait?

COL. SCHINASI: It isn't broken now. You heard, last time we met, from everybody that has a piece of this pie. I don't remember anybody banging the table, as I have seen them do sometimes in the past -- banging the table and say this thing is broken. I understand that there are people who have problems with it.
MAJ. GEN. WOODWARD: And the one star today said the same thing.

COL. SCHINASI: Said what?

MAJ. GEN. WOODWARD: That he thinks it should be clarified, that it's too ambiguous.

COL. SCHINASI: Clarified, but that doesn't mean it's broken. That doesn't mean that there are a loss of acquittals, a loss of convictions, a loss of confusion, or people who don't know what they're doing. I haven't heard that. Yes, the question is is consent unclear and ambiguous? Yes. Every term in this statute -- and I hate to say every term in any statute -- is subject to different interpretations of what it means. That's what we do as lawyers. That's what we do as judges.

CHAIR JONES: Okay, but there is the general question of whether or not we -- which you're raising, which is if it's not broken, should we do anything? I understand the position of both you and General Schenck and where you stand, but as we go through these, people are
recommending suggestions. We're getting a sense of where people think there may be improvements. Whatever the vehicle is or is not, I'd just like to continue with that process.

COL. SCHINASI: Then can I raise another issue?

CHAIR JONES: Sure.

COL. SCHINASI: The question of freely giving consent. Professor goes through and talks about freely giving consent and the concept of voluntary and doesn't want to adopt voluntary because voluntary has a long pedigree that's not necessarily helpful. It has a long pedigree that is well understood. It may not be one that everybody agrees with, but we know what voluntary is. Freely, I don't have a clue. I have no idea what the criminal legal definition of freely is. I do know voluntary.

CHAIR JONES: Freely is currently in the statute, right.

COL. SCHINASI: So the question is do we want to -- what's the current view?
HON. HOLTZMAN: The current view is freely given agreement.

COL. SCHINASI: So the question is voluntary, I understand. That's a suggestion I think Colonel Grammel made.

CHAIR JONES: That we should change it back to voluntary.

HON. HOLTZMAN: How long has this language been --

SPEAKER: Since 2012.

CHAIR JONES: This is new in 2012, the freely given agreement? That's the question.

(Simultaneous speaking.)

MS. FRIEL: When did freely given agreement come to be said?

SPEAKER: It was before --

COL. SCHINASI: In the copy of the statute I have now it says freely. Is this --

(Simultaneous speaking.)

SPEAKER: That's the '12 statute for sure.

DEAN ANDERSON: But the 2007 statute
includes it as well, at least according to this information we got this morning. So it's not a 2012 revision. It's either a 2007 or before revision. The words freely given were in the '07 revision. It's not a recent vintage, I guess, is the upshot.

SPEAKER: Laurie has a question.

CHAIR JONES: I'm sorry. Ms. Kepros.

MS. KEPROS: I'm so glad you brought this up because I think as a lay person, those words are the same. I bet you could look in a thesaurus and find one term or the other. I had inserted in the draft I submitted for today, voluntary because we had some analysts who recommended it, who seemed to feel like it was better. I didn't really have a problem with their idea. I was actually very interested by the concerns that were raised in Professor Schulhofer's comments about, it doesn't really mean voluntary sometimes in the context of Sixth Amendment jurisprudence and Jackson v. Denno kind of case law on voluntariness. I don't know that
it would make the slightest difference to --

MAJ. GEN. WOODWARD: Thank you.

MS. KEPROS: As to what we decide.

MAJ. GEN. WOODWARD: Only a group of

lawyers would sit around the table and argue

about the difference between --

MS. KEPROS: I'm totally ready to hear

arguments. I'm even excited about it because to

me, I'm not sure -- even though, as a lawyer, I

can come up with all kinds of things I would

argue about it, but I don't think as a person

deciding how to apply facts to law it would mean

that much to me.

CHAIR JONES: I think I agree with you

on that. Liz.

HON. HOLTZMAN: But the question is,
is this unclear? Is voluntary --- well, anyway,
I'm satisfied with the language. Certainly, if
it's been in there for quite some time, and it's
been litigated over quite some time, I'm not sure
that this would be a top point for change.

LT. COL. MCGOVERN: We could research
for you and find out the case law surrounding
that, if there were issues with voluntary Article
120 contacts, and why they changed it to freely
given at some point.

HON. HOLTZMAN: Do we know it was
every changed from voluntary to freely given?

LT. COL. MCGOVERN: I personally do
not.

DEAN ANDERSON: Do we know it was ever
voluntary?

HON. HOLTZMAN: That's what I mean. I
don't know.

DEAN ANDERSON: That would be helpful.

LT. COL. MCGOVERN: We can find out if
it's been a litigated issue.

CHAIR JONES: Yes.

DEAN ANDERSON: I have a suggestion.

We're sort of skipping around, I think, between
one and two and five and three. I think that we
have a potential -- we have agreement generally
on the deletion of certain language around
resistance in 8A and C, and then I think we have
I'm getting a sense from this dialogue that there's not a powerful impulse to change freely given to voluntary, or back to voluntary, depending on what the history of that is, but that we should probably look at it and see if it's been litigated. It does seem to me that the question of bodily harm is a very interesting one that we've talked about, as well. My initial reaction to the term of bodily harm was very similar to those around the table. However, I changed my position on the basis that in the military, it sounds like there's a long history of this term, independent of this provision, that makes a lot of sense and works from a systemic point of view.

I would continue with it for that reason. Although again, I may draft the statute differently and agree that the structure to a person who doesn't come from a background where bodily harm means this would draft it in a more logical way, focused on non-consent, because I do think that's sort of the upshot of bodily harm.
Nevertheless, it has a context. It has meaning outside of 120. That meaning is fully delineated and has a long and noble history. I don't see why we would want to intervene at this juncture, just for this statute, to remove bodily harm as a result. That's just my comment on that.

MS. FRIEL: It's also defined right in the statute. I think it helps that it's one of the definitions right there. You flip and see it.

HON. HOLTZMAN: Are we discussing this now, or are we making a final determination? Where are we jumping to.

CHAIR JONES: We were still on one. I don't disagree with you, Professor, that --

DEAN ANDERSON: I apologize. I probably did --

CHAIR JONES: Oh, no.

DEAN ANDERSON: --- move to bodily harm.

CHAIR JONES: We did, and we went
back. Why don't we try this? Under any other --

let me just say this about the freely given

versus voluntary. I'm not sure we should even

look into that. It's there. It's been there. I
don't think it was ever in our focus. I

personally agree completely with Ms. Kepros. The

lay people know what freely given means, so I

think we should take that off -- I don't know if

everybody else agrees -- and not bother to look

into that one at all. Everyone's nodding their

head, so we're taking that one off the agenda.

Are there any other points that anyone wants to

raise today?

SPEAKER: Wait, I think --

DR. SCHULHOFER: When you say taking

it off, do you mean leaving in the term freely

given?

CHAIR JONES: Yes, I do, Professor.

That's better. I think we should just leave

that. I think it works. I'm sorry. How do you

feel about that?

DR. SCHULHOFER: I agree.
CHAIR JONES: That's not going to be on the boards. We do indeed have a number of suggestions with respect to the consent definition. Are there any others before we move on to two, which I think is going to be an easy discussion?

(No audible response.)

I don't hear anything.

You can always bring it up later, but I'm moving on to two. We've discussed this now a few times. The question is simply should we do something to make it clear that the defense of mistake of fact is still a defense in the context of sexual assault cases? We heard General Pede on it this morning. I think we've all talked about it before. The one thing that I think we should be very careful about is -- and Professor, you made this recommendation, and I completely agree with you -- whatever we do, we should make it clear that it's not an affirmative defense, so that we don't run into the problem of shifting the burden to the defendant.
I don't know if anyone else wants to comment on this, but I think basically Issue 2, which is, should the statute make exclusive that mistake of fact as to consent is a defense? I think we should say -- I don't know. Do we think we need to do it or not? That's really the issue.

SPEAKER: I think we need to do it.

COL. SCHENCK: I think we need to do it just because General Pede said he's got senior practitioners requesting it, and he specifically said it was trial judges. Trial judges have a question about it because they don't know the history that General Pede has because that's not part -- no one's looking at the legislative history, in other words. I think we should go ahead and do it. There's no harm in it. It's already -- that's really -- also, the Court of Appeals of the Armed Forces has specifically cited, in numerous cases, that the trial judges have to instruct on mistake of fact as to consent. When we do it, the stat can help with
that. They can still give a recommendation on how to do it, but they can cite to all those CAAF cases that say --

CHAIR JONES: I agree with that, and I think we should do this. I was persuaded by General Pede saying that senior people were concerned about it.

SPEAKER: Including appellate judges, by the way, not just trial judges.

COL. SCHENCK: Right. Frankly, I know what he's talking about.

CHAIR JONES: Does anybody disagree?

Liz.

HON. HOLTZMAN: I just think we could add the words right after --- in F, on Page 1 of the statute. It says, an accused may raise any applicable defenses. I'd just put a comma there and add including mistake of fact.

CHAIR JONES: Mistake of fact.

HON. HOLTZMAN: Another comma, and that's it.

CHAIR JONES: Perfect.
COL. SCHENCK: I would just say mistake of fact as to consent. That's the only --

CHAIR JONES: Oh, mistake of fact as to consent?

LT. COL. MCGOVERN: Ms. Kepros put it in hers, as well, if you wanted to look at the proposed language.

CHAIR JONES: I'm sorry, Kelly, what did you say? It's in Ms. Kepros' as well?

LT. COL. MCGOVERN: Yes, she must have predicted that to come up. She had it in here already.

MS. FRIEL: If we're going to recommend amending the statute, we would recommend adding that language. Otherwise, you could do it as an executive order, say. What they meant by that was mistake of fact after consent because it's in 916. So there are two ways to accomplish the same thing.

CHAIR JONES: Right, and we haven't decided which way --
MS. FRIEL: And we haven't decided.

CHAIR JONES: -- but we have decided that we should do it. I think with two, it's unanimous? Everybody --

MS. WINE-BANKS: Laurie also added consent as a --

CHAIR JONES: Pardon me?

MS. WINE-BANKS: Laurie also added consent in her proposal for identifying defenses, so hers said including consent and mistake of fact.

DEAN ANDERSON: There was no -- as I understand the testimony to us, the query, particularly by the appellate judges, was on whether or not mistake of fact was available, not on -- everybody has said consent is always -- there are instructions given. That's not an issue. My concern with adding it might be confusion because it's not cross-listed in the other provisions. I think we accomplish what we want to accomplish by just saying mistake of fact.
HON. HOLTZMAN: Correct. I agree with that. Because if you limit it to consent, then people want to say mistake of fact is consent. Does that really include intoxication? Does that include health, all those other factors. I think mistake of fact is broader, so that's how I would do it.

SPEAKER: That's good, and

incapacitation.

CHAIR JONES: Ms. Kepros.

MS. KEPROS: What I proposed is to add language, including, but not limited to, consent and mistake of fact. The reason that I do think it would be useful to specifically mention consent is because it is so central to so many of these defenses. It's constantly coming up as an issue. I think maybe it is redundant. I hope it is, but I don't see any harm in having it.

The reason I would say not limited to, is that although it would be a rare circumstance, it is possible that there could be a self-defense case, or you mentioned intoxication, if that is a
defense -- I don't know that it ever would be. I don't know what is available. I know in my jurisdiction, voluntary intoxication is only a defense to a specific intent crime. I don't know if any of this has been interpreted to be that. I just would try to include it, so that it's clear it should be, since we're doing it just sort of in an exercise of caution anyway. That also doesn't get to the first point that Judge Jones made about whether it's a defense versus an affirmative defense.

HON. HOLTZMAN: Or whether it's an element of the crime. That's my problem with putting it in as a defense --

MS. KEPROS: Right.

HON. HOLTZMAN: -- is that it may be viewed as an element of the crime.

MS. FRIEL: I don't think we should put consent with mistake of fact or mistake of fact as to consent. I think we should just have mistake of fact. Consent is not listed anywhere, and Colonel Hines can correct me if I'm wrong,
but as I recall, when I did an appellate opinion
on defenses specifically, consent's not in there,
in this Manual for Courts-Martial, as a defense.

    There are many defenses not listed,
but as my opinion, which hasn't been busted or
returned yet, says, trial judges are bound by the
Supreme Court, the Court of Appeals of the Armed
Forces, but not all these other defenses made up
in the civilian sector. Automatism, some states
say that's a defense. The military isn't bound
by that. If you put consent listed in this
provision under the term defense, it's going to
kind of mess up the rest of the Punitive
Articles, I think. I just think that. I think
it can be raised because it would be argued as
part -- if it's defined in here, people will be
able to argue mistake of fact as to consent. Do
you see what I mean?

    LT. COL. HINES: I think the confusion
comes from -- there's a legal distinction for the
difference, but there really isn't. The defense
can raise both of them. They can raise consent
because going to Ms. Holtzman's question, is it an element or not, the defense can raise it, but it's viewed as, legally, an attack on the government's proof, rebutting the idea that this was non-consensual.

Whereas, we're going to choose to call mistake of fact as to consent an actual defense. It's really creating confusion where there's not really any confusion. The judge will instruct -- if the evidence raises consent, the judge will instruct on it. It's in the charge given to the jury. If they go with mistake of fact as to consent, there's an instruction for that, as well. I guess in the end, I think what I'm hearing from some of the counsel -- my personal view is that they just want it written somewhere that they can raise consent. I think everyone understands they can raise mistake of fact as to consent, but the only place that you see it anywhere is in the judge's bench book.

I don't know that you really need to do anything here to clarify that. You could
probably say both of these are available to the
Defense. You could maybe clarify it just through
subcommittee or Panel dicta. I don't know if
that's the correct terminology. You don't
necessarily need to recommend a statutory or a
change in the Manual, but you could make an
emphatic statement to say whatever we call this,
whatever moniker we put on it, the defense can
raise consent.

