

UNITED STATES DEPARTMENT OF DEFENSE

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JUDICIAL PROCEEDINGS SINCE FISCAL YEAR 2012
AMENDMENTS PANEL

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PUBLIC MEETING

+ + + + +

THURSDAY
AUGUST 7, 2014

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The Panel met in The George Washington University Law School, Faculty Conference Center, 5th Floor, 716 20th Street, N.W., Washington, D.C., at 10:00 a.m., The Hon. Elizabeth Holtzman, Chair, presiding.

PRESENT

HON. ELIZABETH HOLTZMAN, Chair
HON. BARBARA S. JONES
MR. VICTOR STONE
PROF. THOMAS W. TAYLOR
VADM (R) PATRICIA S. TRACEY

ALSO PRESENT

MARIA FRIED, Designated Federal Official
DWIGHT SULLIVAN, Office of the General
Counsel, Department of Defense
CAROL E. TRACY, Women's Law Project
CHARLENE WHITMAN, AEquitas
JOHN WILKINSON, AEquitas
PROF. STEPHEN SCHULHOFER, NYU School of Law,
American Law Institute (by phone)
WILLIAM CASSARA, Attorney at Law, Augusta,
Georgia
CAPT CHRISTIAN REISMEIER, Chief Judge, U.S.
Navy
COL (R) TIMOTHY GRAMMEL, U.S. Army
COL GARY JACKSON, U.S. Air Force
LT COL KYLE GREEN, Staff Director
LTC KELLY MCGOVERN, Deputy Staff Director
DALE TREXLER, Chief of Staff
JULIE K. CARSON, Legislative Analyst
JOANNE K. GORDON, Attorney Advisor
KRISTIN B. MCGRORY, Attorney Advisor
DOUGLAS M. NELSON, Attorney Advisor
ROGER A. CAPRETTA, Supervising Paralegal
SHARON H. ZAHN, Senior Paralegal
JANICE CHAYT, Investigator
AMY GRACE PEELE, Technical Writer

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

(9:59 a.m.)

MS. FRIED: Good morning,
everyone. Welcome to the first meeting of the
Judicial Proceedings Since Fiscal Year 2012
Amendments Panel, also known as the Judicial
Proceedings Panel.

My name is Maria Fried. I am the
Designated Federal Official to the JPP.
Lieutenant Colonel Kyle Green is the Staff
Director.

This panel was established by
Section 576 of the National Defense
Organization Act FY2013, as amended by Section
1731 of the National Defense Organization Act
for FY2014.

Members of the panel have been
appointed by the Deputy Secretary of Defense.
The Honorable Elizabeth Holtzman serves as the
chair. Ms. Holtzman and the Honorable Barbara
S. Jones also served on the Response Systems
to Adult Sexual Assault Crimes Panel.

1 As you can see from the agenda,
2 the panel has held an administrative session
3 this morning. The purpose of that session was
4 to provide administrative briefings and
5 administer the oath of office to the panel
6 members.

7 This panel is a Federal Advisory
8 Committee Panel and must comply with the
9 Federal Advisory Committee Act. Panel
10 meetings will be open to the public and
11 transcribed.

12 The JPP also has a publicly
13 accessible website at <http://jpp.whs.mil>.

14 Publicly available information
15 provided by JPP is posted on this website to
16 include transcripts of all meetings. Any
17 information provided by the public to panel
18 members must be made available to the public.
19 This includes any notes or emails sent or
20 passed to the panel members relating to their
21 work as members of the JPP.

22 I understand that we have not

1 received any requests for public comment for
2 this session.

3 And with that, I would like to
4 turn it over to the chair.

5 CHAIR HOLTZMAN: Thank you very
6 much, and good morning to everybody.

7 I would like to welcome everyone
8 to the first hearing in the Judicial
9 Proceeding Panel. As a former prosecutor, I
10 am intrigued by the fact that we start out
11 with an alias, even before we take our first
12 step.

13 However, before we begin this
14 meeting, I want to say how privileged I feel
15 to serve on this and how privileged I feel to
16 serve with Judge Barbara Jones, who was an
17 excellent chair of the preceding panel, the
18 Response Systems Panel, and how privileged I
19 feel to serve with the excellent and very
20 experienced members of the panel who have been
21 also appointed by the Secretary of Defense to
22 serve.

1 I also want to thank the interim
2 Dean Greg Maggs and the faculty and staff of
3 George Washington University Law School, who
4 have allowed the panel to use these very fine
5 facilities for this meeting and to thank the
6 staff of the judicial proceedings panel for
7 helping us to get to this point.

8 As you have heard, the Judicial
9 Proceedings Panel was created by the National
10 Defense Authorization Act of 2013 and our
11 mandate is to conduct an independent review
12 and assessment of judicial proceedings
13 conducted under the Uniform Code of Military
14 Justice involving adult sexual assault and
15 related offenses through the HR 4310-128
16 amendments made to the Uniform Code of
17 Military Justice by Section 541 of the
18 National Defense Authorization Act for Fiscal
19 Year 2012.

20 The panel consists of five
21 members, who are appointed by the Deputy
22 Secretary of Defense on June 8, 2014. In

1 addition to myself and Judge Jones, whom Maria
2 Fried noted that were previously on the
3 Response Systems Panel, we are joined by Vice
4 Admiral Patricia Tracey, U.S. Navy, Retired,
5 Thomas Taylor, and Mr. Victor Stone.

6 Thanks to each of you, again, for
7 agreeing to serve on this panel and I very
8 much look forward to working with you.

9 This panel is tasked with a number
10 of specific responsibilities for review and
11 assessment and we are charged with providing
12 reports and recommendations to the Secretary
13 of Defense and Congress.

14 In addition to reviewing Article
15 120 of the Uniform Code of Military Justice,
16 we must also assess other legislative and
17 policy changes that have been implemented to
18 improve prosecution of and reduce sexual
19 assault crimes in the military. We are
20 committed to working efficiently to provide
21 timely and thoroughly considered
22 recommendations.

1 As many of you know, our work here
2 follows a long-year assessment by the Response
3 Systems to Adult Sexual Assault Crimes Panel,
4 which completed its review and submitted its
5 report on June 27, 2014. I expect this panel
6 to use information gathered by the Response
7 Systems Panel and will consider its report,
8 analyses, and recommendations as we conduct
9 our own assessment.

10 The Response Systems Panel
11 received substantial information and heard a
12 wide range of perspectives from both inside
13 and outside DoD, including those who have been
14 victimized by sexual assault. And we very
15 much look forward to hearing again from many
16 people and organizations to receive different
17 perspectives on the topic that we are tasked
18 to consider. We will need and rely on the
19 cooperation, support, and help of so many
20 people who have even a much deeper
21 understanding than we do of how these programs
22 and procedures are working within the military

1 and what work can be done to improve the
2 handling of sexual assault in the military.

3 Today, we begin our review by
4 first considering foundational issues that
5 will likely frame much of this panel's
6 assessment. From our initial presentation
7 this morning, Mr. Dwight Sullivan from the
8 Department of Defense Office of General
9 Counsel will provide an overview of the
10 military justice system, ensuring that
11 everyone on the panel understands the system
12 we are tasked to assess.

13 By the way, I should make a
14 parenthetical comment that neither Judge Jones
15 nor I, she probably knew more than I did, came
16 with a military justice background. And so it
17 took us some time to understand the
18 complexities and sophistication of the
19 military justice system. But it is really
20 going to be imperative for the panel members
21 to have a very solid grasp of how that system
22 works and we will appreciate all the help we

1 can get in that regard.

2 Mr. Sullivan will also review some
3 of the significant recent legislative
4 amendments and executive actions that affect
5 sexual assault prosecution in the military.

6 Following Mr. Sullivan's
7 presentation, we have reserved time for the
8 panel to discuss the Response Panel's report
9 and findings and its assessment. Some of the
10 RSP's recommendations suggest topics for this
11 panel to review. Other recommendations that
12 follow will create changes that will affect
13 subjects of this panel's study.

14 Two of us, as you have noted, two
15 of us on the Judicial Proceedings Panel also
16 served on the RSP and I think it is important
17 for us to share our impressions with the other
18 members who were not part of that RSP and
19 field their questions about our report.

20 After lunch, we will begin our
21 review of Article 120 and the prosecution of
22 rape and sexual assault offenses.

1 Our first panel will discuss how
2 rape and sexual assault are prosecuted in
3 different jurisdictions throughout the United
4 States and how the laws have evolved and
5 changed. Ms. Carol Tracy from the Women's Law
6 Project and Ms. Charlene Whitman and Mr. John
7 Wilkinson from AEquitas, I hope I pronounced
8 that properly, will discuss their examination
9 of the definitions and other sexual assaults
10 in the legal system, including text and
11 terminology used in different jurisdictions.

12 Then Professor Stephen Schulhofer
13 from the New York University School of Law
14 will discuss his work as a reporter for the
15 American Law Institute's proposal to revise
16 Section 213 of the Model Penal Code, which
17 contains provisions on the subject of sexual
18 offenses.

19 Our second afternoon session will
20 focus specifically on the evolution of Article
21 120. Mr. Sullivan will return to explain the
22 2007 and 2012 amendments to the statute

1 followed by perspectives from former and
2 current judge advocates and attorneys who have
3 experience with each of the different versions
4 of the statute.

5 Panelists who serve as military
6 judges, staff judge advocates, prosecutors and
7 defense counsel under the different versions
8 of Article 120 and they will offer insight
9 about how amendments to the article have
10 changed sexual assault prosecution in the
11 military justice system.