They could attack the government's
proof, or they can raise mistake of fact as to
consent. I think it's been confused by the
different places that they've been addressed in
the statute and the Manual or --

CHAIR JONES: If all we're trying to
do is tell people that they shouldn't be
concerned that it was taken out, let's just put
it back in the way it was before. I think that
was simply to say mistake of fact is a defense --
am I right -- in the prior statute?

COL. SCHENCK: -- affirmative defense
with mistake of fact as to consent, and then with
--- Chair Jones?

CHAIR JONES: I'm sorry, I can't hear you.

COL. SCHENCK: I think originally it had an affirmative defense of mistake of fact as to consent. You see what I mean? It was in there, and then Prather of the Court of Appeals for the Armed Forces.

CHAIR JONES: That was a big problem.

I agree.

COL. SCHENCK: Then they took it out. They left mistake of fact in the Manual; it's in there. No one's getting that connection.

LT. COL. HINES: They took it out because it was an affirmative defense. The previous statute said the defense had not only to raise this, they had to prove it by a preponderance of the evidence. That's what the report found unconstitutional, so that's why they took those out.

HON. HOLTZMAN: I think the safest course of action here, in terms of not raising
other issues, is just to say mistake of fact. If somebody thinks it's not broad enough, we're sending this out for comment. If General Pede thinks this is not broad enough, or someone else thinks this is not broad enough, we'll hear about that.

I'm just concerned if we do put in consent and create that as a defense, then that creates all kinds of questions that someone's going to challenge us in the Supreme Court. This isn't a defense. It's part of the government's case. I think we're just asking for litigation over that issue, so I'd just be as narrow as the general was.

CHAIR JONES: Mistake of fact?

HON. HOLTZMAN: Yes, that would be it.

Clearly the mistake of fact can be about all of these points.

CHAIR JONES: It can be about any element because it all goes to mens rea.

HON. HOLTZMAN: Correct.

CHAIR JONES: I think that's -- I
completely agree with that, as well. Why don't we suggest, in writing, what a change would be. We can discuss it at our next deliberation. It'll be something we'll definitely send out for comment. No. 3, is should the statute define incapable of consenting? I don't know that we've touched on that -- this afternoon, in any event.

LT. COL. HINES: Judge, I'm sorry. I'll just key that up a little bit to say if you look at the chart, that's the one -- one of these questions where it's almost -- I'll call it overwhelming agreed that we need a definition, and that's from both prosecutor and defense counsel. It's also the one where there isn't a definition. I mentioned earlier that the statute's given us a bunch of definitions.

But there is not, in the statute, a definition of incapable of consenting. There's not one in -- the judiciary is sort of making this one up as they go along, as well. I just would throw that out. I know Colonel Grammel has given us a suggested fix on that, and a few of
the other presenters have.

COL. SCHENCK: Is there anyone in the bench book on that? Anyone?

LT. COL. HINES: I don't believe there is, Dean. I've got it right here. I'll look it up while you --

COL. SCHENCK: I was looking at Judge Grammel's suggested definition, which is under Tab 2 in that packet. I was just wondering if you may have understood that. It looks like the Title 18.

DEAN ANDERSON: What tab was that?

COL. SCHENCK: It's Tab 2, on Page 4.

SPEAKER: Actually, it's Tab 3 in this one's materials.

SPEAKER: There's a Tab 3 and a Tab 2.

DEAN ANDERSON: So could I --

CHAIR JONES: Professor --

SPEAKER: It's right here, yes.

DEAN ANDERSON: I appreciate that this is an area in which there's -- at least it does seem like a significant number of folks who've
testified have requested guidance on incapable of
consenting. I think that my concern with some of
the proposals -- and I think this includes
Grammel's proposal -- is that it requires,
essentially, that someone be unconscious, that is
that they are unable to decline to participate or
to communicate unwillingness, which is another
way of saying they're unable to say no, which
means they're unconscious. Even if someone is
falling down drunk, they could communicate no. I
think that's a higher burden than we should
impose.

SPEAKER: But doesn't he say --

COL. SCHENCK: The very first one,
unable to appraise the nature of the sexual
conduct at issue, that, to me is --

DEAN ANDERSON: Right, so my concern
is on the word unable -- to appraise the nature
of the sexual conduct means that I don't know
that it's sex, or that -- that is a higher burden
than unable to consent or incapable of
consenting. It's imposing upon the person who is
either consenting or non-consenting a higher burden, I think, than the idea of consent itself imposes. Unable to understand what sex is means you're either unconscious or unable to communicate or to understand the nature or engage in -- unable to physically communicate unwillingness means unable to say no, which means you're unconscious. That shouldn't be a requirement for being unable to consent -- or incapable, rather, is the language -- incapable of consent.

COL. SCHENCK: I disagree with that. That's just my personal opinion. I don't think that unable to appraise the nature of sexual conduct is that narrowly interpreted. That's just my opinion. Frankly, there's nothing on that, but I do wonder if the Staff could check for us if that's in Title 18? I think at least previous provisions of Title 18 have that type language, at least the second two provisions. We could look to see if Title 18 does have a definition that we might look at.
HON. HOLTZMAN: May I also make a point? I'm not sure that -- first of all, I'm not sure -- I don't like the word physical. I don't know that we need those words, physically decline participation. I think that the person is unable to communicate -- you might have something in your head, but you can't get the words out -- doesn't mean you're unconscious. It just means you are in a point of either intoxication or some other situation where you can formulate the thought, and you do not want this, but you just can't get the words out. Sometimes that happens. You could be so afraid, too. That's a different circumstance, but I don't know that means necessarily unconscious. I don't read it that way.

I could be wrong, but I don't read it as meaning unconscious because we have unconscious someplace -- don't we have unconscious someplace else?

SPEAKER: Yes. Someplace else.

HON. HOLTZMAN: I think this is not --
I don't think this is designed --

COL. SCHENCK: Also, it notes on No. 3 that there was a previous definition. In the notes, it says, "By removing the 2007 definition of substantially incapacitated." Did we have a 2007 definition of substantially incapacitated we could refer to as a starting point? I probably wouldn't want to recreate something that already didn't work.

SPEAKER: Yes, I think I do.

MS. WINE-BANKS: I think that given the discussion we're having, obviously this proposed definition is not clear. If it's so debatable, then it needs more clarification. It sounds like everybody does agree we need a definition, so that it's a question of maybe someone needs to sit down and start drafting -- looking up what other states have done and what the possibilities are.

CHAIR JONES: Professor Schulhofer suggests that. I think this is one where we need to have a working group and come back and have
them make a presentation. That will be what we'll do.

HON. HOLTZMAN: Can I just ask where this language comes from about inability to communicate and so forth? Where's it taken from?

LT. COL. MCGOVERN: There's been a lot of litigation and Articles written about blackout versus pass out in this argument. We can gather those for you.

HON. HOLTZMAN: I'm just asking where'd the language come from? Grammel? From him, right.

LT. COL. MCGOVERN: General Grammel was saying that was what they came up with.

HON. HOLTZMAN: I see. So he's the one who's the drafter of this language that we're looking at here? It doesn't come from any other source that you're aware of?

LT. COL. HINES: I think he based it -- Colonel Grammel and Lt. Col. Pickands, who did the F4 -- maybe Lt. Col. Pickands is a little more clear on Page 5. He goes back to the 2007
definition as being -- about the definition of substantial incapacitation. I think that's what his proposed language is based on.

HON. HOLTZMAN: So that's what this is?

LT. COL. HINES: Yes.

SPEAKER: Anyway, somebody will clarify that.

LT. COL. HINES: We will do that.

CHAIR JONES: Okay, going to No. 4. We're in, I think it's 120, A5, committing a sex act by administering an intoxicant. It's our Issue No. 4. Professor Schulhofer actually agrees with Colonel Grammel and acknowledges that they're a minority, but he wants to add, as I'm reading this, for the purpose of impairing. Let me let everybody read it for a minute. I have to say when this was discussed and presented to us previously, that made sense to me.

COL. SCHENCK: I would agree with Professor Schulhofer, as well. I think they refer to some instances where they didn't
intentionally -- there was no mens rea element to these, you know, because you get put on sex offender from being the doser, then comes sex offender.

HON. HOLTZMAN:  Let me just raise two issues about that. Suppose you don't have the specific defendant -- specific victim in mind, but you just spiked the punch, so now I'm waiting to see who becomes a victim. Then what's the intention there, and is that case captured? The second might be you didn't spike the punch, but you see the person who did spike the punch, and you're now taking advantage of the victim. Where does that fall in this range of behaviors?

COL. SCHENCK:  For me, on the first comment, maybe you take out specific to the victim. You see what I mean?

HON. HOLTZMAN:  What language?

COL. SCHENCK:  In other words, I spiked the punch with intent to take advantage of whoever drinks the punch. Maybe you don't say my purpose -- my mens rea is not to you
specifically, it's just to get to the sex. It's not specific to that victim's capacity. Do you see what I mean? I don't know how you do that in the language. What was the second?

HON. HOLTZMAN: The second one was what happens if you don't spike the punch, but you're standing around and you see somebody else doing it --

COL. SCHENCK: Right, and then I would charge that as a permissible incoherent offense. I would charge the person who did take action, I would charge that as someone who -- depends what we know about that accused, but I would charge them as principles to the offense or the act of offense. Because you're going to have to figure out how that person knew or saw, so there's a --

HON. HOLTZMAN: Let's say they saw the punch being spiked and just said I'm going to wait around and see if I can get some of this, too.

COL. SCHENCK: So a principal before the fact?
SPEAKER: Dean Anderson.

DEAN ANDERSON: I don't know. I just raised those examples. Maybe there are others.

SPEAKER: I'll come back.

CHAIR JONES: Okay. Oh, sorry.

MAJ. GEN. WOODWARD: My answer to that is that you watch somebody spike the punch, and then you take advantage of somebody who's been made incoherent by drinking that punch, then to me you fall back on you were having sex with somebody who's unable to consent, but you didn't spike the punch, I would think. That would be --

MS. WINE-BANKS: Right, but why would that be a lesser offense than if you did it yourself? If you know that it was done -- the argument that Professor Schulhofer made about it shouldn't be a sex crime to do the spiking of the drink, well that's true. If I spike the drink, and I leave the party, I'm not having any sex with anybody, so I'm not guilty of the sex. But if my friend saw me do it and does have sex, that's more than just taking advantage. That's
MAJ. GEN. WOODWARD: One's taking advantage, and one's an overt act. I think for me, the overt act is a stronger thing to --

MS. WINE-BANKS: But I didn't say to the victim don't drink that. I saw it spiked. So I'm letting someone else -- I'm standing around waiting for it to happen. I think that's a serious --

(Simultaneous speaking)

COL. SCHENCK: But I think that if you see it, and the other person tells you, "I'm going to spike the punch so I can take advantage of someone," you have a specific offense with the co-accused, that that guy that you told takes no action. Judge Hines can correct me if I'm wrong.

There's a number of military offenses you can charge that person with. You've got your conspiracy with one overt act. You've got your failure to act. You've got dereliction of duty. You've got a number of military offenses.

LT. COL. HINES: I think to answer Ms.
Holtzman's concern, I think it's exactly as General Woodward laid out. I think what they've done here is they just made a policy judgment that the person in A5 -- A, Sub 5 -- who actually puts the intoxicant or the drug in the drink and is the active individual who's rendered the victim unconscious, that, as a matter of policy, is more aggravating than the person who, under B3, stumbles upon that person, or even knows from watching throughout the evening and sees her becoming more and more intoxicated, and then commits the act.

For some reason, there's a policy judgment in the statute saying that person's less culpable. Reasonable minds can differ, and I think as Ms. Wine-Banks has noted, why is the second person not as bad as the first person? I think General Woodward answered the question. Ms. Holtzman, I think we could get at that person. We could prosecute that person, but we have to go under B3, as a sexual assault, if he's not the person spiking --
SPEAKER: B3A.

SPEAKER: Yes.

SPEAKER: Right.

HON. HOLTZMAN: I guess my concern is that Professor Schulhofer recommended that the language be narrowed. Am I correct? That the language be narrowed in --

SPEAKER: A5.

CHAIR JONES: I think the concern --

HON. HOLTZMAN: -- in A5?

SPEAKER: Yes.

CHAIR JONES: The concern is that somebody could spike a drink, but not intend --

I'm sorry.

DR. SCHULHOFER: -- as one person said, that would still leave the possibility of prosecuting under 120, D3 for somebody who's taking advantage of the situation that's presented to them without having created the situation intentionally themselves. What I worry about in A5 is the guy who spikes the drink. I think this is a common kind of event in partying
that goes on.

People think it's funny so they add some extra vodka to the punch, and then several people get more intoxicated than they intended, and then a person, without having intended to rape someone has sex with her. That would be a very serious offense under 120a, as it's currently written. I've seen too many go further than what's really appropriate.

HON. HOLTZMAN: That's my concern. I'm not -- I have a real problem with somebody actually facilitating a sex act. They know what they're doing. If they're putting vodka in and then trip and fall, and all of the sudden the vodka spilled out of their hands, that's a different story.

You're talking about somebody who makes -- who's deliberating creating -- whether they think it's a joke or not -- somebody may think rape is a joke. The issue is not how funny they think the act is. The issue is they are facilitating and trying actually to create the
situation in which there will be a sex crime committed. You put a bomb someplace with a

ticker --

DR. SCHULHOFER: Imagine what I was thinking of, and maybe it's just reacting too much to what I've heard about a lot of college partying is that it's not with any sexual idea in mind that people very, very frequently add something to the punch to heighten the atmosphere of the party. They're not necessarily thinking about sex at all. That was the situation that I thought would be covered inappropriately by A5.

SPEAKER: But that's not covered by this. You have to --

DR. SCHULHOFER: I agree with you, that's a dereliction of duty, but --

SPEAKER: But you commit a sex act upon another person by doing this. You're just leaving off the top line.

MS. WINE-BANKS: Unless the person who spiked the drink has the sex act, it's not under A5.
SPEAKER: Right. That's right.

MS. WINE-BANKS: So then the person who spiked the drink is guilty of spiking a drink and whatever crime that might be, but it's not a sex act. If the person who spiked the drink has a sex act, then it's A5. If the person who watched the spiking, but didn't actually physically do it and wasn't a co-conspirator in saying let's pour it together and just handed it to him and let someone else do it, that person would be under B.

SPEAKER: B3.

HON. HOLTZMAN: So the person who spiked --

MS. WINE-BANKS: Is guilty of some crime.

HON. HOLTZMAN: Spiking.

MS. WINE-BANKS: Of spiking. The person who spiked and had sex is guilty of a sex crime. The person who watched, but didn't do the spiking, is taking advantage of the spiking, but isn't guilty of the rape, is guilty of sexual
assault.

MS. FRIEL: Especially the latter makes sense if you think about -- take it out of the spiking the drink. You stand around at a party. You watch somebody get really, really drunk, and you take advantage of them. One is not that much different than the other.

SPEAKER: Exactly.

SPEAKER: She's being very polite.

CHAIR JONES: Ms. Kepros, thank you.

SPEAKER: She never talks without you calling on her.

MS. KEPROS: I think we need to remember it isn't like B3 is not an extremely serious crime with massive sanctions and lifetime consequences. It's not like this is not a crime. It's not an A5. I do think it is a much more aggravated circumstance that someone is maliciously trying to intoxicate someone intentionally to sexually assault them. To me, that does warrant that more intentional behavior in A5, so I support the change that Professor
Schulhofer's recommending.

CHAIR JONES: When I first looked at this, I thought that the issue was the concern that -- yes, we all agree that the person who's going to be found guilty first and foremost has to have committed a sexual act. But then under 5, by, the word by -- and this is how you're going to commit it -- is by spiking the drink and thereby substantially impairing the ability. If you just read that, it's clear. If you look at it a little more closely, I can understand Professor Schulhofer's concern. I think I had it at one point, but it was a while ago, that it's not entirely clear if it's for the purpose of substantially -- it's a question of whether thereby is enough to show the purpose of spiking the drink, even though this is a person who engages in a sexual act, actually spiked it in order to do that. I think we ought to take a look at this again because we may be talking a little bit at cross purposes. I may actually not care because I think everybody probably knows
what this means. I think the concern is that
it's a little unclear about whether or not the
person administering it has to do it with the
intent to impair, not just thereby impairing.

MS. WINE-BANKS: I guess my concern in
narrowing it is proving, as a prosecutor, that it
was done with the intent, at that moment, to have
sex, as opposed to, I thought it would be funny,
but then after I did it, I formed the intent to
have sex. That should be included in the crime
of rape as a more serious offense. If you add
the words for the purpose of, I think it --

SPEAKER: You need premeditation.

MS. WINE-BANKS: I think the
premeditation may be more than I would think
necessary. But I think you're right. We should
probably look at what the reality is.

CHAIR JONES: Professor, I was trying
to speak for your --

DR. SCHULHOFER: It's really a
question of the temporal -- the time difference,
whether the exploitation or abuse was planned
from the beginning, at the time the drink was
spiked, or was it spiked with no sexual purpose
and the malicious intent or the wrongful intent
arose later, when the opportunity presented
itself. I think that states the issue. Bottom
line, I think that the last speaker stated the
issue very clearly.

I would disagree about how it should
be resolved because I think it's fine for the
prosecutor to prove that the intent was
premeditated, then it shouldn't be bumped up to
that very aggravated different category, but I
think the issue is clearly drawn. I don't think
that there's anything unreasonable that the
person winds up being convicted under B3.
Anyway, that states the issue, and I think we all
have different opinions about it.

CHAIR JONES: I agree. I think we
ought to think about it, whether they intended
this to be -- that the prosecutor would have to
prove premeditation.

COL. SCHENCK: I also want to just
point out, now that -- I think Jill was the one
who said it -- in the first line, we say sexual
act, and then sexual act, itself, in G1B, has its
own intent element in there. I just want to
throw that out. I don't know how the two mens
rea elements are going to play together.
Originally, I was all for this added in there.
Now I'm just concerned about this sexual act, to
me, with that intent to abuse, annoy, or harass.
This goes to, I can stick my finger in your
mouth, and end up with a sex act.

SPEAKER: I'm sorry, where are you?

COL. SCHENCK: Under rape, in the
first line, is who commits a sexual act. I think
Jill pointed that out. By. But sexual act itself
is defined, so when you turn to sexual act
itself, it's that broad meaning of I can stick my
finger in your mouth, if I have the intent to
abuse, then I'm guilty of a sexual act. You see
what I mean? So 1B has its own mens rea element
in there. I don't know how those two mens rea
elements work if you put another one in.
Under Definitions, G1, Sexual Act, V, with an intent to abuse, annoy, harass, or arouse -- can anyone -- I don't know. I'm just throwing it out now that Jill drew my attention to it.

CHAIR JONES: I think we have to think about that. Dean Anderson.

DEAN ANDERSON: Yes, I just want to point out that we've got a couple of bad things happening in A5. Not only do we have the presentation of alcohol into the punch -- let's just take the party punch example -- and the mens rea associated with a sex act itself, but we've got administering it either by force or threat of force or without the knowledge or consent.

What that means is it's not just that it's the alcoholic drink that we're going to make stronger. It's that this is non-alcoholic punch, and without your consent, we're making it an alcoholic punch. Do you see what I'm saying? Without consent means that someone's presenting the alcohol. I think there's an element there that's implicitly a problem. It's more than just
let's make the party drink a lot more intense to
enhance the party mood.

It's that we're going to take
something that's not -- here's a Coca-Cola, but
I've placed Rohypnol in it, for instance. That
is, without consent, something like that. By
force or threat of force or without knowledge and
consent also adds a culpable element here that I
don't think we've paid attention to in this
provision.

COL. SCHENCK: That's a good point.
I think we've got that definition of force or
threat of force. We need to leave that.

COL. SCHINASI: How about simply
encouraging them to drink to the point that they
are --

SPEAKER: That's a-whole-nother
ballgame.

DEAN ANDERSON: Right, and that's
different than this. That seems to me to be
squarely within sexual assault, B3A.

HON. HOLTZMAN: Because it requires
without the knowledge or consent. If you're encouraging people to drink, they know they're drinking.

DEAN ANDERSON: That's the more culpable act involved. It's not just handing someone a drink until they're very drunk. This is not an alcoholic beverage.

CHAIR JONES: Well, it could be, but if you put additional amounts of alcohol into --- or a pill or --

HON. HOLTZMAN: That's the aggravating element here. The aggravating element is that not only -- that the ability of the other person to appraise or control conduct has been affected, but that you have deliberately, intentionally, knowingly done something here that has that consequence. To me, it seems -- I don't think it needs --

CHAIR JONES: It's fine the way it is?

HON. HOLTZMAN: I think it's fine. I don't know why the standard here is different at the end. If you look at it, the other person to
appraise or control conduct, the control conduct
doesn't appear anywhere else, I think, in the
statute, so they've thrown in some new term here.
I wouldn't have written the statute like that.
You should use consistent terms throughout, but
what are you going to do?

CHAIR JONES: How many people think
it's fine the way it is, in the sense that if you
look at the word by right at the beginning, that
establishes the only connection you need. You
basically committed a sex act by administering.
Is that enough? What's the consensus on that?
Dean Anderson?

DEAN ANDERSON: Yes, just to clarify
the call question for the straw poll, are people
satisfied that this describes sufficiently
culpable conduct, that it should be rape and
should not be revised?

CHAIR JONES: All right, I'll take a
--

SPEAKER: I don't know if that was a
clarification, actually.
CHAIR JONES: No, that's what I was trying to say. Thank you. How many people agree with that, that we should not try to revise it?

HON. HOLTZMAN: Wait, the professor wants to say something.

CHAIR JONES: Yes, Professor?

DR. SCHULHOFER: Sorry. I heard two different points of view. One was that if there's no sexual abuse intended at the time a person starts to drink, and the insidious intent arises later, that's and A5, and it should be covered. The other point of view was that no, this is focused on the person who does this from the beginning with premeditation, but that the word by takes care of that. Those are two very different reasons for leaving the statute as it is. Personally, I think the idea is if you think premeditation is key, I'm comfortable with putting all the weight on those two letters, by, to achieve that purpose. I just wonder whether people are going to leave it as is because they think it does require premeditation
as it is?

MS. FRIEL: I think -- the rest of the table can correct me if I'm wrong. I thought our discussion was we didn't think premeditation was necessary or was appropriate. It doesn't matter whether you have it or you don't have it. If you put the stuff in the drink and you later decide to take advantage of that, you should be as guilty as if you premeditated it. I think we want to cover both situations. We think the statute does, as written.

CHAIR JONES: Everybody's nodding, Professor. You can't see that, but they're all nodding.

MS. FRIEL: It sounds right to me.

LT. COL. HINES: Judge, what was our vote again, if you don't mind, on that? I just counted six people.

CHAIR JONES: I guess we should take the vote again.

SPEAKER: The vote for not changing?

CHAIR JONES: For not changing, not
changing, no change.

SPEAKER: We have a consensus.

CHAIR JONES: Professor, are you still for changing it?

DR. SCHULHOFER: Yes, I would change it.

CHAIR JONES: Thank you.

MS. KEPROS: Me, too.

CHAIR JONES: Ms. Kepros, okay, thanks. We have made it to bodily harm.

SPEAKER: Once again.

LT. COL. HINES: Judge Jones?

CHAIR JONES: Yes?

LT. COL. HINES: We've been going for little, I thought --

CHAIR JONES: You want to take a break?

LT. COL. HINES: --- we might take a brief break, yes.

CHAIR JONES: Sure, take a ten-minute break.

(Whereupon, the above-entitled matter
went off the record at 3:06 p.m. and
resumed at 3:34 p.m.)

CHAIR JONES: All right, we're going
to start up again. And Professor, can you hear
me?

DR. SCHULHOFER: Yes, I can.

CHAIR JONES: Oh, you sound even
better than earlier today. This is improving.

Okay, we are at number five. As posed, does the
definition of bodily harm require clarification?

And that's throughout the statute. And I know
you have strong feelings, Liz, so I'm going to
interrupt you and make you tell us.

HON. HOLTZMAN: Well, I go back to the
point -- I'm sorry. I go back to the point I
made earlier. Professor Schulhofer, you weren't
here to hear my comment to General Pede.

But I am concerned that the language
is so -- it's backwards. And most people -- you
have to get, read to the end of the statute to
understand that bodily harm means any kind of
offensive touching.
My -- I have two -- I just have a problem with this because I think that we don't know, and I admit this, we don't know what impact this is having on the Panels and on jurors, prospective jurors, but it's easy to be confused because the normal meaning of bodily harm is not offensive.

Harm and -- what's offensive and what's harmful are two different things. They're different in normal speech. Everybody knows something that's harmful. I mean, it's not the same as being offensive.

Somebody can use bad language that's offensive or can smile at the wrong point, it's offensive, or doesn't say, thank you, sir, or, ma'am, that could be offensive to some people, but that's different from bodily harm. And so I'm just very -- I'm just concerned that this lack of clarity is affecting jury verdicts and there could be improper acquittals in my view.

And I was thinking about the comment earlier that this statute is written for lawyers.
and judges, and I just think that no statute is written for lawyers and judges. It's written for the public that's affected by it, which is the prospective defendants and the public in general.

And no defendant has the right to come into court and say, I'm not guilty of murder because I didn't understand the murder statute. The only time you can really rely on the advice of counsel is when you have a tax statute, and we all know why, because tax statutes are incomprehensible. You need a lawyer for that.

You shouldn't need a lawyer to understand the rape statute. It should be clearly comprehensible to the public, to the military, to the recruits, and to the Panel.

And so I, I mean, I'm not somebody who was really -- wants wholesale change here, but I do think that this could be harmful in the sense that we're getting, not just offensive, harmful, in the sense that we're getting improper acquittals, and so I would like to see that language changed.
And the fact that it's well known in
the military, I mean, they took it from a
different statute, an assault statute. I
understand it was handy. It was probably close
to the statute in terms of numbers. Maybe it was
128 to 120 or whatever it is. It was close by
and it was handy dandy. I get that.

But I don't think -- I don't get
improper acquittals and that's what I worry about
now. You can be exactly right and say, what is
your proof and what is your evidence; and they're
going to say, mea culpa, I don't have any proof
or evidence except that this is just a violation
of the normal English language.

And I think the statute should be
clear, particularly this statute should be very
clear to the people who are going to be
prosecuted under it, and to the public who wants
to understand what's going on.

MS. WINE-BANKS: Liz, would it solve
your problem if the definition of bodily harm
were actually the element? So that instead of
saying it's a sexual act by causing bodily harm,

it's a sexual act by offensive touching of

another?

HON. HOLTZMAN: Yes, that would be --

MS. WINE-BANKS: So that it was clear

up front what the crime was.

HON. HOLTZMAN: Yes, well, that's the

other problem with this, not only the lack of

clarity, but you have the logical issue which is

that you're committing the crime by committing

the crime. I mean, in print it's illogical --

it's an illogically drafted provision. So I

haven't really thought, and I apologize, it's

just I haven't thought of an alternative. I

don't know whether that would work. I'd have to

give it some real thought.

CHAIR JONES: Ms. Kepros?

MS. KEPROS: I guess I have sort of a

question about this in terms of real life

practice, and maybe somebody here can speak to

it. My impression from the testimony we've heard

has been that this is usually used to prosecute
non-consensual sexual contact.

And so, to me, it keeps coming back to isn't the crime, really, that you committed sex assault upon another person by having that contact without their consent? And if that is really the crime that this tries to get at, shouldn't it just say that?

Then you could eliminate bodily harm from this entire article. It doesn't appear anywhere else. I know grievous bodily harm is here for other reasons, but that has its own separate definition.