12 We will also need to understand
13 what additional changes may be necessary to
14 make Article 120 more effective and fair than
15 it is.

16 These presentations today will
17 provide an important foundation for the panel
18 but they will certainly not end our review and
19 assessment of Article 120. Hardly. I
20 anticipate we will schedule a number of future
21 sessions to address other aspects of the
22 statutes and hear additional perspectives from

1 other people and organizations.

2 As you know, the panel operates
3 according to the Federal Advisory Committee
4 Act or FACA, which is intended to ensure
5 public input and contemporaneous public access
6 to the panel's work. The panel has
7 established a website to ensure full public
8 access and I encourage all of you to visit the
9 website and review its materials.

10 Verbatim transcripts of all public
11 meetings, public comment, and all background
12 information provided to panel members are
13 posted on the JPP website, which may be found
14 at jpp.whs.mil.

15 Thank you very much for your
16 attention and I believe we are ready for our
17 first presenter, Mr. Sullivan.

18 Thank you, Mr. Sullivan for coming
19 before us this morning.

20 MR. SULLIVAN: Thank you very
21 much, Madam Chair, and welcome and good
22 morning to the members of the panel.

1 The Chair has described the rather
2 ambitious proposal that I am going to go
3 through for the next 50 minutes but what I
4 plan to do is stop at 10:55 no matter where I
5 am to solicit any questions. Normally, I
6 would make myself available offline to address
7 other issues but because of the FACA
8 restrictions, obviously, we can't do that.
9 So, at 10:55 I am going to stop to provide an
10 opportunity for dialogue.

11 But let me also say, please stop
12 me at any time if you have any questions or
13 want to offer any information at any time
14 throughout this. Hopefully, this will be
15 helpful to you all. So, I want to make this
16 as interactive as we can.

17 So, the military justice systems
18 covers the conduct of roughly one and a half
19 million active duty members of the military
20 and that is larger than the populations of 11
21 states and the District of Columbia, just to
22 give you a feeling for the scope of the

1 military justice system.

2 And the military justice systems
3 exercises jurisdiction over active duty
4 service members 24 hours a day, 365 days a
5 year. Whether the service member is on leave,
6 on duty, or in a non-duty status, they are
7 covered by the Uniform Code of Military
8 Justice.

9 But referring to those one and a
10 half million people even understates the reach
11 of the UCMJ because it also applies to about
12 850,000 Reservists when they are performing
13 their reserve duty or National Guardsmen when
14 they are performing duties in a Title 10
15 status.

16 Also, there are some instances
17 where the UCMJ applies to civilians. So, a
18 military retiree, who isn't performing any
19 duties is still subject to the UCMJ and can be
20 and occasionally are prosecuted by courts
21 martial.

22 Civilians accompanying the U.S.

1 forces in the field in either time of war or
2 contingency operations are subject to UCMJ
3 jurisdiction. There has only been one such
4 prosecution since the Vietnam War. So, these
5 are very rarely used but the authority is
6 there.

7 Also, persons in custody of the
8 armed forces who are serving confinement. So,
9 if you have a member of the military who has
10 a confinement and is discharged, receives a
11 dishonorable discharge but still remains at
12 the U.S. disciplinary at Fort Leavenworth,
13 Kansas, for example, we can and sometimes do
14 prosecute them by courts-martial for
15 subsequent misconduct committed while they are
16 prisoners.

17 So, there are some instances where
18 there is the authority to courts-martial
19 civilians. Again, it is rarely used.

20 I always like to go back to the
21 basics. Where does this authority come from?
22 Well, it comes from the United States

1 Constitution which gives Congress the power to
2 make rules for the government and regulation
3 of the land and able forces. And Congress has
4 enacted that through the Uniform Code of
5 Military Justice, which we will look at in
6 detail today.

7 Now before the UCMJ was enacted
8 there were separate systems governing the Army
9 and the Department of the Navy. So, the Army
10 was governed by the Articles of War and the
11 Navy was governed by the Articles for the
12 Government of the Navy, which were
13 colloquially and colorfully referred to in
14 practice as Rocks and Shoals. And that is
15 after part of Article 4, Article for the
16 Government of Navy 4, which made it a crime
17 for a member of the naval service to willfully
18 or through negligence suffer a vessel to be
19 run upon rocks or shoals, related to its
20 colloquial name.

21 In 1950, Congress passed the
22 Uniform Code of Military Justice, passed in

1 1950, signed into law by President Truman but
2 not effective until May 31, 1951.

3 So, on May 31, 1951 this new code
4 governed all of the military services, the
5 Army, the Navy, the Marine Corps, the
6 relatively young Air Force and the Coast
7 Guard. It applied to all of those provisions.

8 And UCMJ is a very extensive
9 statute, codified at 10 U.S.C. Sections 801
10 through 946. So, it does a lot of things.
11 But today, I am going to zero in on three
12 specific things that it does. First, it
13 establishes the military justice system's
14 structure. Second, it enacts punitive
15 articles. And third, it has a relatively
16 broad delegation of authority to the
17 President. So, we will look at those three
18 aspects in turn, starting with the military
19 justice system's structure.

20 And one of the most important
21 things to understand is that convening
22 authorities, who are generally military

1 commanders, decide the appropriate level of
2 disposition of charges within the military
3 justice system. It is currently a command
4 controlled system. Obviously, you are going
5 to be discussing the work of the RSP. That
6 was a question of considerable consideration
7 by the RSP, should there be changes to that.
8 But as the UCMJ is structured today, it is a
9 command controlled system.

10 So, these commanders can choose
11 one of four levels of disposition of charges,
12 in addition to less formal responses, such as
13 extra military instruction or counseling or
14 even administrative discharge. There are four
15 levels of disposition provided by the Uniform
16 Code of Military Justice: non-judicial
17 punishment, summary courts-martial, special
18 courts-martial, and general courts-martial.
19 So, we will look at those in turn.

20 Non-judicial punishment can only
21 be imposed by a military commander or
22 commanding officer or officer in charge.

1 Service members can generally decline to be
2 have their cases resolved by non-judicial
3 punishment. There is an exception for those
4 that are embarked on or attached to vessels.
5 Their NJP works very differently between the
6 services. The services execute NJP in very
7 different manners. And a non-judicial
8 punishment is not a criminal conviction. So,
9 it does not have collateral effects, such as
10 sex offender registration, loss of right to
11 own firearms, loss of voting rights is not a
12 criminal conviction.

13 Maximum punishment include
14 correctional custody for 30 days but that is
15 very rarely used today; restriction for up to
16 60 days. And the particular maximum
17 punishment depends upon both the rank of the
18 individual imposing the NJP and the rank of
19 the individual receiving NJP. There are
20 differences. These are the maximum
21 punishments that might apply in any particular
22 case.

1 Also, for service members that are
2 attached to or embarked upon vessels, NJP
3 would authorize non-judicial punishment.
4 Punishment that is not used infrequently is
5 three days confinement on bread and water.

6 It is interesting to go back to
7 the legislative history. Congress said you
8 know what, being on a ship at sea, there isn't
9 a whole lot you can do. So, if we just
10 authorize confinement, all we are doing is
11 letting someone off duty for three days. We
12 need to make it more onerous than that. So,
13 Congress authorized three days confinement
14 with bread and water.

15 I once represented a sailor who
16 had previously received three days'
17 confinement with bread and water. I actually
18 asked him what kind of bread did they give
19 you. And his response was stale, white bread.

20 So, that concludes non-judicial
21 punishment.

22 Now, we will go to the next level,

1 summary courts-martial. Only enlisted members
2 may be subject to summary courts-martial.
3 Every service member can refuse summary
4 courts-martial, even those attached or
5 embarked upon a vessel. Typically, when a
6 service member refuses summary courts-martial,
7 typically but not invariably, their case will
8 then be referred to a special courts-martial.

9 It is a one officer courts-
10 martial. Once again, there are substantial
11 difference that summary courts-martial are
12 conducted between the services and the Supreme
13 Court has expressly held that a summary
14 courts-martial conviction also is not a
15 criminal conviction. So you have the
16 collateral consequences that might arise from
17 a criminal conviction that do not attach to a
18 summary courts-martial conviction.

19 Maximum punishments include
20 confinement for 30 days, restriction for up to
21 two months, and reduction to the lowest
22 enlisted pay grade. A summary courts-martial

1 cannot order a discharge, although it is not
2 infrequent that a service member that is
3 convicted by summary courts-martial will then
4 be administratively discharged. But the
5 summary courts-martial itself cannot adjudge
6 a discharge.

7 Okay, that takes us to special
8 courts-martial. So, we are rising in the
9 level of formality as we go up the chain. A
10 special courts-martial very much resembles a
11 federal criminal trial. And a conviction by
12 a special courts-martial is considered to be
13 a federal criminal conviction. So, a
14 conviction at a special courts-martial for a
15 qualified offense would, for example, require
16 a service member to register as a sex offender
17 as a result of that conviction. It could also
18 result in a loss of right to own weapons, and
19 other collateral consequences that attach upon
20 conviction of certain kinds of offenses.

21 The accused at a special courts-
22 marital can choose either to have a judge-

1 alone trial, a bench trial, or a trial in
2 front of a panel of members. The members are
3 the military equivalent of a jury. There are
4 very real constitutional differences between
5 a members panel and a jury, one of which is
6 the members panel is hand-picked by the
7 convening authorities. The commander hand
8 selects the members that will provide the role
9 of the jury on the courts-martial. A special
10 courts-martial panel must have at least three
11 members.