I just don't believe it's serving much purpose to create this term of art just to provide another definition and require everybody to go look somewhere else to find that it means something contrary to the plain language.

MS. WINE-BANKS: Right, but short of redrafting it in a dramatic way, one way to fix it might be to eliminate the words bodily harm as the means of committing the sex act that causes it to be a Class B crime, is to take the
definition and substitute it in there and just
say, by offensive touching.

   MS. KEPROS: I think I'm agreeing with
what you're saying, but what I'm sort of trying
to get at is to me the phrase offensive touching
is just terrifying because I have no idea what
that means, and that's almost worse to me because
it's so weird, and vague.

   And is it just my feelings are hurt,
or is it, you know, that, you know, I take
offense even? You know, I don't know quite what
that is, and again, to make that a serious sex
crime is --

   MS. WINE-BANKS: It's unwanted, any
unwanted --

   MS. KEPROS: Right, exactly.

   MS. WINE-BANKS: -- non-consensual --

   MS. KEPROS: Well, unwanted, non-
consensual. I mean, this definition uses the
word, you know, in reference to consent. And
again, that's why I'm trying to pose a broader
question.
Does it infer anything else or is the issue really non-consent, and if so, maybe this is a place we should talk about either redefinition or you know, something that's a little bit easier to process as a reader?

HON. HOLTZMAN: I think you make a very good very point here, which is if you actually look at whatever it is, (g)(3), the term bodily harm means any offensive touching of another. That doesn't mean in any sexual way. It's just offensive. And it could be I'm offended if, you know, you patted me on the shoulder. I mean, that obviously --

(Simultaneous speaking)

HON. HOLTZMAN: I mean, am I missing something?

LT. COL. MCGOVERN: If you go back to the front of the page where under (a) and (b), degrees and sexual assault, that definition is when you commit for grievous bodily harm which is defined in (g)(4) --

HON. HOLTZMAN: Right.
LT. COL. MCGOVERN: -- and then (c)(1) and B, causing bodily harm. So when you're looking at the statute itself rather than just the definition, those are really the only two instances --

HON. HOLTZMAN: Right, but what I'm saying here too, is if you want to look at the definition of bodily harm --

LT. COL. MCGOVERN: But first degree requires a sex act, so B, any person subject to this subject who 1) commits a sexual act upon another person by causing bodily harm. It seems to indicate there that it would require a sexual act.

Now, if the charge of bodily harm was something above and beyond that in addition to the sex act, I think we've heard testimony that bodily harm would not have to be additional sexual conduct.

CHAIR JONES: Kelly, this is important. Could you take me through that again? What are you saying?
LT. COL. MCGOVERN: I'm saying the only provision we're really -- you all are really considering right now is for offense (b)(1)(b), a sexual act upon another person by causing bodily harm to that person is one way we can be accused of a sexual assault, right?

So then you flip to the back to substitute the definition of bodily harm into (1)(b), a sexual act upon another person by causing an offensive touching no matter how slight to that person.

CHAIR JONES: Thank you, I got it.

BRIG. GEN. SCHWENK: So I think this is another example of the desire to keep away from the consent issue, so they do in a roundabout. So you have the sex act, then you have bodily harm, right? So now we have bodily harm, which is what? It's the sex act. It can be no more than the sex act.

So what does this definition give us? One thing, offensive. It's the only thing it gives us. So not any sex act is a crime, but if
it comes down to bodily harm, it's an offensive sex act. So it's another way to get by consent without saying the word consent.

MS. WINE-BANKS: But it doesn't include consent, because the definition in -- it goes on beyond --

BRIG. GEN. SCHWENK: Right, but it says including --

MS. WINE-BANKS: -- offensive touching, including any non-consensual.

BRIG. GEN. SCHWENK: Including any non-consensual.

MS. WINE-BANKS: Right.

BRIG. GEN. SCHWENK: So offensive is broader than non-consensual, and it's something -- but it's still got to be offensive. So that's what makes (b)(1)(b) crime is the offensive. That's all that's there. So we almost could say, "commits a sexual act upon another person --

(Simultaneous speaking.)

BRIG. GEN. SCHWENK: --- by an offensive, you know. I mean, it's a roundabout
mess. So I think working group ought to look at it and look at how is a clear way to say that?

And I'd like to get rid of bodily harm because when you look at grievous bodily harm, because I'm slow, I thought it would start with bodily harm that is grievous, and that's not what grievous meant. Instead it goes completely -- it doesn't even mention bodily harm.

So if we could make it simpler and clearer in, you know, some working group, make it simpler and clearer and then get rid of the bodily harm, then we could just leave grievous bodily harm which I think is fine the way it's defined.

CHAIR JONES: Before we can assign this to a working group, which we'll do at the end of this meeting, does anyone want to make any other comments? Yes?

MS. KEPROS: Well, the only question I guess I have -- obviously I love that idea -- is what behavior would we want to capture?

BRIG. GEN. SCHWENK: Then I want to
change what I --

MS. KEPROS: But I wonder what behavior you want to criminalize beyond non-consensual sex touching? Because I don't know what offensive means, and so --

HON. HOLTZMAN: You might not need to. I mean, if someone took a really hard look at it, you might not need -- this might just be the simple, non-consensual sexual contact.

MS. KEPROS: Well and that's what I've been --- and I just want to make sure there isn't a gap here that I'm, you know, I'm misinterpreting this or there's some other behavior that, you know, that other people think we need to describe in this.

LT. COL. HINES: Judge, I think one nice takeaway that was -- Lt. Col. Pickands and Major Rosenow both in their materials at four and seven, I think they went into this.

Their answer to this was sometimes when you have a fact scenario, that they like to have the bodily harm scenario, because when there
is the victim who wakes up and doesn't really
remember anything beyond the offensive act, if
any, she knows -- she can tell that someone's had
sexual intercourse with her, but she really can't
tell investigators anything else.

That allows, according to Lt. Col. Pickands and Major Rosenow, the government can
proceed and just charge that offensive touching, or that sex act or contact as the bodily harm.

So I would just suggest that the
working group look at what they both had to say about that because they both expressed concern that if you took this away they might not -- they would have a hard time charging that fact pattern under one of the other provision in the statute.

MS. WINE-BANKS: It wasn't taking it away. It was just redefining it by putting the
definition in instead of the words bodily harm.

BRIG. GEN. SCHWENK: Right, I think I agree with Jill. I was just talking about
getting rid of "bodily harm" as the definition and a term that's used except in grievous bodily
harm, and instead making it simpler, and then
that brought Laurie's problem up, simpler, how?

MS. FRIEL: Yes, it sounds to me like
they're making -- sorry, we're making two
suggestions. One is to either replace bodily
harm with the words "offensive touching", or
replace the words with "without consent", as
consent is defined in the statute, and those are
the two choices.

DEAN ANDERSON: Or replace it with the
definition of bodily harm which is "any offensive
touching, comma however slight, comma including
any non-consensual sexual act."

MS. FRIEL: Right, and I guess the odd
thing about that to me is I'm just used to a
factor scheme where we have serious physical
injury and physical injury. One is a lesser of
the other. Here, we have grievous bodily harm is
serious bodily injury.

One would think that bodily harm then
is some bodily injury, still the word injury and
I think that's one of the issues Representative
Holtzman has with this is it just still seems to imply you have to have an injury.

HON. HOLTZMAN: Well, right, and the point -- and also there's -- which is very -- you know, you've raised a really important point. Is there a gradation that's been omitted here?

Because if it's just simply non-consensual sexual contact, what's the level of that crime as opposed to -- if that's all that happens. It's non-consensual. The person's not intoxicated. They're not whatever.

There's been no other -- but then you also -- and you -- and what's the difference between that and then you have the grievous bodily harm which is very serious, or they've used a gun or something like that.

But what about the intermediate which is a step above simply sexual -- a simple sexual act and grievous bodily harm? There is none. That's the -- I don't know. Maybe -- am I missing something here?

MS. KEPROS: I think it's (a)(1),
unlawful force. I think that would cover that
level of physical violence that you're
describing.

DEAN ANDERSON: Yes.

BRIG. GEN. SCHWENK: But we don't have
that in B.

HON. HOLTZMAN: But we -- yes, that's
not in (b). That's (a). That's rape. So what
you would be doing is --

BRIG. GEN. SCHWENK: I just thought
maybe the answer is that's one of those they
didn't want to have so many -- remember one of
the things they were trying to do, according to
Chuck and Chris, was keep things simpler and not
have it be so voluminous in different levels.

So maybe they did what we
traditionally do in the military where in
sentencing they're going to have sentencing
guidelines. Leave it to the Members or the Judge
to decide, based on the facts, how aggravated
this (b)(1) violation is. And if it's only the
sex act itself, then, you know, when it comes you
come for sentencing, it's worth whatever that's worth.

But if it's some kind of bodily harm, in the traditional sense of bodily harm, above the sex act, but not grievous bodily harm, then maybe you add onto what you gave last week to the other cases which seems to be a higher one because they beat the person up pretty badly, but they didn't get to grievous bodily harm. Maybe that's how they left it. I don't know. That's my guess.

CHAIR JONES: All right, I'm going to move on since we know we're going to be working on bodily harm in the working group to number 6 which is the definition of threatening, wrongful action, ambiguous or too narrow?

And that comes up, let's see, it's 120(g)(7), and we had a split. Two presenters thought we should modify it. Two presenters, including Colonel Grammel said no change. Professor Schulhofer, and you can hear me, right, Professor?
DR. SCHULHOFER: Yes, I can.

CHAIR JONES: Okay.

DEAN ANDERSON: I apologize, can you tell us where that is in the statute, the definition -- not the definition section, but the --

LT. COL. MCGOVERN: (a)(3).

DEAN ANDERSON: (a)(3).

BRIG. GEN. SCHWENK: And (b)(1)(a).

DEAN ANDERSON: But threatening wrongful action comes under the definition of fear, but it's a subsection of fear.

(Simultaneous speaking)

CHAIR JONES: So where do we think we are then, (g)(7)?

HON. HOLTZMAN: (g)(7), but it refers back to (b)(1)(a).

CHAIR JONES: Okay.

BRIG. GEN. SCHWENK: It's also in (b)(3).

HON. HOLTZMAN: Well, that's specific --- subjected to death and bodily harm.
BRIG. GEN. SCHWENK: True, but the
term is there.

CHAIR JONES: So the question is, is
that too ambiguous? I'm trying to find it, so I
don't have an opinion yet.

HON. HOLTZMAN: It's G7.

CHAIR JONES: Yes. Wasn't one of the
issues here that this wouldn't actually cover a
kind of coercion? You know, not the positive,
but even the negative, that that ---

HON. HOLTZMAN: Well, I think you're
talking -- yes, Professor Schulhofer is talking
about -- he wants to make clear that it's
unacceptable to obtain consent by offering
undeserved privileges or mitigation of deserved
criticism, and he'd like us to discuss it and
wants to hear more about it.

MAJ. GEN. WOODWARD: But this is where
you hear from some people that say we shouldn't
say that if somebody offers something positive to
someone, or detracts from that, whether they're
not truly in fear. They're only in fear of their
career, or they're in fear of losing something of
monetary value, that that's not a fair thing to
put into this article.

It should be in some other article,
and I think that's what the Professor is saying
by, should we address it in some other article?

DR. SCHULHOFER: I think some of the
witnesses said that, for example, that in the
concrete cases you had a drill instructor, or as
you call it, a military training instructor now,
something like that, for basic training.

The drill instructor said, I'll let
you get leave this weekend to go home to your
parents, but, you know, if we have sex first, or
something of that nature. So the witnesses said
that would be wrongful, and others said, well,
that's not clear that's wrongful. The person's
not entitled to leave, so he's just offering a
benefit. The person would not be in fear.

I think it should be impermissible, so
it's just a question of, you know, is this
sufficiently clear or this is not -- I'm sorry,
is this sufficiently clear that this would be

covered?

MS. WINE-BANKS: Would that be covered

by a different crime within the military system?

COL. GREEN: This goes to the second

set of issues that the subcommittee is going to

address in the future, and this carries over to

that.

But I think the issue is the 2007

version of the statute specifically enumerated an

offense based on -- incorporated within the

definition of threat, positive or negative

conduct through the abuse of authority, and that

was removed in the 2012 version, and then we're

left this question.

And so, I think you all will take this

up more specifically in terms of coercion and

abuse of authority in that context and whether

that needs to be enumerated. Currently, there is

no enumerated offense, and to reach that conduct

under 120, this is the only channel in which to

do that.
MS. KEPROS: We have an issue 14 that we will reach in our next set of issues that I cannot distinguish from this one at all. It looks like exactly the same question. Should the definition of threatening or placing another person in fear be amended to ensure that coercive sexual relationships or those involving abuse of authority are covered under an existing article 120 provision?

All of those other issues are around the issues of abuse of power. So my recommendation is that we table this until we look at the other issues.

CHAIR JONES: It sounds good to me.

MAJ. GEN. WOODWARD: Yes, the two differences are the consent or, you know, that the other one is getting to whether someone who’s under -- they willingly consent, but if they're under that level of power of authority, do they really have the ability to consent?

CHAIR JONES: What number do you say this is identical to? Did you say ---
MS. KEPROS: 14 is what I just read to you.

BRIG. GEN. SCHWENK: Which is the second batch of questions that the JPP gave us that have to do with inappropriate relationships.

CHAIR JONES: Oh, I see.

BRIG. GEN. SCHWENK: And so we divided them out.

CHAIR JONES: They're not in our -- I got it.

BRIG. GEN. SCHWENK: We get 1 to 11 on 120, and then the others were --

CHAIR JONES: Got you, okay.

MS. KEPROS: 12 through 17 are all about the abuse of power and those kinds of coercive dynamics. That's why I was wondering if it might be better put to the directive end.

DR. SCHULHOFER: I don't have any objections to deferring this until we can think about it in a broader context. That obviously makes sense.

But I would just put on the table that
I think when you have a training situation where recruits are under the authority of the drill instructor, and that authority is used to coerce or induce sexual sedition, I think that's a very different crime from other sorts.

You know, if the sergeant has the person come over and paint their garage, this is very different. And it seems to me that the abuse of authority for sexual coercion could fit in as a very distinct category.

MAJ. GEN. WOODWARD: Right, but we're going to address that.

MS. WINE-BANKS: Will the issue of unlawful force also get bound up in this issue of improper use of authority? I mean, it's not one of the definitions we're looking at, but I've always wondered what unlawful force is as opposed to lawful force?

I mean, lawful force for a sex act? I don't -- I can't envision a lawful use of force that -- I mean, I just can't even conceive of what that would be. So I've therefore wondered
why we have something that's unlawful use of force.

MS. FRIEL: S&M. That's -- I mean, you could, the way the use of force is defined here, somebody could consent to having force used upon them that is sufficient to restrain them. There are people who agree who to be bound, and beaten, and God knows why, in the act of having sex. So I think that would make sense to me that that's what they're getting at there.

MS. WINE-BANKS: Would that be lawful force if I consented -- that you can consent -- when you can consent, as in, I'm okay, but would you then consider it lawful force? It would be consensual force. And there is somewhere that says you can't consent to grievous bodily harm.

MS. FRIEL: Right.

MS. WINE-BANKS: And so if S&M gets out of control, or the choking thing, and you die, you couldn't consent to that even though you did consent to that. So maybe it would be the issue of authority, but I still wonder about
lawful force and unlawful force.

CHAIR JONES: Okay.

BRIG. GEN. SCHWENK: I agree with

Laurie's thought that this would be better looked

at in the whole context of those kinds of

relationships, so I think that's ---

HON. HOLTZMAN: You mean official

relationships, not accidental.

BRIG. GEN. SCHWENK: Official

relationships. Yes, thank you. There was a DoD

directive on those kinds of -- at least on

recruiters and the person to be recruited, and

trainers and trainees. I don't know if it's out

yet. But --- to figure that out.

MAJ. GEN. WOODWARD: Yes.

CHAIR JONES: So I think we're all in

agreement that we're going to defer talking about

the definition of threatening wrongful action

until we get to the 12 through 17 issues.

And are we saying the same thing about

the next question which is, how should fear be

defined? Or, no, I'm sorry, no, okay. Well,
it's in 120(g)(7) as well, and the question is,
how should it be defined to acknowledge both
subjective and objective factors?

The professor's opinion is to date he
hasn't heard a compelling reason for change. Is
there anyone who has a compelling reason to
change the -- or add to the definition so that
people would better understand what fear is or
whether it's subjective or objective, I guess?
I'm trying to figure out what the problem is.

LT. COL. MCGOVERN: Well, it was
someone who said that you take your victim as you
find them, and it's a fragile, fearful person,
then their subjective fear, even though not all
reasonable fear by normal standards, should be
included. So was that the argument?

LT. COL. HINES: I think that's right.
And Judge Orr and maybe one other a submission to
the Panel had indicated that the fear should be
simple fear alone. It's the witnesses or the
victim's fear, and you don't instruct the Panel,
but it also has to be an --- objectively
reasonable based on community standards.

And so I think the majority of people that you've heard from have said, don't change it. Leave it as the victim's fear, but there's the added step that the fear has to be objectively reasonable.

CHAIR JONES: It has to be objectively reasonable right now under the statute. So do we want to discuss this further or do we have the statute as it is?

LT. COL. HINES: Professor Schulhofer, did you have a comment? I thought I heard you trying to speak.

DR. SCHULHOFER: Are we on number seven?

CHAIR JONES: Seven, yes.

DR. SCHULHOFER: No, I agree that it shouldn't -- the fear should have to be objectively reasonable, so I would not change the current definition.

CHAIR JONES: All right.

DEAN ANDERSON: Why, I guess, is my
question?

CHAIR JONES: Why should it have to be

--

DEAN ANDERSON: If the fear is legitimate, honestly held, it means the act was coerced from the perspective of the victim.

MS. FRIEL: So here's the example I gave when I talked --

DEAN ANDERSON: We can always come up with an irrational person.

MS. FRIEL: No, that's -- but their -- here's the example, and this was a real case. A woman dating a detective goes back to his home. He says, come on in the bedroom and have sex with me. She has sex with him. She tells me afterwards she was in fear. She thought that he might kill her.

I go, what did he do or say to make you think that? She said, well, I knew he had a gun. He's a detective. He's got to have an off duty gun. And I said, did he show it to you or did he say anything? Did he even say it's in my
night table'? He said nothing about it.

I'm telling you, she really did. She
was not lying to me. It was legitimate. She
subjectively had that fear. Is that detective
guilty because she had that subjective fear?

I mean, that's, you know, I think
that's why we have the, do you truly have a
subjective belief? And then, is that subjective
belief reasonable under the circumstances?

DEAN ANDERSON: So, I apologize, we're
where in the statute on the fear thing because I
think fear shows up two times, right? So we're
talking about the ---

(Simultaneous speaking)

MS. FRIEL: I think it's in the
definition of threatening or placing someone in
fear.

DEAN ANDERSON: No, no, I understand
that we're talking about the definition of fear,
but fear shows up in the statute under rape, A3,
but again, this is someone commits the sexual act
by doing this. The mens rea of the defendant is
that they are threatening or placing the other
person in fear, and I can't see how that
detective did that under --

BRIG. GEN. SCHWENK: He took his gun
off and put it on the table next to the bed.

(Simultaneous speaking)

MS. FRIEL: He did place her in fear,
but he just didn't know he was. So, I mean, I
could see this --

MAJ. GEN. WOODWARD: That is how he
accomplished -- that's how the sex act got
accomplished, he just didn't know it.

DEAN ANDERSON: In (b)(1)(a), I think
there's another place other than (b)(1)(a),
threatening or placing the other person in fear.

Well, actually, did you prosecute the case?

MS. FRIEL: No, of course not.

DEAN ANDERSON: Yes, right, so --

MS. FRIEL: No, but it didn't fit our
statute because we had a, what is your subjective
belief, and is your subjective belief reasonable?

I didn't even have to get the prosecutorial
discretion. It didn't fit within the definition.

BRIG. GEN. SCHWENK: So this statute

is like yours?

MS. FRIEL: Yes.

HON. HOLTZMAN: Where is the objective

standard here?

DEAN ANDERSON: A reasonable fear that

noncompliance will result in the other person --

HON. HOLTZMAN: Oh, reasonable fear,

okay, sorry, yes, okay, thank you.

CHAIR JONES: So are we okay with

this?

MS. FRIEL: I mean, think about it ---

in the military context, what if somebody asks

you to have sex with them and another -- let's

take the rank out of it. Another person of equal

rank asks you to have sex with them, you say yes,

and then afterwards you say, I had a fear that if

we went out in a combat, he wouldn't have my

back, and he, you know.

I mean, we don't sit there and go, how

is that reasonable? Did he say something or do
anything that suggested that --- but somebody

could have that kind of fear. I needed to comply

so people would have my back. I don't know

whether you'd want to make that rape then.

MAJ. GEN. WOODWARD: Wouldn't you mean

that -- I think it's more that -- not that her

fear or his fear, whichever the victim was, was

reasonable. That was probably a reasonable fear.

It was the overt act on the part of the other

person that made that fear possible, i.e., the

detective didn't do anything overt to make that

victim afraid of him.

Did anybody in that unit make that --

do anything over to bring that fear to the person

that they wouldn't --

CHAIR JONES: Yes, the concern ---

that he wouldn't watch my back, could be a

reasonable fear. Yes, we're not saying by

definition that's never a reasonable fear. But

yes, you're right, if there's nothing that would

have caused that, then it's not a reasonable

fear. I think that's what you're saying.
MAJ. GEN. WOODWARD: Well, no, I think it could be reasonable that that was caused, it's just that nobody did any --- you know, that the individual is not responsible for it because he didn't do anything overt to make that a reasonable fear.

I guess there could be like a unit-wide cultural thing that makes that a reasonable fear that, if I do something out of the way, you know, that I could be alienated and left to hang in combat.

CHAIR JONES: Right.

MAJ. GEN. WOODWARD: But it didn't mean the individual who is the accused did that.

MS. WINE-BANKS: If you take away the definition that includes reasonable, you open it up to being prosecutable, whereas as long as the word reasonable is there, the fact that the alleged defendant didn't do anything overt would mean he would have, he or she, would have no culpability.

COL. SCHINASI: Reasonable always
means under the circumstances, and so what circumstances do you have that make it objectively reasonable? And in the scenario we are discussing, none.

HON. HOLTZMAN: She has a fear. No one is saying that the victim doesn't have a fear. But the point is if the fear is not reasonable under the circumstances, there's no justifiable basis for that fear, in other words, justifiable in the sense that most people would be afraid in that circumstance, then I think it's a problem.

And so what we're saying is that the defendant -- because the language placing somebody in fear is too vague, and so the fact that you're carrying a gun because you're a detective, you could be placing somebody in fear. It's just not a reasonable fear if this person's been your friend for 20 years and --

MS. FRIEL: That if you don't have sex with them, you're going to get hurt.

HON. HOLTZMAN: Right, so they could
very well have that fear, but if it's not
reasonable, then people could be prosecuted
simply because somebody had any fear, and that's
the question.

DEAN ANDERSON: On this question I'm
looking at this definition of threatening or
placing another person in fear, and it just seems
to be that there could be a way in which the
definition is duplicative of reasonableness.

There is language that says that the
defendant communicates or acts in a way that is
of sufficient consequence to cause fear, that
noncompliance will lead to wrongful action or --

CHAIR JONES: Are you in seven? You
are?

DEAN ANDERSON: Yes, I'm looking at
the definition of seven. So you have to have
action that is of sufficient moment --

MS. FRIEL: He carries his gun. He's
required to carry his gun in the example I gave
you. But he carries his gun, so he did
something.
DEAN ANDERSON: But simply carrying a
gun is not an action --

HON. HOLTZMAN: Well, communication,
I have a gun. He told her 20 years ago. I mean,
how long did they see each other, five years?

MS. FRIEL: Twice.

HON. HOLTZMAN: Twice, okay.
MS. FRIEL: Maybe once, I can't
remember.

HON. HOLTZMAN: Whatever it was, maybe
he told her, I have a gun.

MS. KEPROS: He told her he was a
detective.

MS. WINE-BANKS: So she knew, I'm a
detective, and she went out with me voluntarily.
She assumed I carried a gun because I'm a
detective.

MAJ. GEN. WOODWARD: No, but we're
talking about his overt action which was, I have
a gun, not specifically threatening her, but it
could be an implied threat.

MS. WINE-BANKS: Well, I think the
story that you told was she just knew he was a
detective and assumed he had a gun. She didn't
see it.

MAJ. GEN. WOODWARD: But I think
that's what the deal was, I think.

DEAN ANDERSON: I'm just trying to
understand it mostly, and identify which side I
believe. I'm just not sure right now. I'm not
necessarily persuaded that we should pause any
more on this, but I did want to parse this
statute to make sure I understood what's
necessary under the statute to constitute the
kind of fear that triggers the import of the
statute.

MS. WINE-BANKS: Well, for it to be --
- in the circumstance, if the detective
communicated to her in some way, you know, of
course I carry a gun all the time because I'm
never off duty, that would be a communication of
sufficient consequence that could cause a fear.
Whether that's a reasonable fear that, if you
don't do what I say, I'm going to use my gun, is
of question.

DEAN ANDERSON: I agree, except that
the statute doesn't say they could cause a fear. It says that it's a communication or action that
is of sufficient consequence to cause the fear.

MS. WINE-BANKS: Right.

DEAN ANDERSON: Yes.

HON. HOLTZMAN: But if you on, it says
that noncompliance, so --

DEAN ANDERSON: Yes, just not any
fear, but that noncompliance would --

HON. HOLTZMAN: Yes, so there's kind
of a request implicit --

DEAN ANDERSON: Or demand.

HON. HOLTZMAN: -- or demand in item
seven. So it can't be just -- your scenario I
don't think would fall under seven.

MS. FRIEL: No, but the one that Jill
contemplated would.

HON. HOLTZMAN: Say it again, Jill.

What happened?

MS. WINE-BANKS: I don't remember what
I said. That, "I'm a detective." That's the only communication. And she just assumes that he's carrying a weapon, and that is of sufficient consequence to cause a fear -- I'm not saying reasonable -- to cause a fear that if she doesn't comply with his secondary communication of, "Let's have sex," that she could be hurt. "Contemplated by the communication or action."

So it seems to me that actually that wouldn't -- the communication has to be, "I'm carrying a gun and I'll use it on you."

DEAN ANDERSON: Yes, that would have to be the kind of communication that would work under the second part of this.

MS. WINE-BANKS: Yeah, I think it would.

DEAN ANDERSON: So I guess I'm wondering what independent work the word "reasonable" is doing, given that the rest of the construction of the provision requires that the communication or action be of sufficient consequence to cause the fear, and not just any
old random fear, but a fear that noncompliance
will result in something bad, not just any old
noncompliance resulting in something bad, but bad
that is bad that was contemplated by the
communication or action.

MS. KEPROS: I'm not identifying the
scenario where there's an inability to prosecute
something. I don't see how removing the word
reasonable solves the problem.

MS. WINE-BANKS: Wouldn't it make the
problem worse?

MS. KEPROS: That's my fear, my
reasonable fear.

(Laughter.)

MS. KEPROS: Every other person here,
I believe, was a prosecutor, so you tell me a
case you can't prosecute under this statute.

MS. FRIEL: Or flip the question the
other way, what's the problem with the word being
in there other than it may be redundant?
Because, again, to remove the word is a statutory
change. Someone will consider it a significant
change. They'll be charging yet a third version
of this statute. Well, let's flip it the other
way. Do we see a problem with the fact that the
word's there?