12 And unlike NJP and summary courts-
13 martial, the procedures that are used for
14 special courts-martial are very similar from
15 service to service. There are some
16 differences. For example, the JAGMAN in the
17 Navy provides some differences from AR 27-10
18 in the Army but they are very similar
19 procedures. A lawyer could easily go from an
20 Army to an Air Force to a Coast Guard courts-
21 martial and function quite well among those
22 four.

1 So, the maximum punishments for a
2 special courts-martial include a bad conduct
3 discharge, which can only be adjudged against
4 an enlisted member. An officer can neither be
5 confined nor discharged as a result of a
6 special courts-martial conviction. But the
7 key maximum punishment that is special are bad
8 conduct discharge, confinement for up to 12
9 months, and forfeiture of two-thirds pay per
10 month for 12 months, and, for enlisted
11 members, reduction to the lowest enlisted pay
12 grade. Those are typical sentences that are
13 in play in a given special courts-martial.

14 All right, that takes us to the
15 general courts-martial, the most serious form.
16 Once again, it resembles a federal criminal
17 trial. Once again, the conviction is
18 considered to be a federal criminal conviction
19 for collateral consequence purposes.

20 Before there can be a general
21 courts-martial, there are statutory
22 prerequisites, including an Article 32

1 investigation, which next year will become an
2 Article 32 preliminary hearing. And then
3 also, advice from the commander's staff judge
4 advocate. A case can be referred to a general
5 courts-martial only if the SJA advises the
6 commander that there is jurisdiction over the
7 offense, there is jurisdiction over the
8 offender, the charges state an offense, and
9 that the charges are warranted by the evidence
10 that was presented at the Article 32.

11 Once again, an accused can choose
12 to be tried at a bench trial, except for a
13 capital case, for which a members case is
14 statutorily required. But generally an
15 accused can choose to be tried by a bench
16 trial or by a panel. Now, the panel must
17 consist of at least five members, once again,
18 hand selected by the convening authority.

19 And once again, the procedures for
20 general courts-martial, while there are some
21 narrow differences among the services, are
22 quite similar from service to service.

1 The maximum punishments for a
2 general courts-martial include a dishonorable
3 discharge or a dismissal for officers,
4 confinement for up to the maximum authorized
5 for a particular offense -- so, for example
6 for rape, the maximum authorized sentence is
7 confinement for life without eligibility for
8 parole; a courts-martial can adjudge up to
9 that maximum -- forfeiture of all pay and
10 allowances, reduction to the lowest enlisted
11 grade but for enlisted only -- an officer
12 cannot be reduced in rank as a result of
13 courts-martial conviction -- and where it is
14 statutorily authorized, death. So, for
15 example, we have service members on military
16 death row today, all of whom were convicted of
17 premeditated murder.

18 So for special and general courts-
19 martial, the rule is that two-thirds majority
20 vote is required to convict. And if there is
21 less than a two-thirds majority vote, the
22 result is acquittal. No hung juries. There

1 is a vote. Either it meets the requirement
2 for conviction or it doesn't. Resulted in
3 either a conviction or an acquittal.

4 There is a two-thirds majority
5 required for the sentence. Now,
6 interestingly, unlike in most civilian
7 jurisdictions, where members decide guilt or
8 innocence, they are also the sentencing
9 authority. So, you don't have judge-alone
10 sentencing where it was a members trial.

11 So, where the members that will
12 impose the sentence, two-thirds majority
13 required for any sentence, generally, except
14 for death where unanimous vote for the
15 sentence is required or confinement for more
16 than ten years, for which a three-quarters
17 majority vote is required.

18 So, I wanted to give you a feel
19 about how many of these we do a year. So, for
20 fiscal year 2013, there were 1,240 general
21 courts-martial among all five armed forces.
22 There were 1,213 special courts-martial, 1,101

1 summary courts-martial, and more than 62,000
2 non-judicial punishments, about two-thirds of
3 which were conducted by the Army.

4 And so now I am going to give you
5 a feel for how a case goes through the system.
6 And it might be most helpful if I could go
7 over to the graphic for this.

8 So, let's assume a sexual assault
9 case arises from the Air Force. So, once a
10 sexual assault is reported, the case will then
11 be referred to the Air Force Office of Special
12 Criminal Investigations. Every service has a
13 military criminal investigative organization.
14 That is the Air Forces.

15 The charges in the Air Forces are
16 preferred by the squadron commander and then
17 the wing commander can authorize the Article
18 32 investigation that we discussed before. So
19 that hypothesizes that the squadron commander
20 says yes, I find sufficient basis to prefer
21 charges. Those charges then go to the wing
22 commander, who decides whether to order an

1 Article 32 investigation.

2 And an Article 32 investigation is
3 like a federal preliminary hearing under
4 Federal Rule of Criminal Procedure 5.1. It
5 isn't identical to it but it is similar to
6 that. So when we say investigation, that is
7 not, say the sort of FBI type investigation
8 that the other side does. This Article 32
9 investigation is really a judicial-like
10 proceeding. It is like a federal preliminary
11 hearing.

12 So, once the investigation is
13 complete, then the charges will go to the --
14 in our hypothetical, the wing commander refers
15 the charges up to the Numbered Air Force
16 Commander, recommending that there be a
17 general courts-martial. Then the Numbered Air
18 Force Commander will decide whether to refer
19 those charges for trial. And so the Numbered
20 Air Force Commander can refer those charges to
21 a general courts-martial. And then as we said
22 before, the Numbered Air Force Commander will

1 hand select the members that will be the
2 equivalent of the jury for that courts-
3 martial.

4 So, in our example, a courts-
5 martial was held. The individual was
6 convicted. The individual is sentenced to a
7 bad conduct discharge and a certain amount of
8 confinement.

9 Then the case then goes back to
10 the Numbered Air Force Commander. After this
11 full trial that again resembles a federal
12 criminal trial for all purposes, the case goes
13 back to the Numbered Air Force Commander to
14 take what is called a convening authority's
15 action.

16 Now, traditionally, a commanding
17 officer had unconstrained discretion to either
18 set aside findings of guilty or to reduce the
19 punishment adjudged. However, Congress
20 significantly narrowed that discretion in the
21 National Defense Authorization Act for Fiscal
22 Year 2014 for offenses that occur on or after

1 June 24, 2014. The commander has much
2 narrower discretion than commanders
3 historically had.

4 Let's hypothesize that the
5 commander approves the findings and approves
6 the sentence. Any case that includes either
7 a discharge or a year or more confinement will
8 go for an automatic appeal to the Air Force
9 Court of Criminal Appeals. So, there are four
10 courts of criminal appeal, various services
11 have them. This case would go to the Air
12 Force Court of Criminal Appeals for an
13 automatic appeal.

14 Once that appeal is done, the
15 losing party can then seek review from the
16 Court of Appeals for the Armed Forces. Now,
17 the Court of Appeals for the Armed Forces, its
18 jurisdiction is largely discretionary. It
19 largely gets to pick and choose the cases it
20 reviews. So, if the accused loses at the Air
21 Force Court, the accused files a petition with
22 the Court of Appeals for the Armed Forces,

1 much like a Cert Petition, asking the court to
2 consider the case. And then the court rejects
3 most of the cases. They hear about 15 percent
4 of the cases that are raised for its review.

5 On the other hand, when the
6 government loses the case, they ask the judge
7 advocate general to certify the case to the
8 Court of Appeals for the Armed Forces. Upon
9 certification, CAAF must hear the case. So,
10 that is mandatory jurisdiction.

11 It is also legally possible for a
12 judge advocate general to certify the cases
13 that the government won at the Court of
14 General Appeals. It does sometimes happen.
15 It happened in the DLM case, which we will
16 talk about this afternoon but it is relatively
17 rare. Usually that panel has certified its
18 exercise on behalf of the government
19 discretionary review, where the review is
20 being sought on behalf of the service member.

21 If and only if the Court of
22 Appeals for the Armed Forces hears a case, is

1 one of those 15 percent where they decide to
2 hear it or it has been certified as a case and
3 there is also mandatory jurisdiction if the
4 CCA approves a death sentence, that must be
5 reviewed by them. If and only if CAAF reviews
6 the case, it also falls within the
7 discretionary jurisdiction of the United
8 States Supreme Court.

9 So since 1984, there has been a
10 statutory right to file Cert Petitions from
11 CAAF to the Supreme Court. The court has only
12 granted review for nine military justice cases
13 since then, so it is very rarely used.

14 So again, that is how a case
15 progresses through the system from the
16 complaint to possible review by the Supreme
17 Court. Any questions about that? Yes,
18 please.

19 VADM TRACEY: A couple. Just
20 remind me in this example is the squadron
21 commander O-3, O-6? General flag officers
22 have kind of a seniority.

1 MR. SULLIVAN: Kyle, what is the
2 general rank of a squadron commander?

3 LT COL GREEN: Squadron commanders
4 are typically O-4s and O-5s.

5 VADM TRACEY: O-4s and O-5s.
6 Okay.

7 MR. SULLIVAN: And so again, it is
8 the wing commander who is going to be O-6.
9 And so this wing commander also in the system
10 where now the sexual assault offenses must be
11 reviewed by an initial disposition authority,
12 that IDA must be at least an O-6. So that
13 wing commander would provide that role and
14 then when it goes to the numbered Air Force
15 Commander, that is typically two or three
16 stars.

17 VADM TRACEY: And the wing
18 commander has discretion not to forward the
19 case on to a general courts-martial convening
20 authority?