COL. SCHINASI: You could see
reasonable as negating subjective, because
reasonable means under the circumstances.

DEAN ANDERSON: Right, it's just not
you could see it. Reasonable is an objective
standard. It negates the subjective element.

(Simultaneous speaking.)

MS. FRIEL: Right, but you're also
saying the other language does that anyway.

DEAN ANDERSON: Exactly, subjectively.

COL. SCHINASI: So if you take that
out, then you could say her subjective fear,
whatever it is, is sufficient. So "reasonable"
carries that baggage.

DEAN ANDERSON: For better or worse.

BRIG. GEN. SCHWENK: Or that

protection.

DEAN ANDERSON: Exactly.
HON. HOLTZMAN: How many people said that this was a problem? Do we have any presenters who -

COL. GREEN: The JPP heard from two people. Dean Schenck, in your law review article, this is something that you noted, and also Colonel Jackson from the Air Force noted that it does not include a subjective and an objective standard, and advocated for considering the addition of a subjective standard in addition to the objective reasonable standard.

HON. HOLTZMAN: Wait a minute. Why?

We don't need to have an objective and a subjective standard.

COL. SCHINASI: There really are two standards here. The first is the set of facts that determine what the victim thought. That's not a standard. The standard is how that's going to be interpreted. That's the objective standard. There is no subjective standard.

COL. SCHENCK: But I want to point out that my Articles, I don't have any personal
attachment to those --

(Laughter.)

COL. SCHENCK: But at the time it was
to draw attention to the policy statute. Now
there seems to be discussion. I'm fine with
leaving the "reasonable" in, but when I addressed
it, it was the eggshell skull theory victim
aspect that I was addressing.

COL. SCHINASI: I teach torts, so it's
near and dear to my heart. That's a scenario
totally different than this.

COL. SCHENCK: Yeah, I totally
understand. But I mean, as far as when I was
writing it, what I was focusing on, I was focused
on vulnerable victims.

COL. SCHINASI: So what's strange to
me -

COL. SCHENCK: But I mean, I agree
with Dean Anderson. There's a lot of limiting
language in there. I mean, there's a lot of
gates in there when you're talking about defining
threatening or placing that other person in fear.
So writing in "reasonable" isn't really going to make a hill of beans by taking it out or keeping it in. Everything else is there.

DEAN ANDERSON: I just want to state for the record that I think that there -- because I'm the one who said why, you know. But I think it's important to go through this language and to try to understand what the statute means. And upon parsing this fairly carefully, it does seem like there are a number of provisions that essentially require reasonableness already.

And we may disagree with that and want to overhaul the entire statute, but I don't see a reason -- there certainly haven't been arguments to that effect in front of us. And I don't think reasonableness here does a lot of independent work from the rest of the language of the statute, and so I don't object to it.

CHAIR JONES: Okay. Then we're going onto the definition of force in Number 8. But I guess we should say, then, with respect to fear, we're leaving that alone. No change. Is that
everybody's sense? Okay, good.

All right, should the definition of
force -- is it too narrow? Should it be made
broader, 120(g)(5)? Professor, do you want to
speak to this one?

DR. SCHULHOFER: Well, I guess I felt
that the definition of force was adequate, but
this really ties into the question of resistance.
The concern was the definition of force might
need to be made broader to make clear that, if a
victim didn't resist, there could be a broad
spectrum of circumstances that would excuse the
failure to resist.

But it seems to me it's not necessary
to get into all if we just say directly that it
never matters why a victim resisted, that the
lack of resistance does not amount to consent
either way.

LT. COL. MCGOVERN: If I can draw your
attention back to the statute, and two places
where the word force is particularly used are in
the rape portion, (a)(2) and (a)(5). The
unlawful force that's in (a)(1) is separately
defined. So just when you're plugging that
definition, that it's in that context.

DEAN ANDERSON: And it doesn't come up
under sexual assault. I only say that because,
to the extent that it's narrow, it's narrow with
the most serious offense, which is why it's
narrow.

MS. FRIEL: I have a question. So
here's my question about the way it's defined
now. So you have weapons clear. Inflicting
physical harm seems to suggest to me you're
inflicting some kind of injury or something.

So what about in the case under (b)
where somebody actually uses some physical
strength on someone but it's not really
sufficient to overcome their resistance. They
don't resist. That's what happens a lot, that
somebody gets pushed down, they might be able to
fight back, especially if you're talking about
two Soldiers who are in better shape than I am,
and I can just -- you tell me if in practice this
works out -- but I could see somebody saying, 
"Come on, that pushing down on the bed, that's 
not sufficient force, that Soldier could have 
fought back," and so it wasn't sufficient to 
overcome them.

But actually the pushing of somebody 
down, people get really scared when there's any 
force, and they tend to comply once any force is 
used. That's why in a civilian statute it 
usually says force or threat of force, expressed 
or implied, that puts you in fear of some kind of 
physical injury or something else.

And so this seems narrower than most 
of the civilian statutes that I've seen. And I 
don't know where you would cover the scenario I 
just gave you where some force was used but it 
wasn't sufficient to overcome somebody's 
resistance.

MS. KEPROS: Would it be (b)(1)(a)?

MS. FRIEL: Threatening or placing 
that person in fear.

HON. HOLTZMAN: Well, is it bodily
harm again?

MS. FRIEL: No, she's saying under A. So you're saying somebody pushes somebody down, uses some, what we would call, in laymen's terms, physical force, and so -

LT. COL. MCGOVERN: Causing or likely to cause grievous bodily harm. So you don't actually have to cause the harm. And then in 5 it does say by force or threat of force.

DEAN ANDERSON: Yeah, but that's for intoxicants. 5 is substances, right? So, shoving someone onto a bed, let's just take that because it's a kind of -- sorry, pushing someone onto a bed and pinning them, right, that's classic.

It's not going to fall under rape because it's not likely to cause death or grievous bodily injury. It's not force that's likely to do that. It's not going to -- it may or may not threaten the person or put them in fear, if we talk about the definition of fear again. We parsed that recently. But I think it
would come within the rubric of just non-consensual sex, potentially.

HON. HOLTZMAN: I think it's number one, (a)(1), because unlawful force, if you see it defined, means any act of force done without legal justification or excuse. So pushing someone on the bed would be an act of force. So I think it would come under (a)(1).

MAJ. GEN. WOODWARD: And that fits under 5B.

HON. HOLTZMAN: It also fits under the definition of force, just whatever the use of --

DEAN ANDERSON: Sufficient to overcome or restrain.

HON. HOLTZMAN: Yeah, right, but you need the force as part of the sexual assault or rape. But I think it comes under rape.

MS. WINE-BANKS: Also you've raised a different question which is, I think, Kelly, what you said, that force is also implied. The definition of force has no applicability to, you know, putting something into somebody's drink by
force.

That's not -- you know, did I hold a gun at your head while I dropped it in and then forced you to drink it? Well, that would certainly be it, but I don't think that's what is intended to cover.

So the word "force" used in two different subsections of A, having the same definition, is a problem that I hadn't focused that until she just said that.

MS. FRIEL: And your unlawful force still says -- the term unlawful force means an act of force done without, so you still have to go back to the definition of force which requires "to be sufficient to overcome resistance."

HON. HOLTZMAN: I see, okay, right, all right, fine. So we don't really have -- that goes back to the point I made earlier on the bodily harm. We don't have an intermediate -- this is really what we covered under bodily harm. So you're under (b)(1)(b), because it's bodily harm. It's an offensive touch.
BRIG. GEN. SCHWENK: Right.

HON. HOLTZMAN: So there you go.

(Simultaneous speaking.)

LT. COL. MCGOVERN: You don't think that force under -- the force in C, inflicting physical harm sufficient to coerce or compel submission, that doesn't cover pushing someone onto the bed?

MS. FRIEL: I would think pushing someone on the bed, I could see a lot of jurors saying that's not sufficient to overcome, restrain, or injure a person. They could get right back up. They could push you back. They have the physical ability to do that.

CHAIR JONES: And if there a definition for physical harm?

LT. COL. MCGOVERN: But these are "or's." That's all that they have to do, is A, B, or C. So if that was enough to coerce or compel submission of the victim, that was sufficient force.

MS. FRIEL: Well, except that requires
harm. C requires physical harm, which suggests --
- so that's not defined.

HON. HOLTZMAN: Right, it's not bodily harm. Who knows what physical harm is, right?

CHAIR JONES: Physical harm is what bodily harm is.

BRIG. GEN. SCHWENK: Oh, there we go. That will be our definition.

MS. FRIEL: Well, I do see though that the scenario I'm suggesting would fit under (b)(1)(b), however we change the words, right?

MS. KEPROS: That's just what I wanted to check in. Since we have still this looming issue about what we're going to do with bodily harm, I mean, I think what you're describing is a non-consensual event.

And so I'm just checking in to say, hey, does the word non-consensual cover that or is there something else going on?

BRIG. GEN. SCHWENK: It's a (b)(1)(b), but it's not a rape, so you're down to sexual assault.
MS. KEPROS: Okay.

COL. SCHINASI: But it also may not be harm. Just pushing somebody down on a bed doesn't necessarily harm them.

BRIG. GEN. SCHWENK: Well, but under (b)(1)(b), if we ever get finished with it, it's going to be -- the sex act itself may be enough.

HON. HOLTZMAN: Bodily harm doesn't require --

(Simultaneous speaking.)

MS. KEPROS: It's just non-consensual bodily -- or excuse me, sexual touching.

COL. SCHINASI: And the question is force, not harm. It's not a contest. I mean, you could very well have the victim saying, "Yeah, I wasn't afraid of this guy. I could take this guy," which is kind of the important point of it.

HON. HOLTZMAN: Yeah, but it's still an act of force. The term unlawful force means an act of force, so then you have to go back to what force means, and force means the use of such
physical strength or violence that's sufficient
to overcome.

Well, the jury might decide that
pushing someone on a bed is not sufficient. So
that's the problem. And then you go to bodily
harm, which is not bodily harm. This is a quite
wonderful statute.

BRIG. GEN. SCHWENK: But maybe when
they wrote it, that's what they intended, you
know? If the jury decides it's not sufficient,
then it shouldn't be at that level. It should be
down a level. And then you get a sexual assault
instead of a rape.

LT. COL. MCGOVERN: Previous versions
of rape were simply force without consent.

MS. FRIEL: Right.

LT. COL. MCGOVERN: That's where you
got the changes then in 2007, so you should use
that in context. I believe, traditionally, if
there was any level of force, it equated to rape.

(Simultaneous speaking.)

HON. HOLTZMAN: It's offensive
touching.

   MS. WINE-BANKS: Oh, right, that's offensive touching.

   BRIG. GEN. SCHWENK: It doesn't mean bodily harm, though. It means bodily harm in the military.

   MS. KEPROS: You guys are raising a question in my mind that I understand probably isn't really on the agenda. I'm just curious if there's any quick response.

   Well, how can (a)(1) and (a)(2) both exist and not violate equal protection? Because it seems like 2 is way worse.

   (Simultaneous speaking.)

   BRIG. GEN. SCHWENK: Well, doesn't it seem like the line is broader in 2?

   MS. KEPROS: That's my first question.

   2 seems worse, and so how can those be punished to the same extent?

   BRIG. GEN. SCHWENK: The only difference between 1 and 2, as far as 1 being able to eat up 2, is the unlawful.
MS. KEPROS: Right.

BRIG. GEN. SCHWENK: You know, because

if it just said force, it wouldn't eat up 2. So

that means you have to have unlawful.

(Simultaneous speaking.)

COL. SCHINASI: It's a matter of, (a)

is anything, and (b) is a specific kind.

MS. WINE-BANKS: But almost by
definition, 2 is a more serious thing than

unlawful force. Which could be nothing.

LT. COL. MCGOVERN: I think -- and to

kind of sum up what you've heard today, one,

again, is those circumstances where there appears
to have been some sort of consent, in the S&M
sort of circumstances, so there actually is quite
a bit of force involved, you know, perhaps to the
point of asphyxiation, and so it does become a
rape.

So I just don't want everybody

minimizing (a)(1) so much, because that really
could cover very serious circumstances that are
quite different.
MAJ. GEN. WOODWARD: Yeah, but couldn't (a)(1) be exactly the same as (b)(1)(b)?

DEAN ANDERSON: Do we know, historically, just to clarify in terms of the word "unlawful," when did that enter the statute here? I know that there's a history of having the word "unlawful" floating around of unlawful sexual penetration, but that has to do with the marital rape exemption. When did the word "unlawful" get hooked up with force?

LT. COL. MCGOVERN: In the 2012 version. And I think we can send an RFI to Colonel Kennebeck. They've had conversations with Colonel --

DEAN ANDERSON: And were those conversations about sexual proclivities toward sado-masochistic sex?

LT. COL. MCGOVERN: Yes.

DEAN ANDERSON: Oh, okay, so that's actually what they intended to have this be about.

MS. WINE-BANKS: If that's what was
meant, then that's what it should say. And saying "using unlawful force against the other person," and defining unlawful force as an act of force done without legal justification, which is tautological, isn't -- I'm giving you permission to use force. Does that make it lawful? Well, it makes it lawful, but it's not unlawful.

COL. SCHINASI: You're avoiding the word consent.

MS. WINE-BANKS: And when does it become lawful?

HON. HOLTZMAN: Well, see, it says "without excuse," so it may be that the fact that I have permission gives me an excuse.

COL. SCHINASI: You're avoiding consent, right? Lawful force is when you consent to being forced to do something.

HON. HOLTZMAN: Right.

COL. SCHINASI: And so it would be nice if they said consent, but they don't want to say consent.

LT. COL. MCGOVERN: Socially, in the
law, and as a community, we proscribe some things
which other people would agree to. I mean, with
assisted suicides, you know, it's the same sort
of thing. Where do you draw the line in the
military for force and what is consensual?

HON. HOLTZMAN: It's just odd that
that would be the number one item.

LT. COL. MCGOVERN: We can submit an
RFI and get some additional background
information for you all.

CHAIR JONES: That would be good. So
that's Number 8, which is really, I gather,
wrapped up with Number 5 do we think?

HON. HOLTZMAN: Does the professor
have something to say about 8? Because he had a
big paragraph on it in this letter.

CHAIR JONES: Professor, did you have
anything you wanted to say about Issue 8 about
the definition of force?

DR. SCHULHOFER: Well, there was a lot
of byplay and I'm not sure I followed it, but it
seems to me that -- I see the semantic problems,
but it seems to me that (a)(1) and (a)(2) are
doing different things because you can consent to
the use of low-level force, as people discussed,
an S&M situation, for example, and somebody
agrees to be tied up. That would normally be
sufficient to compel submission. But if you
agree to it, that's okay. It's not unlawful
force.

But then you need A2 because you can't
consent to force that can cause grievous harm.
So I think there's some disagreement within the
group but at least my own view is personally I
don't see any compelling need to make the change
here.

CHAIR JONES: Alright, why don't we
get the information on (a)(1)? And I don't think
we need to change it either, but let's look at
the information when it comes in.

HON. HOLTZMAN: Excuse me, Judge.

CHAIR JONES: Yeah.

HON. HOLTZMAN: Professor, in your
comment about the definition of force, you were
concerned about the implication of the Soto case.

DR. SCHULHOFER: Yes.

HON. HOLTZMAN: Are you still, or has that vanished?

DR. SCHULHOFER: Well, I was referring to Major Payne bringing it up, and I think she was right to bring that up. I read the case and I had to read it again, because it's really under the pre-2012 statute. So she's drawing some speculation about how that court might react under the current statute.

I think she's right to see that the court implies that the prosecution case might not be strong enough if all they show is the absence of resistance. And that's why she was suggesting that the current definition of force, which has to be sufficient to compel submission, leaves you in that situation where a failure to resist might not be sufficient to establish the assent. And so I'm not sure what to say about it. I think this is just, you know, embedded in the other question about the implications of resistance or
failure to resist.

CHAIR JONES: Alright, well, we'll take this up again when we get that additional information, which may or may not bear on what we're talking about, but it will give us the occasion to look at 8 again.

Alright, Issue 9, is the definition of sexual act - I'm sorry, Professor, what?

DR. SCHULHOFER: I was thinking out loud here, but I guess if we leave the definition of consent the way it is, then we might need to do something about the definition of force to expand the circumstances that would excuse the failure to resist. I think that just gets folded into the point you just made about taking another look at this.

CHAIR JONES: Okay.

HON. HOLTZMAN: Well, I think also if there's a suggestion that if we take out some of the language that we were talking about with regard to consent in 8, and we suggest that there be language, for example, in an executive order
otherwise indicating that there's no requirement
for resistance, making that clearer, if it could
be, than now, that might solve the problem.
Isn't that correct, Professor, or am I wrong?

DR. SCHULHOFER: That's right.

HON. HOLTZMAN: Okay.

DEAN ANDERSON: All the more reason
for that on the first issue of resistance.

CHAIR JONES: Okay, onto 9, are the
definitions of sexual act and contact too narrow
or are they overly broad? There are a lot of
people supporting change in this. It's
120(g)(2). By that, I mean presenters.

MAJ. GEN. WOODWARD: This is the one
with the object?

CHAIR JONES: Yeah. We're still
waiting for that case, is that right, the one
that's up there, yeah?

COL. GREEN: Yes, Judge. They haven't
issued a decision on that yet.

MS. KEPROS: I liked Colonel Grammel's
suggestions around this. He identified both ways
-- in one way it was too broad, and in another it was too narrow, so I think that's a good change to make. I don't like, you know, the forced toothbrush for harassment scenario. Do I think most prosecutors would pursue that? I hope not.

But with respect to all of you former prosecutors sitting here, I don't like having these things unclear in the law. Why have things that could potentially be charged if it's not something we think should be a crime, and particularly shouldn't be a sex crime? We should fix it.

HON. HOLTZMAN: So what are you suggesting, specifically?

MS. KEPROS: I want to adopt Grammel's proposed changes.

HON. HOLTZMAN: Can you explain what that is?

MS. KEPROS: Yeah, let me pull it out. Okay, so, for sexual acts, he suggests deleting the words "or mouth" from only Subparagraph B, and that deals with the toothbrush problem.
For sexual contact, because it allows
a body part to body part to be kind of anything,
he suggests making sure that you've got that
specific intent to arouse or gratify sexual
desire of any person. And the last phrase for
specific intent should be added to Subparagraph
A.

In addition, an ambiguity in the last
sentence can be corrected, and "or by any
object," can be added after, "by any body part,"
to address the pending case we keep discussing
with the stethoscope.

I just think he really does a nice job
narrowing the parameters of what I think we all
think this needs to get at.

CHAIR JONES: Any discussion on that?

DR. SCHULHOFER: I think that the
suggestions that I was making with respect to
narrowing there were consistent with -- was that
Ms. Kepros that was just speaking?

CHAIR JONES: Yes, it was.

DR. SCHULHOFER: Yeah, I think my
The approach was very consistent with that, and I think was also inspired by what she suggested in her written comment.

The concern I had about the one area where it seems to be that the definition of sexual act was too narrow was that it didn't include the tongue unless you think that's part of the mouth.

And in addition, it requires penetration under Section (1)(a), which really is a little narrow with respect to situations where you have contact between the mouth and penis.

So, in that one small respect, I would broaden g(1)(A), but then I agree with the narrowing that everybody else suggests on the other provision.

HON. HOLTZMAN: So what words would you use?

DR. SCHULHOFER: I'm sorry?

HON. HOLTZMAN: What words would you use to narrow g(1)?

DR. SCHULHOFER: To narrow it, I would
use the same language as Colonel Grammel and Ms. Kepros for narrowing it. But broadening it, in g(1)(a) I would say "contact between the penis, vulva, or anus, or mouth, or tongue," and I would take out the language that says contact involving the penis bears upon penetration however slight.

MS. FRIEL: So I don't know that you really need to say tongue other than mouth. I've never seen a case where the tongue wasn't considered a part of the mouth. In any statute I've ever read that talks about different kinds of sex acts refer to the mouth for oral sex. So you probably don't need to do that.

I agree that if we're going to fix this statute, I don't understand why in (a), which is about contact, and (b) is about penetration, (a) goes on after it says, "contact between the penis and these things," and then it says, "but contact means penetration." That's just bizarre to me. It doesn't make any sense.

Tell me something else, and just maybe I'm reading this wrong, and maybe it's because
it's late. So, if the penis and the vulva touch each other, that's covered in A. What about the mouth and the vulva? What about -- that's the other way of having oral sex, and it seems to me that, by not covering that in A, the only place that's covered is in B, and you would have to have penetration of the mouth.

HON. HOLTZMAN: (a) involves the vulva, or anus, or mouth.

MS. FRIEL: But it says penis and the vulva --

HON. HOLTZMAN: Oh, yeah, right.

MS. FRIEL: -- or anus, or mouth, so (a) seems to --

HON. HOLTZMAN: You're right.

MS. FRIEL: Right? Everything in (a) requires a contact or penetration, depending on which way you read that, with the penis in those things. What about the mouth and the vulva?

MS. KEPROS: That is covered by g(1)(e) even with the amendment. The penetration of the vulva by any other part of the body would
be accomplished by the mouth. It wouldn't be penetration of the mouth. It's penetration of the vulva with the mouth.

MS. FRIEL: But what if there's no penetration? What if somebody puts their mouth to the outside and does not penetrate?

(Simultaneous speaking.)

MS. KEPROS: I mean, that's what it is.

MS. FRIEL: Or it's contact, which is why --

HON. HOLTZMAN: But contact requires penetration. too.

MS. FRIEL: Right, that's what's bizarre, then it should just be penetration. I mean, I'll just say, in New York, rape is a penis penetrating the vagina however slight.

Oral sex, however we want to do it, just requires contact. You could just touch the mouth without penetrating it. You could touch the vulva without penetrating it. Those are all covered by contact because that to everyone made
more sense. So this is just really odd to me.

And it also, by treating penis
differently -- that is, oral sex basically with a
man, and oral sex between two women differently --
that doesn't make sense to me in terms of
evenness.

If you have some kind of, say,
forcible oral sex between two women Soldiers, why
should that be different than between a man and a
woman?

MS. KEPROS: We got some legislative
history on this. And I don't remember if it was
in writing or something people talked about, and
there were weird things just because of the
gender history of the military, and I suspect
that is a byproduct of that.

MS. WINE-BANKS: And either way, it's
the same penalty. It's the same crime.

(Simultaneous speaking.)

COL. SCHENCK: It's no longer a crime.

On the forcible side, it's still a crime. On the
consensual side, it is not, so maybe that had
something to do with it.

MS. FRIEL: Right, but the way it's defined now, mouth to vulva without penetration is not a sex act, is not a sexual act, because it requires penetration.

MS. KEPROS: Isn't it sexual contact?

MS. FRIEL: Yes, but then oral sex between two women is treated less seriously than oral sex between a man and a woman under the same lack of consent situations. Why would that be?

MS. KEPROS: I'm not understanding why oral sex, mouth to vulva, is not penetration. Why wouldn't it be?

MS. FRIEL: Well, if you don't penetrate, however slight, if you -- I mean, this is getting gross. If you lick the outside and not stick your tongue inside, then you don't have penetration. This is what my life has become.

(Laughter.)

(Simultaneous speaking)

COL. SCHENCK: On this issue, I specifically had a forcible sodomy case, was one
of the charges, and -- it was a forcible sodomy case. It was one of the charges. It was anal sodomy. And the oral sodomy, the victim had clenched her teeth. That was what she said. She had spaces in her teeth. But the issue was did the penis pass the lips? I mean, this was a full-blown contested case and it came down to the clenching of the teeth. It was a horrible case.

MS. FRIEL: Which is why we have it be contact under New York State law.

MS. KEPROS: I think you can say it shouldn't be that. I just think this is a policy decision that we've seen a lot of different legislators make, and they say, "We're going to treat penetration as different from contact."

COL. SCHENCK: I mean, is that less traumatic, you know, than not getting past her teeth?

HON. HOLTZMAN: I think this is irrational and I think we should have some working group that's going to review this, because it doesn't make sense.
CHAIR JONES: I've heard enough. I agree with you.

So, now where are we? That was 9?

We've lost a couple people. Okay, we only have two left. Should we go for them here?

All right. Should the accused's knowledge of a victim's capacity to consent be a required element of sexual assault? This is Number 10, let's see, 120(b)(2) and (b)(3).

The question stated differently:

Should the statute be amended to remove the requirement that an accused knows of the victim's incapacity to consent?

I don't see anyone in the box for supporting the change, and Colonel Grammel, among others, says no change.

Professor Schulhofer, do you have some comments on this?

DR. SCHULHOFER: I think I agreed with the consensus that provision does not need to be changed.

CHAIR JONES: Okay.
HON. HOLTZMAN: Well, actually what it says, it leaves recklessness to be -- sorry. Your comment, sir, in your memo, says that the accused's knowledge of the victim's capacity to consent should be - there should be knowledge or at least recklessness instead of where there's a negligence standard here at present. What's this provision?

CHAIR JONES: It's 120(b)(2) and (b)(3) according to the chart.

HON. HOLTZMAN: So when you reasonably should know is a negligent standard.

DR. SCHULHOFER: Right.

HON. HOLTZMAN: And I thought your view was that it should be at least a recklessness standard, which is a little bit higher,

DR. SCHULHOFER: Yes, I'm just looking at (b)(2). The kind of language says "knows or reasonably should know" in (b)(2).

HON. HOLTZMAN: Right.

DR. SCHULHOFER: Well, I guess - I'm
sorry, I guess I spoke too quickly. I do support change in that respect. I misread that, because the statement as it was put just said, "Should the accused's knowledge be a required element?"

But the statute actually as it currently stands says, knowledge or negligence, "should know." And I think it should be that the person knows or is aware of the risks if the person is unconscious or unaware.

MAJ. GEN. WOODWARD: Is aware of the risk?

CHAIR JONES: I think you have to speak up, everybody.

MS. WINE-BANKS: How would you be unaware? How could you possibly not notice that someone is asleep or unconscious?

DR. SCHULHOFER: What?

LT. COL. MCGOVERN: If the accused is still intoxicated as well.

MS. KEPROS: I think you could be in a dark room and the person you are touching is moving their body in response, you think, to your
overtures, and you don't realize they're not really with it.

HON. HOLTZMAN: Right, and it's not only asleep or unconscious, but otherwise unaware that the sex act is occurring. So you might not know that they're otherwise unaware. They may not be asleep and they may not be unconscious. They may be in this other state --

MAJ. GEN. WOODWARD: Blacked out.

HON. HOLTZMAN: -- you know, where they can't communicate. Maybe it's a dark room or whatever, and the person maybe should know. I don't know. But what the professor is suggesting is a recklessness standard, which is a little bit higher. I mean, you can either know or be reckless.

MAJ. GEN. WOODWARD: Well, is this where we get to, you know, the how many drinks can someone have and, you know, what is reasonable to understand that someone is so drunk that they don't have the capacity?

I mean, "reasonably," to me, makes
that more reasonable. I mean, to say "reasonably
know" makes me feel more comfortable that we're
giving someone at least the latitude to
understand whether somebody is --

HON. HOLTZMAN: What the professor is
suggesting, or maybe -- Professor, you can
explain yourself better than I can. Maybe he
should explain.

MAJ. GEN. WOODWARD: Professor,

exactly what would the wording change that you
would change what now says "reasonably should
know" to what?

DR. SCHULHOFER: I would say knows or
is aware of the risk that the other person is
asleep or unconscious.

MAJ. GEN. WOODWARD: What is "aware of
the risk?"

DR. SCHULHOFER: So I'm substituting
"reasonably should know." I'm substituting "is
aware of the risk that."