21 MR. SULLIVAN: That is correct.
22 So the wing commander, provided they are an O-

1 6, they have that authority. If for any
2 reason you had a wing commander that was less
3 than an O-and it was a sexual assault case, it
4 would have to be reviewed by an O-6. And so
5 in the Department of Navy where convening
6 authorities generally exercise at a much lower
7 level, those cases, in the Marine Corps you
8 might often have an O-5 battalion commander as
9 the special courts-martial convening
10 authority. Sexual assault cases still have to
11 be reviewed by at least an O-6.

12 Yes, sir?

13 MR. STONE: What did you say about
14 the CAAF review and the Supreme Court? The
15 Supreme Court can only consider if CAAF has
16 considered it?

17 MR. SULLIVAN: Correct. So, the
18 way the statute is written, the Supreme Court
19 does not have statutory jurisdiction,
20 certiorari jurisdiction over any case where a
21 panel sought CAAF review and CAAF said no, we
22 choose not to review that. So, about 85

1 percent of the military justice cases that are
2 raised to CAAF will never qualify for Supreme
3 Court review.

4 Yes, ma'am?

5 CHAIR HOLTZMAN: When you said the
6 government can certify a matter that qualifies
7 for automatic appeal, are there standards for
8 certification?

9 MR. SULLIVAN: There are not. The
10 only constraint discretion of the judge
11 advocate general would be an individual's
12 service.

13 And I should also mention that
14 following the conclusion of this and including
15 in cases where CAAF denied review, there is
16 sometimes the opportunity for collateral
17 review in the Article 3 courts.

18 So for example, a service member
19 that remains confined after this process can
20 file a habeas petition. They are quite often
21 filed in the Federal District of Kansas
22 because the United States disciplinary

1 barracks is in Kansas. They are also confined
2 in other places but Kansas is the preferred
3 locus.

4 A Tucker Act claim could be raised
5 in federal court for back pay and a collateral
6 challenge could be made in federal court that
7 way. And then a Tucker Act claim can be made
8 in the Court of Federal Claims to provide an
9 opportunity for collateral challenge, once
10 this is done.

11 But this is the military justice
12 system. None of that is under the UCMJ but I
13 just wanted to tell you there is an
14 opportunity for collateral review within the
15 Article 3's judiciary and in the federal
16 court.

17 Any other questions about the way
18 that a case goes through the system?

19 All right, so now I want to take a
20 look at the punitive articles. There are 65
21 punitive articles, though many of those
22 punitive articles include multiple offenses,

1 so there are many more than 65 offenses within
2 the UCMJ. But there are 65 punitive articles.
3 And many of them are military-specific
4 offenses, such as absence without leave or UA,
5 as we call it in the Department of the Navy,
6 desertion, violation of a lawful order, or
7 misbehavior before the enemy. Many of them
8 are typical common law offenses like murder,
9 rape, burglary, and robbery.

10 Now, in addition to these 65 --
11 well, actually one of the 65 punitive articles
12 is the General Article, Article 134. And
13 Article 134 covers three broad types of
14 offenses but it brings an enormous amount of
15 misconduct.

16 So the three broad types of
17 offenses it brings in are first, all disorders
18 or neglects to the prejudice of good order and
19 discipline. So that is typically called
20 conduct prejudicial to good order and
21 discipline. Second, conduct of a nature to
22 discredit the armed forces. Service discredit

1 conduct. And third, any federal crime that
2 isn't capital. Any 18 USC offense, any 21 USC
3 drug offense that isn't capital can be tried
4 by courts-martial under the third provision,
5 crimes and offenses not capital. And what we
6 often see are state law violations that are
7 tried by courts-martial through the Federal
8 Assimilative Crimes Act. So, one of the non-
9 capital offenses that can be tried by courts-
10 martial is the Federal Assimilative Crimes
11 Act, which gives the federal government the
12 opportunity to try a violation of state law
13 that occurs in a federal enclave within a
14 particular state. So that is a commonly used
15 example.

16 So, within the Manual for Courts-
17 Martial, the President has identified specific
18 offenses under Article 134. Now, these are
19 nonexclusive. There can always be a novel
20 Article 134 that is charging some misconduct
21 that nobody thought of before until that
22 particular accused became creative. But the

1 President has identified certain Article 134
2 offenses. He identified 52 of them and then
3 I am giving you some examples.

4 So, you will see there is a broad
5 range of offenses, including both military and
6 non-military offenses. So, adultery, false or
7 unauthorized pass offense, fraternization,
8 breaking restriction. So, sort of military-
9 specific offense. Obviously, adultery is an
10 offense in some states, although the
11 opportunity for states to prosecute that after
12 Lawrence v. Texas, obviously, is in doubt.

13 Then there are also there are
14 common civilian-type offenses. Negligent
15 homicide is one offense that the President has
16 designated for trial under Article 134.

17 Kidnapping, so there no specific UCMJ
18 kidnapping statute. If you have kidnapping,
19 it gets prosecuted under Article 134.

20 Obstructing justice, pandering and
21 prostitution, although there is a specific
22 UCMJ offense for forcible pandering in Article

1 120 , as we will see this afternoon, and then
2 communicating a threat. So, those are some
3 examples.

4 So before we move on to delegation
5 of authority to the President, any thoughts or
6 questions about the punitive articles?

7 CHAIR HOLTZMAN: Do they include
8 sexual assault?

9 MR. SULLIVAN: Yes. So one of the
10 65 -- three of the 65 offense govern sex
11 crimes -- well actually more than three.
12 Article 120 provides for four --

13 CHAIR HOLTZMAN: No, no. I mean
14 designated by the President under 134.

15 MR. SULLIVAN: So, the President
16 can -- there is something called the
17 preemption doctrine, which means the President
18 cannot designate something under Article 134
19 if it is covered by one of the other 64. So,
20 this is a way to make up for something that is
21 left out.

22 And so again, so one sex crime

1 that is included is pandering and
2 prostitution, yes.

3 And so now we are getting into
4 delegation of authority to the President.
5 There are two important delegations. One is
6 Article 36. So, Congress didn't want to
7 specify all of the procedure rules and
8 evidentiary rules for a courts-martial, so
9 they delegated to the President the authority
10 to make procedural rules, including rules of
11 evidence for courts-martial. And they said to
12 the President, look, to the extent
13 practicable, apply the same rules that apply
14 in federal district courts and to the extent
15 that that is not inconsistent with the UCMJ.

16 And then there is a second broad
17 delegation of authority to the President and
18 that is the authority to prescribe maximum
19 punishments for offenses. So almost every
20 UCMJ punitive article, most of them, the vast
21 majority of them say simply that the offense
22 shall be punished as a courts-martial may

1 direct. And it is up to the President to
2 designate a specific maximum punishment, say
3 this offense carries a bad conduct discharge
4 and confinement for six months. This offense
5 carries a dishonorable discharge and
6 confinement for life.

7 The one exception to that is that
8 only Congress can designate offenses as being
9 death-eligible offenses under the UCMJ.

10 Now, the President has carried out
11 that delegated authority by promulgating the
12 Manual for Courts-Martial. And so the most
13 recently published Manual for Courts-Martial
14 is the 2012 edition. They periodically
15 republish. And this is a collection of the
16 executive orders that the President issues to
17 carry out that delegated authority plus there
18 are some other things in the manual, for
19 example, the Joint Service Committee provides
20 a non-binding discussion. The drafts have
21 drafters' analysis within it. So, there are
22 a number of other things. But the important

1 point of this is a collection of the executive
2 orders promulgated by the President.

3 And so there are five parts to the
4 manual other than some appendices that, again,
5 include advisory materials. The five parts
6 are the preamble, which sets out the purpose
7 of the military justice system; the rules for
8 courts-martial, which are the equivalent of
9 the Federal Rules of Criminal Procedure,
10 although they are quite different from the
11 Federal Rules of Criminal Procedure. There
12 are Military Rules of Evidence that are the
13 equivalent of the Federal Rules of Evidence
14 and almost identical to the Federal Rules of
15 Evidence with some areas of difference, but
16 largely follow their Federal Rules of Evidence
17 counterparts; there are the punitive articles,
18 including the maximum punishments that have
19 been designated by the President offense by
20 offense; and then there is a provision on non-
21 judicial punishment procedures.

22 And one more thing I want to

1 mention before wrapping up the military
2 justice overview is just a note on overlapping
3 jurisdiction. It is important to keep in mind
4 that almost any time a military service member
5 commits a non-military specific offense, let's
6 set aside for the moment breaking restriction,
7 or a pass offense, or desertion, or AWOL, or
8 UA. So, setting those aside, almost any time
9 a military service member commits an offense,
10 they are subject to prosecution in multiple
11 jurisdictions.

12 So if a service member who is
13 stationed at the Marine Corps barracks at 8th
14 and I were to commit an offense outside here
15 today, that is going to be tried in U.S.
16 District Court for the District of Columbia.
17 It could be tried in D.C. Superior Court, or
18 it could be tried in courts-martial.

19 If a military member commits an
20 offense on a military base with exclusive
21 federal jurisdiction, then it is going to
22 depend on exclusive federal jurisdiction. A

1 military member commits an assault and battery
2 in the Pentagon. That offense could be tried
3 by courts-martial or it could be tried in U.S.
4 District Court for the Eastern District of
5 Virginia.

6 If a service member commits an
7 offense on base with concurrent jurisdiction,
8 so for example Fort Story in Virginia has
9 parts of it that have concurrent jurisdiction,
10 those offenses could be tried in Virginia
11 state courts, Virginia Commonwealth courts.
12 It could be tried in Federal District Court or
13 it could be tried by courts-martial.

14 Overseas, service members
15 generally can be tried, who violate the law
16 for again, a non-military specific offense,
17 unless they are in an area, in an occupation
18 status or combat zone where the individual
19 wouldn't be subject to the host nation laws,
20 let's say they are in Japan, part of our U.S.
21 Forces in Okinawa, and they commit an offense
22 off-base, that offense could be tried in

1 Japanese court or it could be tried by courts-
2 martial.

3 So, no matter where a service
4 member is when they commit a non-military
5 specific offense, there will typically be
6 multiple jurisdictions that can try the
7 offense. And there are various memoranda of
8 understandings for overseas purposes, status
9 of forces agreements that address when and by
10 whom the individual can be tried. But there
11 is generally multiple jurisdictions that could
12 exercise jurisdiction in those cases.

13 So, that concludes the portion of
14 this discussion that will be the military
15 justice overview. Any questions about that?
16 Yes, please.

17 MR. TAYLOR: Yes, thank you very
18 much for that. I was a little interested in
19 the number of summary courts-martial compared
20 to the others and wondered if you would
21 comment a little bit about what the current
22 practice is on who is the officer who conducts

1 the summary courts-martial and also whether
2 there is a right to counsel, given the fact
3 that confinement can be to up to 30 days.

4 MR. SULLIVAN: But by statute and
5 by generally federal regulations, there is no
6 right to counsel, though I understand that it
7 is done differently in the services. I
8 believe the Air Force, as a matter of
9 practice, provides counsel but there isn't a
10 right to counsel.

11 The summary courts-martial officer
12 typically -- again, it may be different than
13 in the Air Force, but typically will not be a
14 lawyer. It is typically going to be a line
15 officer. In the Air Force is it typically a
16 lawyer?

17 LT COL GREEN: It typically is a
18 JAG.

19 MR. SULLIVAN: So again, as I
20 said, the way that these are done from service
21 to service vary considerably. But typically
22 the summary courts-martial officer is not

1 going to be a judge advocate. It is going to
2 be a line officer.

3 And what we often see,
4 particularly in the Marine Corps is summary
5 courts-martial has become something of an
6 alternative dispute resolution mechanism. And
7 what you will see not infrequently is a
8 service member, whose charges might initially
9 go to a special courts-martial, go to the
10 command and say I tell you what, I will accept
11 the summary courts-martial and I will waive my
12 right to an administrative discharge board.
13 And so essentially, that gives the command the
14 ability to say okay, we will put this guy in
15 the brig for 30 days while we out-process him.
16 And so that has become a not infrequently used
17 way that the summary courts-martial has been
18 used.

19 There was an interesting article
20 in the Marine Corps Gazette a number of years
21 ago called "The Lost Battalion" that talked
22 about the very real difficulties that arise

1 from having a large number of people under
2 appellate review.

3 So, once a service member receives
4 a discharge, that discharge can't be executed
5 until their appellate review is complete. We
6 talked about that appellate review system.

7 So, you have had a large number of
8 people that have been subject to a courts-
9 martial, have served their time, and we have
10 sent them home. We said look, you are on
11 appellate leave. You are still on active duty
12 but you are in a no-pay-due status. And so if
13 you just sit there and you wait for your
14 appellate review to complete, because we are
15 statutorily not authorized to execute a
16 punitive discharge until the completion of
17 appellate review.

18 So, there is this influential
19 article called "The Lost Battalion" that says
20 basically we have a battalion with the Marines
21 that we can't have people doing real duty
22 because they are on this appellate leave

1 status. And as a result of that, commanders
2 began to look for ways to get rid of lower
3 level misconduct through ways that would not
4 result in the Marine Corps being charged with
5 somebody on appellate leave. And so this
6 summary courts-martial board waiver came into
7 play as a result of that.

8 So, I dare say a fairly large
9 number of the summary courts-martial fall into
10 that category.

11 MR. TAYLOR: Thank you.

12 MR. SULLIVAN: Yes, please?

13 MR. STONE: You mentioned at the
14 very end about how there are MOUs to
15 regularize, at least generally, the procedure
16 about whether a person is charged by say U.S.
17 Attorney acting under the Assimilated Crimes
18 Act or acting under the Federal Criminal Code
19 or the Military Code.

20 Can you just tell me something
21 about what happens if a defendant says I am
22 not interested in an Article 1 prosecution; I

1 demand an Article 3 prosecution? Does he have
2 any right to say that or are there Supreme
3 Court cases that say he doesn't? I presume
4 they challenged that later by habeas and said
5 I never got my Article 3 right, saying I never
6 got a jury, I never got this?

7 MR. SULLIVAN: No. No, the
8 Supreme Court has expressly held that a
9 service member who is on active duty is
10 subject to trial by courts-martial for any
11 violation of the UCMJ, period.

12 And there was a time from 1969 to
13 1987 when the Supreme Court, by case law,
14 O'Callahan v. Parker had imposed an additional
15 requirement for subject matter jurisdiction to
16 say the offense must be related to military
17 service. And so from 1969 to 1987, you had
18 this additional service connection
19 requirement. That requirement, however, was
20 overturned by the case of Solorio v. United
21 States in 1987, which again, stands for the
22 proposition that merely being on active duty

1 is sufficient for the exercise of courts-
2 martial jurisdiction. And there was an
3 interesting dissent by Justice Marshall, where
4 he was construing the Fifth Amendment
5 exception for cases arising in the land of
6 naval forces for the grand jury provision.
7 But again, that was a dissent. So again, the
8 majority rule was clear. If you are on active
9 duty, you can be court-martialed, whether it
10 is connected to military service or whether it
11 violates another civilian offense or not.

12 MR. STONE: So, I think that that
13 means that the proceedings under the UCMJ that
14 we are looking are not bound by the U.S.
15 Constitution.

16 MR. SULLIVAN: Well, actually, the
17 Supreme Court has held that the Constitution
18 does apply to the military and does apply to
19 the military justice system but can apply
20 differently.

21 So for example, you had a case
22 called Weiss v. United States, where the court

1 said a service member does not have a right to
2 be tried by a military judge with a fixed term
3 of office, as an example. And they said while
4 the due process clause does apply to the
5 military, it applies differently. And what
6 process is due is determined in a different
7 manner than under the Medina v. California
8 standard for federal review of state criminal
9 justice procedures. It is a much more
10 deferential review than what is already a
11 deferential review in the review of state
12 criminal procedures.

13 MR. STONE: But what I am getting
14 to is all the Fifth Amendment rights that we
15 are used to and used to standard
16 interpretations of, whether it is right to a
17 jury, whatever, they don't apply.

18 MR. SULLIVAN: Sir, the Supreme
19 Court has said the Sixth Amendment jury right
20 does not apply. The Fifth Amendment has a
21 specific exemption for the grand jury right.
22 However, the Sixth Amendment right to counsel

1 does apply and the courts have so held.

2 The Fourth Amendment right to be
3 free from unreasonable searches and seizures
4 does apply but what searches and seizures are
5 considered unreasonable will be very different
6 in a military context than a civilian context.

7 First amendment rights do apply.
8 Equal protection rights do apply. So, there
9 is quite a lot of jurisprudence for the
10 Supreme Court about applicability of the Bill
11 of Rights. What we can expressly say is it is
12 not a case that the Bill of Rights is
13 categorically inapplicable because the Supreme
14 Court, again, has applied them.

15 In 1950, when the UCMJ was
16 written, there was considerable dispute and
17 debate about the applicability of the Bill of
18 Rights to the Military Justice System. So,
19 the UCMJ largely wrote in those provisions
20 that Congress contemplated would be provided.

21 So for example, Article 31
22 provides a right against self-incrimination.

1 And interestingly the Congress's adoption of
2 Article 31 preceded Miranda but it includes a
3 rights warning. So, there is a statutory
4 rights warnings requirement that preceded
5 Miranda in Article 31. And interestingly, the
6 Supreme Court cited that in the Miranda case.

7 Sir, you asked a great question.
8 There is an enormous body of literature that
9 would at least fill the table up to here on
10 that very question, applicability of the Bill
11 of Rights.

12 What we can say is not
13 categorically inapplicable but applied
14 differently. But again, in some context such
15 as ineffective assistance of counsel, the
16 military courts will apply Sixth Amendment
17 case law with almost no filter. It was almost
18 directly applicable. Strickland v. Washington
19 directly applicable to the Supreme Court, not
20 necessarily to the military justice system.

21 So, some of this case law are
22 applied pretty much just as they would be in

1 civilian courts. Some apply differently and
2 some, like the Sixth Amendment right to jury,
3 inapplicable.

4 MR. STONE: I don't know if we had
5 it. Is it possible for us to get like a one-
6 page summary, just one page which Bill of
7 Rights protections in criminal cases applies,
8 not applied, doesn't apply, just so we have an
9 idea that we don't suggest something that
10 turns out to be not what the Supreme Court
11 would connect.

12 MR. SULLIVAN: I would be happy to
13 draft that and provide it to the panel but it
14 will have a lot of caveats.

15 All right. And with that, we will
16 just very quickly get into some of the recent
17 legislation.

18 So, the most recent bill which
19 substantially affect the UCMJ was the National
20 Defense Authorization Act for Fiscal Year
21 2014. Title XVII of that bill addressed
22 sexual assault prevention. There were 36

1 sections in Title XVII, 16 of them included
2 military justice reforms.