MAJ. GEN. WOODWARD: I think it makes
sense that we should hold them accountable if
they should reasonably know if the other person
is incapacitated.

DR. SCHULHOFER: I'm sorry, who was
speaking?

MAJ. GEN. WOODWARD: This is Maggie
Woodward.

DR. SCHULHOFER: Oh, yes. Well,
generally, I understand that that's a very widely
shared intuition, but I think my hesitation about
it is that it really amounts to convicting
somebody on the basis of negligence, convicting
them of a very serious criminal offense.

So they put in the criminal law that
supposition that we generally resist. So if the
jury is persuaded that the person was aware of
the possibility -- they don't have to actually
know that the person was unconscious -- but if
they realize that the person might be
unconscious, might not be conscious, that's
enough.

And if you can convince the jury that
the person was aware of that possibility then a
criminal conviction really takes it to the extreme.

LT. COL. HINES: Ladies and gentlemen,
I would note that the Benchbook addresses this issue, and I think it goes back to General Woodward's statement, and maybe Ms. Wine-Banks' question.

All of the evidence, the facts and circumstances surrounding the alleged assault, that will come up at trial. So the way the Government would prove this is to call witnesses to come in and say, "Okay, the accused was there. The victim was there," to show that the accused saw the victim during the night. He was able to observe her condition. He maybe even handed her some of the alcohol that she consumed.

Even his testimony, and he's got to get on the stand and make a mistake of fact in defense. He's going to have to articulate, "Well, based on her demeanor, I thought she was consenting." So, my point is all of that stuff will come out at trial.
And the judge has a boilerplate Benchbook charge where he explains to the Panel to consider all of the evidence on the issue of whether the accused's belief that -- or the fact that the victim was incompetent, on whether the accused knew that or whether he reasonably should have known that.

So it's not just him getting up and saying, "Well, I thought she was competent or I thought she was consenting." It's all of that other evidence filtered through that other instruction to the Panel. It's not just his subjective belief that he's saying he had a mistake of fact here, was it under all of the circumstances and evidence that you have here, was that reasonable?

MS. WINE-BANKS: So how much of a difference is there between "reasonably should have known" based on those circumstances you've articulated, which make a lot of sense, and he was in "reckless disregard" of those facts?

What's the burden of proof shift for those two
words?

DR. SCHULHOFER: The space between those two is very, very small because if a reasonable person would have realized, then it's very likely that the defendant himself would have realized, unless there's some reason why he wasn't.

Of course, in the situation where the defendant is drunk, it may become plausible that a reasonable sober person might have realized the circumstances. But in a lot of these situations, you're going to have mutual drunkenness on both sides, and there is a kind of culpability there. There's carelessness. There's disregard in a variety of ways.

But for criminal culpability, it's really crucial that there be that subjective awareness that you're at risk of abusing somebody. And if you can say, "Well, a sober" -- well, I would just repeat or stress what I said, that the space between the two things is very small.
And in the overwhelming majority of cases, if a reasonable person would have believed it, then this defendant was aware of it himself. The point is that the jury has to be convinced that this defendant himself was culpable and not be imposing criminal liability just on the basis that somebody else would have realized it.

I'd refer to this case the Supreme Court just decided last week, two weeks ago, and it may be somewhat surprising to many people, but this Elonis case involved a defendant who posted abusive language about his wife on his Facebook page. And he was prosecuted for making a threat, threatening serious bodily harm. And the judge instructed the jury just in the terms that -- I think, was that Colonel Hines that was reading from the Benchbook?

LT. COL. HINES: Yes, sir.

DR. SCHULHOFER: Yes, I thought so.

So the judge instructed the jury on those kind of terms that you just read, that either the defendant himself realized that this was being a
threat, or a reasonable person would have
realized that his language would be taken as a
threat, and he was convicted on that basis.

And the Supreme Court, in the Elonis
case, reversed that conviction, and they said,
No, for the purposes of criminal law, it's
crucial that the defendant himself have
subjective culpability, that it's not a world of
tort liability.

So that's the perspective that is
untraditional, and I think an important one when
you're talking about conviction of very serious
crimes. And it may not make a difference in the
great majority of cases, but I think the main
point is that we have confidence that the jury,
that the members, the court-martial members, are
coming back and saying, "Yes, this defendant
himself was culpable of abusing his victim."

MS. FRIEL: But by that argument, the
drunk accused, who is drunk enough that they
don't have any mens rea, they don't think they're
doing anything wrong because they've gotten
themselves so drunk they're not seeing the signs of lack of consent, then they shouldn't be guilty of anything because they have no bad mens rea. That's where that argument would end up going.

DR. SCHULHOFER: Right.

MS. FRIEL: Yeah, but they have to be able to know. A reasonable sober person would have seen somebody, you know, was either too intoxicated to consent or was actually resisting.

So if you're going to take the reasonable sober person, which we all agree that should be the standard, not the drunk person's standard, then why is this different here?

What if somebody says, "I never drank before, I have no idea what the signs of intoxication are. And although this woman was stumbling, slurring her words, and throwing up, I didn't realize she was incapacitated to consent"? Do we really care that he didn't get it or do we care what a reasonable person would have seen under those circumstances?

DR. SCHULHOFER: I think we have to
remember that people don't get acquitted just
because they claim that they're not culpable.
They have to convince the jury that they -- the
jury has to believe that this person really,
truly wasn't aware he was engaged in any abusive
conduct.

MS. FRIEL: Well, it's the opposite
the way you change it. That puts the burden on
the Government to prove something, not the
defendant to prove it. Now the government's got
a higher burden here to prove that this person
subjectively believed something or had some bad
mens rea.

I don't know. I just can't -- we have
enough trouble trying to prove these cases. I
can't see doing that. But I'd like to reread --
I read the coverage of the case that you're
talking about, so I'd like to read the case and
see what the Supreme Court said. But I can't see
that it applies here in this kind of thing, as
opposed to posting something online which
implicates freedom of speech and things like
that.

MAJ. GEN. WOODWARD: I disagree with you that -- so if someone is drunk and then takes advantage of somebody else, and because they're too drunk to be reasonable, I guess, is what you're saying, that we shouldn't hold him accountable. But I really reject that premise.

CHAIR JONES: I think this is something that we ought to think about. And what was the -- do you know the name of the case? Was it Elonis?

MS. KEPROS: I think it's E-L-O-N-I-S.

LT. COL. HINES: Professor, can you read us the name of that Supreme Court case again?

DR. SCHULHOFER: Yes, sure, let me just get that.

LT. COL. HINES: Oh, okay, it's in your handout. We're fine.

DR. SCHULHOFER: Yeah, it's E-L-O-N-I-S. It was decided on June 1st. And on the free speech issue, incidentally, it was argued at the
Supreme Court on this free speech issue. And the Supreme Court said they weren't going to consider whether it was different for freedom of speech or not, because they said they had long enough cases over a wide range of different issues.

They cited a number in which whether it was protected or potentially protected conduct or not, that actual awareness of wrongdoing was crucial for criminal liability. And among the cases, for example, they cite a case that involved the use of food stamps where the defendant had to know that he was making improper use of the food stamps, so it was not a question of freedom of speech.

Now, I note, you know, having said that, it is certainly a very common instinct for people to say, "Well, you know, he was drunk, and he should have known, and a sober person would have known, and we should hold him responsible."

That's a very common intuition, but I'm comfortable with the decision to just take a further look at it.
But what I'm suggesting, of course, would change the current statute to require the prosecution to prove culpability. Does that make things more difficult for the prosecution than the current law? Yes, it certainly does. But, you know, I don't think that ends the conversation just because it means that the prosecution has to prove guilt.

CHAIR JONES: I think we are going to take a further look at it. I'd like to read that case, which I haven't. And I understand the concern you're raising, Professor. I think it's serious, and we certainly need to think about it.

HON. HOLTZMAN: Maybe some people in the military who have to think about this too could give us their views on the impact of that case on the statute.

CHAIR JONES: Okay, last.

MS. WINE-BANKS: Can I ask a question --

CHAIR JONES: Oh, sure, I'm sorry.

MS. WINE-BANKS: About the drunkenness
issue, because this is making me mull this over about we don't excuse drunk people who drive. They're culpable. We hold them accountable for what a reasonable person would know. They shouldn't get behind the car. Why wouldn't we hold a drunk person accountable for physical abuse of another person? And are we going to let them get away with that?

MS. FRIEL: Am I less harmed by being raped by a really drunk person than by somebody who was a little less drunk or sober?

MS. WINE-BANKS: Right, right, no, or stoned or whatever.

MS. FRIEL: No, I don't care what their condition is.

LT. COL. MCGOVERN: I think the way the law is structured is the conduct, first, is illegal, to either rape or drive, and then there's no defense to being drunk. Being drunk is not a defense.

MS. KEPROS: That's the question I was going to ask. Is there any kind of voluntary
intoxication in military jurisprudence? Because there is for specific intent crimes in many civilian jurisdictions. You are not guilty of first degree murder if you are absolutely voluntarily intoxicated.

LT. COL. HINES: In the military, if it's a specific intent crime and the accused comes in and says, "I was so intoxicated, I couldn't form that specific intent," then that's a defense.

And to go back to Ms. Friel's question, this is a specific intent crime because the Government's got to show that the accused knew or reasonably should have known of the victim's condition. So I see that as a specific intent requirement. So the Professor's point is well taken, I think.

MS. WINE-BANKS: When you're looking at this, can you -- I want to know a little bit more about the difference in standard of proof for a reasonable person and reckless disregard. Because, again, this would take legislative
change, and I'd like maybe if you could address
whether it would be that much harder to do
legislatively than through executive order.

    HON. HOLTZMAN:  Oh, nobody's going to
want to make this change legislatively.

    MS. WINE-BANKS:  Okay, so if it would
take a legislative change, I think that, as a
realistic matter, unless there's a dramatic
difference between the two standards of proof,
it's probably not worth our time debating it
because it's not going to happen.

    So I would be really interested in
what it would mean in terms of prosecution.
Would more people be convicted or would it really
not have much impact? Would a jury find a
reasonable person standard to be the same as
disregard?

    HON. HOLTZMAN:  Well, the other thing
is just --

    DR. SCHULHOFER:  As a matter of
practicality and prudence, I wouldn't be
optimistic about my proposal getting unanimous
approval from Congress. So I agree with you that this is probably not one that's worth investing a lot of political capital in.

But, I mean, I do think it's the right result, and I think it reflects the Supreme Court's thinking. And I think it's very clear that the fact that the victim would be dead anyway, or the fact that the victim would have been, you know, found the sexual assault unwelcome. The fact that the victim is harmed doesn't determine whether the defendant is criminally responsible. So, this is the right result.

In this case, the President could clarify this by executive order, but at this point, I'm not pushing either of those. But in terms of what's really the right approach, I think we should come down very hard on sexual abuse and focus on the abusers and people who are culpable.

MS. WINE-BANKS: And there's the consideration that if the Supreme Court ruling is
clear that these would be voidable, that, you
know, they'd be overturned on appeal,
convictions, because they didn't meet the
constitutional standard, then maybe Congress
would actually do what it had to do, or an
executive order.

HON. HOLTZMAN: One of the things we
could do maybe is to refer this to the Joint
Services Committee to consider in light of this
case. Not take any position on it, just say,
"This case has come to light, and in our
consideration of it, we think you should examine
it." We could do something like that, which
would take it out of our hands, and give it to
them, and they can decide.

CHAIR JONES: Personally, I'd like to
take a look at it. I'd like to analyze it. And
then that could be a perfectly reasonable way to
deal with it. I think it's too late to have a
review of everything we've done today.

So, Colonel Hines is going to give us
a quick review, a written review, of where we
ended up on 1 through 11.

In terms of working groups, I'm going
to give everybody 48 hours to send me an email
saying what you want to work on. And then if you
don't volunteer for anything, I will assign you
to a working group. How about that?

MS. WINE-BANKS: Can we just send you
the one we don't want?

(Laughter.)

CHAIR JONES: There's a thought.

MS. KEPROS: I wonder, I just wanted
to endorse Professor Schulhofer's request
regarding Issue 11 that we get some additional
presentation, or training, or something.

CHAIR JONES: Oh, I'm sorry, yeah, I
didn't even notice. I forgot about 11. We sort
of talked about it earlier today, yeah.

COL. SCHENCK: Have you seen the
executive order that's pending? It's in Article
134. I think the Staff's going to provide us
with a draft of the executive order that's
pending.
MS. KEPROS: Well, because it's asking us to weigh in on this, and so I'm just wondering if we could get some, in addition to the executive order, some more education around how Article 134 operates versus 120?

I got some information off the record about this, and I think it's something we should learn more about.

CHAIR JONES: Okay, so -

LT. COL. HINES: And that information -- this is to comply -- Ms. Kepros and I had a brief conversation. This is for the benefit of everyone else. The question came up because, I believe, Col. Schenck or Chris Kennebeck talked about the draft, and the indecent act was in the draft around Article 134.

And I'm sort of the one who suggested, well, we need to actually get that and look at it because Article 134, if the President puts an offense under 134, there's an additional element that the Government has to prove which is what's called the "terminal element."
So it's not only an indecent act, in
this example, but also that that indecent act was
prejudicial to good order and discipline or
service discrediting. And there's a lot of
debate out there about, well, if you're going to
charge something as a sexual assault or a sexual
offense, should you really make the Government
prove that it was also service discrediting?

CHAIR JONES: It should be per se.

LT.COL HINES: Or should be under
Article 120. So I just wanted to put that out
there.

CHAIR JONES: When is our next
meeting?

LT. COL. HINES: July 22nd.

CHAIR JONES: July 22, okay. In
Arlington, right? Okay, great.

(Whereupon, the meeting in the above-
entitled matter went off the record at 5:13 p.m.)
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In the matter of: Judicial Proceedings Subcommittee

Before: US DOD

Date: 06-25-2015

Place: New York City, New York

was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate record of the proceedings.

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Court Reporter