3 And the Military Justice Act, John
4 Altenburg, who was the former Deputy Judge
5 Advocate General of the Army who was the
6 convening authority for the Military
7 Commission System, he is the Chairman of the
8 ABA Standing Committee on Armed Forces Law, a
9 true military justice giant, he has called the
10 Title XVII of the NDAA for FY21 O-4 the most
11 extensive UCMJ revision since 1968. And I
12 think he is exactly right.

13 But out of these 16 different
14 provisions, we can sort of boil it down to two
15 essential points. And that is that the NDAA
16 for FY2014 significantly enhanced victims'
17 rights within the military justice system and
18 it significantly constrained convening
19 authority's power and discretion, as we
20 mentioned before about what they can do post-
21 trial is constrained but also what they can do
22 pretrial was also greatly constrained. And in

1 the few remaining minutes, I will run through
2 some of those changes.

3 But it is also important to note
4 that some of those changes apply only to
5 sexual assault cases, some apply more broadly,
6 and some of them have already taken effect.
7 Some of them don't take effect until -- the
8 reform of Article 32, for example, will only
9 apply to cases -- to offense that occur on or
10 after December 26, 2014. So, it won't even
11 come into effect until December 26, 2014. It
12 is only offenses that occur on or after that
13 date.

14 So, whether the next year or even
15 beyond, we will still have cases that go to
16 Article 32s under the old Article 32 statute.

17 So, one of the very important
18 reforms was the enactment of a statutory
19 victims' rights act. And it is modeled after
20 the Victims' Rights Act that is in U.S. Code
21 at 18 USC 3771. And it generally follows the
22 same rights that are provided to victims in

1 federal criminal trials with certain
2 modifications where there are military
3 differences in procedures that make the 18 USC
4 3771 rules not directly applicable.

5 Another very important provision
6 was a requirement of the military legal
7 assistance programs to represent victims of
8 certain offenses. Now Secretary Hagel had
9 already ordered all of the services to provide
10 what is typically called Special Victims
11 Counsel Programs but what the Department of
12 the Navy calls VLC, Victim Legal Counsel
13 Programs. Secretary Hagel had ordered all of
14 the services to provide those.

15 Congress codified the program in
16 Title XVII and then also expanded it. So for
17 example, the original programs, the Air Force
18 pilot program, for example, was limited to
19 adult sexual offenses. Congress required that
20 Special Victim Counsel also be made available
21 where a juvenile was the victim of the sexual
22 offense, and certain other offense, including

1 stalking.

2 And interestingly, when the Marine
3 Corps instituted this, the Marine Corps simply
4 said we will make a victim legal counsel
5 available for a violation of any offense. You
6 know burglary, you have a right to a victim
7 legal counsel within the Marine Corps.

8 There were five reforms to the
9 pretrial process. As we mentioned, Article 32
10 investigations will become even more like
11 federal preliminary hearings with one
12 important difference, though. Right now a
13 civilian cannot be compelled to testify at a
14 32. So even under a 32 under the law today,
15 there is no right to compulsory process to
16 make a civilian testify. Congress decided to
17 also give military victims the option not to
18 testify at an Article 32 hearing.

19 Also, currently, the services vary
20 in terms of whether they audio record Article
21 32s, for example, the Air Force and Coast
22 Guard do not. Congress ordered that all the

1 services must audio record the Article 32 and
2 the victim has a right to review that
3 transcript.

4 Congress also required that the
5 Article --

6 CHAIR HOLTZMAN: Excuse me. When
7 does that go into effect?

8 MR. SULLIVAN: Once again, it is
9 for offenses that occur on or after December
10 26, 2014.

11 And then Congress also required
12 that unless there is an operational necessity,
13 that the Article 32 investigating officer will
14 be a judge advocate. Right now, in all the
15 services except for the Army right now,
16 typically the Article 32 IO is a judge
17 advocate. However, in the Army, typically the
18 Article 32 IO is not. Congress said look,
19 unless there is an operational requirement,
20 you must have a judge advocate. However,
21 Secretary Hagel had already said for a sexual
22 assault case, all of the services must use

1 judge advocates for the Article 32 IO, with no
2 exceptions. So, for sexual assault cases,
3 that rule already is in effect today.

4 Other pretrial reforms include
5 providing that a defense counsel cannot
6 interview the victim without going through the
7 trial counsel, the prosecutor in the case.
8 There is a requirement that certain discussion
9 in the Manual for Courts-Martial be eliminated
10 that says that the character and military
11 service of the accused should be considered by
12 the commander in deciding how to dispose of
13 charges. Congress directed that language be
14 removed from the MCM. It was already in a
15 non-binding part of the MCM but that has
16 already been taken out by Executive Order.

17 Jurisdiction over penetrative type
18 sexual offenses, an attempt to commit
19 penetrative type sexual offenses was limited
20 to a GCM. And general courts-martial
21 convening authorities' decisions not to review
22 such charges are now subject to higher level

1 review.

2 So, if the staff judge advocate
3 advises the general or admiral hey, don't
4 refer these charges and the general or admiral
5 doesn't, that has to be reviewed by the next
6 level of command. If the staff judge advocate
7 said hey, general or admiral, refer these
8 charges and the general or admiral says no,
9 that has to be reviewed by the Service
10 Secretary.

11 Okay, with that I am going to stop
12 now, in case you have any discussion or
13 questions you would like to get to. Again,
14 you will see me again this afternoon. So, I
15 will also be happy to address anything more
16 then but I did want to give the opportunity
17 for some interaction here.

18 Yes, please?

19 MR. STONE: You just mentioned
20 that one of the changes was that defense
21 counsel are required to seek interview of
22 sexual assault victim through the trial

1 counsel. I should have thought, even before
2 this statutory amendment that that would have
3 been an ethical violation for an attorney to
4 do that, go around a person who is
5 represented, around their counsel and go
6 directly to that person.

7 So, I guess I am a little bit
8 confused about why that was necessary and/or
9 whether that was an ethical violation before
10 the statutory change.

11 MR. SULLIVAN: The trial counsel,
12 of course, is the counsel for the United
13 States. They are the prosecutor. Sir, they
14 weren't the counsel for the victim. There is
15 no attorney-client relationship between the
16 victim and the prosecutor.

17 So, before this, it was
18 statutorily permitted. In fact, Article 46 of
19 the UCMJ said that the defense and the
20 government shall have equal access to
21 evidence, including witnesses. And this was
22 an amendment to Article 46. Before this,

1 defense counsel could and regularly did go
2 directly to the victim.

3 Now, interestingly, in the Senate
4 Armed Services Committee past version of the
5 NEA for FY2015, the Senate Armed Services
6 Committee has adopted a change to this
7 provision. It is not the House bill but in
8 the Senate bill this would be changed to say
9 instead of going through the trial counsel,
10 the defense counsel must go through the
11 attorney for the victim. So, if they have a
12 special victim counsel, they would go through
13 the special victim counsel. If they have
14 retained counsel, they go through retained
15 counsel but it would marry up with the typical
16 ethical rules you mentioned before, which is
17 that counsel may not communicate with a
18 represented party concerning the matter of
19 representation without going through the
20 counsel.

21 So again, the Senate version would
22 take the prosecutor out of this and say

1 defense counsel, you have to go through the
2 victim's lawyer.

3 MR. STONE: I guess I am just a
4 little bit confused because before this was
5 passed, the Air Force had their program that
6 provided Special Victims' Counsel and victims
7 always had the right to retain their own
8 counsel and will continue to.

9 MR. SULLIVAN: That's right.

10 MR. STONE: So, I still don't
11 quite understand why that was necessary in
12 2014 or in the 2015 bill, given the ethical
13 rules that they just have to follow if they
14 want to be a member of a bar. And I presume
15 even the lawyers in the military have to pass
16 some state bar. If they find themselves
17 disbarred or disciplined, they then couldn't
18 be a military prosecutor. So, I guess what I
19 am wondering is is it your view that this
20 overrides the ethical obligations of military
21 lawyers and if that is not passed, let's say
22 it is debated and not passed, that then they

1 can avoid counsel and still say Congress
2 didn't pass it, therefore, this ethical
3 obligation is of no force and effect?

4 MR. SULLIVAN: No. No, the
5 military lawyers are members of state bars.
6 They have to be a member of a state bar. And
7 so that provides them with their authority to
8 practice. Now, they also have to be approved
9 by the judge advocate general in their service
10 but a prerequisite is a state bar. So, they
11 are bound by their state ethical rules, except
12 where they are in conflict. And there are
13 examples where there are differences in the
14 rules and the military rules say look, when
15 you are performing military duties where there
16 are differences, ours trump. For example,
17 there is no imputed disqualifications for
18 defense counsel. So defense counsel that work
19 in the same office can represent parties with
20 conflicts. That is one where the military has
21 chosen to go that route.

22 But as a general matter, we follow

1 the state ethical rules and all of the
2 military ethical rules themselves. So, all
3 the services have their own ethical rules.
4 All of them have the provision that you can't
5 communicate with a represented party.

6 Now, there is some -- before these
7 changes passed, there was some argument about
8 whether a witness is a represented party,
9 since the victim, technically, is not a party
10 to the proceeding. So, where the term
11 represented -- and ethics rules sometimes use
12 the term you can't communicate with a
13 represented party, sometimes say you can't
14 communicate with a represented person. So, if
15 it is party, then the defense counsel could
16 make an argument hey, I am not restricted by
17 that because the victim isn't a party.

18 So one purpose of this is to make
19 clear that regardless of the wording of the
20 rule, you have got to go through the counsel.
21 But again, what Congress chose to do in 2014,
22 in the NDAA for 2014 was say you have got to

1 go through the prosecutor. So, that would not
2 have been the rule previously.

3 Now, in addition to that, where
4 you do have a represented party, you would
5 always have to go, you would still have to go
6 through that counsel as well. So in other
7 words, as an ethical matter, you have to go
8 through the victim's lawyer but as a statutory
9 requirement, you also have to go through the
10 prosecutor.

11 So right now, there is sort of two
12 prerequisites to a defense counsel talking to
13 a victim, where the victim is represented by
14 counsel.

15 But it is also important to note
16 that there are many instances in which a
17 victim may not be represented by counsel. So,
18 for example, if a service member talks back to
19 a commanding officer and so the commanding
20 officer is the victim of the disrespect, that
21 commanding officer typically isn't going to be
22 represented by counsel and the defense counsel

1 is typically going to feel free to go talk to
2 that commanding officer about the offense.
3 So, the question is, should Congress put
4 between the defense counsel and that
5 commanding officer a visit to the prosecutor's
6 office, where, in a civilian jurisdiction,
7 there would be no comparable requirement to go
8 talk to the AUSA or the assistant state's
9 attorney before you go talk to some victim in
10 the case that doesn't have an order regarding
11 that.

12 MR. STONE: Focusing specifically
13 on these offenses we are talking about, which
14 are sexual assaults of various natures in the
15 military for a minute, what, if I may ask,
16 absent this Senate action and that bill being
17 passed, what is the view of the Department of
18 Defense General Counsel's Office on the
19 defense counsel or the prosecutor not going
20 through a Victims' Counsel when they know
21 there is a Victims' Counsel appointed? Is
22 your office taking the position that because

1 that victim is a person and not a party, they
2 are able to do it? Or are you taking the
3 position either for ethical rules or simply
4 internal general operating procedures, they
5 should not do it?

6 MR. SULLIVAN: I'd have to go
7 through it. There are four different ethics
8 rules that govern military lawyers. One of
9 them is the Coast Guard so they don't fall
10 within DoD. But the Army has its own ethics
11 rules, the Air Force has its own ethics rules,
12 and the Department of the Navy has its own
13 ethics rules that apply to both the Navy and
14 the Marine Corps judge advocates. And so I
15 would actually have to look at each one of
16 those to see whether they used person or
17 party. My recollection is the Navy uses
18 person. And I am getting a nod from someone
19 in the back room that would know. I am almost
20 sure I looked that one up particularly.

21 The Navy uses person. So in that
22 instance, there would be an ethical

1 prohibition. Even without statute, there
2 would be an ethical prohibition against the
3 defense counsel talking to a victim
4 represented by an SVC, without going through
5 the SVC.

6 MR. STONE: But the other services
7 aren't clear and that is part of the reason
8 for this --

9 MR. SULLIVAN: It may very well be
10 that the other -- it may very well be that the
11 Army and the Air Force use the same word. I
12 remember looking up the Navy one and I am
13 getting a nod.

14 MR. STONE: Would you mind getting
15 back to us later, so we know?

16 MR. SULLIVAN: Sure.

17 MR. STONE: And do you think that
18 this panel has the ability to make a
19 determination that when military counsel knows
20 a victim is represented, that they need to go
21 through that counsel?

22 MR. SULLIVAN: Oh, sure.

1 Certainly.

2 CHAIR HOLTZMAN: Excuse me. We
3 don't have any power to make any
4 determination. We can just make
5 recommendations.

6 MR. STONE: Recommendations.

7 MR. SULLIVAN: I think I have
8 overstayed my welcome.

9 CHAIR HOLTZMAN: No, we thank you
10 very much for your very helpful testimony. We
11 really appreciate it. Thank you very much.

12 I guess next on the agenda is
13 discussion of the responses to the work of the
14 Response Systems Panel. Should we take a
15 five-minute break? Anyone want a break now?

16 No, okay. So, let's go. Kyle,
17 what is your view about how we are going to
18 conduct this?

19 LT COL GREEN: Ms. Holtzman at Tab
20 4, we have materials that the staff has
21 prepared describing the tasks that you were
22 assigned and the time line assigned to the

1 Response Systems Panel and then the Judicial
2 Proceedings Panel.

3 So, we have provided both the
4 layout of the time line of the different
5 bodies and then a comparison of the different
6 tasks assigned to each, as well as some of the
7 findings and areas identified by the Response
8 Systems Panel.

9 So, it is really just an
10 opportunity, ma'am, maybe for you and Judge
11 Jones to provide your impressions of anything
12 of importance to this panel, in terms of the
13 Article before us.

14 CHAIR HOLTZMAN: Judge Jones, do
15 you have any comments to make about this?

16 JUDGE JONES: That's all right. I
17 just remembered the only comment I have is,
18 and I see that if you take a look under
19 summary of tasks, they are actually under
20 Section 10, four matters that the panel
21 recommended to this panel to consider. And I
22 actually, I suppose we could discuss each one

1 of those, although some of it has been
2 covered.

3 Should Article 120 be split into
4 different articles that separate penetrative
5 and contact offenses, for instance? Which I
6 guess would be very germane because we are
7 going to hear a lot about 120 later today.

8 A victim's right to information
9 during discovery, depositions of victims,
10 which of course is directly related to the
11 change in Article 32, and plea bargains in the
12 military, compared to civilian jurisdictions
13 and that is an outcropping of trying to figure
14 out a way to give military victims the same
15 rights as you would get in a federal court in
16 a situation where plea bargaining is so
17 different in terms of their access. So, that
18 is basically what happened in our discussions
19 about that.

20 So take the last one first, was
21 that in federal we go through the prosecutor,
22 who talks to you about what plea bargain they

1 are thinking of agreeing to, possibly to take
2 to the judge. And the victim has their input
3 that way.

4 In the military system, of course,
5 it is the convening authority who agrees on
6 what bargain there is going to be struck. And
7 so that was one area where we did a lot of
8 comparison and our real focus was just to
9 figure out a way to make a recommendation that
10 for victims in the military justice system,
11 there would be a method provided for them to
12 get their impressions, their desires, their
13 objections, or their agreement before the
14 convening authority. So, that is where that
15 sort of began.

16 And in terms of what this panel
17 might want to consider, it is a very broad
18 question, I guess, of just a review of how
19 plea bargaining is done with the focus being
20 the bargain being created between the accused
21 and the convening authority, where the
22 military judge doesn't know what the bargain

1 is. And that bargain, obviously, if it is one
2 that results in a length of custody, for
3 instance, a term of custody that is lower than
4 what the military judge sentence is, the
5 bargain prevails and the accused is entitled
6 to that bargain.

7 It is just a very different system
8 than what civilian judges and practitioners
9 are used to. So, it seemed an area that we
10 might want to take a look at.

11 Depositions of victims, now that I
12 am going in reverse, I guess I hadn't realized
13 how much time is going to pass before we even
14 get to an operational new Article 32 system.
15 So, I think that is going to be an interesting
16 topic and maybe we could start thinking about
17 it and get people's ideas, in terms of what
18 does this really mean for the Article 32
19 system. But we are not going to be able to
20 figure out what is going to happen in practice
21 for quite some time, if we are not even
22 beginning to look at anything until cases

1 arise after, I think you said December 26th,
2 Mr. Sullivan, December of this year.

3 We had very real, a very strong
4 interest in victims' rights, which is very
5 important. And our Subcommittee on Victims'
6 Rights was very, very active in terms of
7 looking for ways to make sure that military
8 victims got exactly the same rights, if not
9 more, if they could have advanced that, than
10 civilian victims. And the one that kept
11 coming up was the right to information during
12 the discovery process.

13 And of course, most information is
14 in the hands of the prosecutor. The victim,
15 the whole relationship, frankly, of a victim
16 and the victim's counsel, which is, of course,
17 a new program, a victim could always have a
18 counsel, and the prosecutor and how much a
19 prosecutor wants to share with anyone, even
20 the defense, is an interesting set of
21 discussion points for any system.

22 In the federal system, there are

1 basic rules about what a criminal prosecutor
2 has to give to a defendant. There aren't any
3 rules about what they might have to -- what
4 information they might have to give to
5 witnesses or the victim witness.

6 And of course, there are all sorts
7 of issues with respect to what the Freedom of
8 Information Act would permit, not to mention
9 the Privacy Act.

10 So, it just seemed to us very
11 complicated. We had a lot to do in 12 months,
12 so we decided to say, let the JPP take a look
13 at this.

14 And with respect to Article 120,
15 actually Liz and I were talking about that
16 this morning. And again, that came from not
17 the Victim Services Subcommittee but our
18 Comparative Systems Subcommittee. And one of
19 the thrusts and, I think, one of the most
20 valuable sets of recommendations came out of
21 that committee and they related to trying to
22 figure out a way to make it easier to actually

1 compare statistics.

2 We were given the role or the task
3 of comparing the military criminal justice
4 statistics, convictions, the number of cases
5 sent to trial, you name it, with the civilian
6 system. And what we quickly discovered is it
7 is very difficult to do because different
8 jurisdictions have different elements for the
9 types of crimes. So, it wasn't easy to
10 compare a sexual assault under the state
11 courts' definitions with the military
12 definitions.

13 In addition, each of the services
14 has those things differently in how they
15 actually look at what they are counting. And
16 so we made a lot of recommendations about
17 that. And in addition to that, we made an
18 overarching recommendation that the military
19 justice system, while it may well wish to keep
20 the Workplace Gender Relations Survey, should
21 also basically implement a Crime Victims
22 Survey. And the reasoning behind that is

1 because we found or we believe that you can't
2 get good statistics, in terms of how many
3 sexual assaults there are, which forget about
4 what the definition of the sexual assault is,
5 but how many sexual assaults there are in a
6 year based on the Workplace and Gender
7 Relations Survey.

8 That what we really need in the
9 military, if we are going to be able to
10 compare numbers of assaults, sexual assaults,
11 is a survey that can tell us how many occurred
12 in a year. And that kind of survey would be
13 one much more like the National Crime Victims
14 Survey, where there are interviews, the survey
15 is bounded, which means that the person
16 actually is reporting on what happened during
17 a time period, as opposed to what has happened
18 and possibly they may include things from five
19 years' before. It is a different kind of
20 survey. The Crime Victims Surveys that are
21 out there, give you more accurate statistics.

22 And so the idea of splitting

1 things up, I think was very much related to
2 trying to get more organization so that we
3 could compare within the services and also
4 compare with the civilian world, if we tried.
5 And it was very, very difficult, I would say
6 impossible to accurately compare anything.

7 And so the National Crime Victims
8 Survey, type of survey for the military was
9 something that we thought could be very, very
10 important. Of course then you still have to
11 have all four services, all of the services
12 counting things the same way, calling things
13 the same things. And until that is done, you
14 can't figure out if one of the services, what
15 particular processes and procedures they are
16 using may be more effective, if you define
17 effective as taking more cases to trial,
18 getting more convictions, whatever your
19 definitions are. Right now, we can't really
20 accurately figure that out.

21 So, I mean that is my quick run
22 through on the four specific things that we

1 thought this panel might look at. I see we
2 have tons of other things to look at besides
3 those.

4 CHAIR HOLTZMAN: Thank you, Judge
5 Jones. I just wanted, myself, to briefly
6 summarize some of the work of the Response
7 Panel.

8 In addition to what Judge Jones
9 noted was really, I think, very important,
10 focus on how to develop and measure properly
11 the incidence of sexual assault. That was
12 really the primary focus of the work of the
13 panel.

14 Obviously, as you can see by the
15 pages in this booklet that we have been
16 provided, that there were a number of other
17 areas that we focused on, some of which may
18 have relevance to our job and some of which
19 may not.

20 For example, the role of the
21 commander was a very controversial issue last
22 year and the panel devoted a lot of attention

1 to it. Most of the work that we did probably
2 is not really relevant to our activity now,
3 except that there is a question that we have
4 been enjoined to look at, which has to do with
5 I believe it is clemency. Is that correct?
6 The withholding and to measure how well and
7 how effective the law has been to withhold the
8 power to refer cases for prosecution to a
9 higher level.

10 I don't know how easy it is going
11 to be to do that measurement. And this will
12 also affect a junction for us to look at
13 certain crimes and the results of certain
14 sentencing. Because you have what is called
15 a unitary sentencing system in the military,
16 so that if someone is convicted of a variety
17 of offenses, including, for example, rape plus
18 a burglary and the defendant is sentenced to
19 five years, you have no way of knowing whether
20 five years is for the burglary and zero is for
21 the rape or vice versa. So, it is impossible
22 to know, in many instances, what we are

1 talking about here because, in fact, the
2 statistics aren't there.

3 The panel made a recommendation
4 that the unitary sentencing system be changed
5 so that we have a better way of understanding
6 what sentences were being imposed. So, that
7 is an area that will have some significance
8 for us.

9 We also, of course, as Judge Jones
10 pointed out, did a lot of work on the issue of
11 victims' rights and most of which probably
12 will not have relevance to our work. But some
13 of it may, for example, specifically we have
14 been asked to review the Special Victims'
15 Capability trends, as well as the
16 implementation of the Special Victims Counsel
17 Program. That program has been in effect
18 almost a year now. So, it may be possible to
19 get some preliminary information about how the
20 program is being evaluated and any preliminary
21 result that exists.

22 That feeds into another

1 recommendation made by the Response Systems
2 Panel, which had to do with the last of the
3 recommendations conducting independent audits
4 and assessments. The panel felt very strongly
5 not only that there ought to be independent
6 assessments but that the methodology for the
7 assessments ought to be developed with expert
8 independent advisors.

9 One of the other areas that the
10 Response Panel dealt with -- let me just go
11 back for a second to the trends and statistics
12 of courts-martial. That is one of the -- or
13 item two in terms of what the Judicial
14 Proceedings Panel has to deal with, trends and
15 statistics of courts-martial.

16 Trends in the sexual assault
17 punishment, you know it may be extremely
18 difficult for us to respond to that with the
19 unitary sentencing system that we have. And
20 again, comparison of military, federal, and
21 state court punishment. Again, how do you do
22 that with a unitary sentencing system?

1 Sentences reduced or sentence on appeal, that
2 is something that we have also been asked to
3 look at.

4 So, some of the problems that we
5 encountered in the response panel will beset
6 us here as well, as long as that unitary
7 system is in place.

8 Just to go further, briefly, the
9 Response Panel also focused on ensuring
10 fairness and due process to defendants. That,
11 I don't believe, is something that necessarily
12 will apply to our work but I just wanted to
13 draw your attention to that.

14 And we have, again, the panel
15 also, with regard to military justice
16 procedures, this item, again, we recommended
17 abolishing the unitary sentencing system,
18 which would have a major impact on our ability
19 to figure out how effective the punishments
20 are and to identify trends.

21 But also, the panel has asked
22 about and recommended against the adoption

1 sentencing guidelines or mandatory minimum
2 sentencing.

3 I think that that is pretty much
4 it. We tried to develop the relevance of the
5 work of the Response Systems Panel to us. I
6 think that that is sort of a broad, very broad
7 brushed indication of what the connection is
8 between the work of the panel and our work.

9 I don't know whether that was too
10 quick or too broad a brush.

11 JUDGE JONES: Liz, did you mention
12 comparing training and experience level?
13 Forgive me, if you did.

14 CHAIR HOLTZMAN: No, I didn't.

15 JUDGE JONES: I mean did a very
16 deep dive on looking at training of defense
17 and trial counsel compared to the civilian
18 world. You know you can always look at it
19 more. And then I guess our task is to assess
20 trends in training. So, I mean our conclusion
21 was that things were in pretty good shape in
22 the military.

1 That while it is true that a lot
2 of JAG officers don't have the years of
3 experience that you might find in a district
4 attorney's office in terms of sexual assault
5 prosecutions, they had a tremendous amount of
6 training and that the system of having a
7 senior JAG officer with experience second
8 seating them made for a very qualified
9 prosecution.

10 And also, when we looked at
11 defense, the defense side of the picture,
12 there was a lot of satisfaction there, too
13 with the amount of training done.

14 We did make recommendations with
15 respect to defense side of it that were sort
16 of please ensure that they get adequate
17 resources. There have been a lot of resources
18 put into the Special Victims' capability
19 section, which of course, is prosecutorial and
20 victims' services part of it. And so, we
21 wanted to make sure that the accused were also
22 getting their fair share of resources. And so

1 that was a -- but we did not find a deficiency
2 in the way that defense counsel in the
3 military were handling their cases.

4 CHAIR HOLTZMAN: One other point
5 that I didn't mention has to do with we are
6 tasked with, JPP is tasked with reviewing the
7 adequacy of compensation and restitution for
8 crime victims under UCMJ. And one of the
9 recommendations that the RSP made had to do
10 with -- I don't remember who was tasked with
11 this but there was a concern that the
12 restitution issue might come into conflict
13 with the family of the accused need for
14 support. And the panel made a recommendation
15 in that respect. I don't see it.

16 LT COL GREEN: No, ma'am. I
17 believe that was related to the clemency
18 authority and automatic forfeitures that are
19 imposed may be waived to the benefit of the
20 family members of the accused.

21 And obviously, with the limitation
22 that was placed on Article 60 whether or not

1 that conflicted and precluded convening
2 authorities from caring for the families of
3 the accused.

4 CHAIR HOLTZMAN: Well, what was
5 the conclusion of the panel?

6 LT COL GREEN: The panel actually
7 made a recommendation and that was a
8 recommendation to Congress to amend the
9 changes made to Article 60 to allow for the
10 convening authorities to provide for waiver of
11 automatic forfeitures for the benefit of the
12 accused's family.

13 CHAIR HOLTZMAN: Right. So, that
14 is the point I was making which was that that
15 recommendation is something that you might
16 want to bear in mind in connection with the
17 requirement to judge adequacy of compensation
18 and restitution for crime victims under the
19 UCMJ, which is one of our responsibilities.

20 JUDGE JONES: And that particular
21 recommendation is an example of what was
22 really just we think an unintended consequence

1 of the original legislation. I don't think
2 that it necessarily came up that it would be
3 clemency restrictions that would have that
4 kind of impact on the family of the accused.
5 Because I am not sure that it was brought to
6 anyone's attention that that forfeiture would
7 mean that a family of a serviceman accused
8 would not have any support. So, it was just
9 one of those interesting things that you have
10 to keep in mind those unintended consequences,
11 I suppose.

12 MR. TAYLOR: Yes, first of all I
13 would like to -- and thank you very much,
14 Judge Jones, for your leadership of the
15 Response Systems Panel. The report sort of
16 speaks for itself. Thank you for that and
17 thank you, Representative Holtzman for
18 chairing this group and for re-upping for
19 another panel on a very, very important
20 subject.

21 One of the things that intrigues
22 me about our task is that as a professor of

1 public policy, I'm always interested in what
2 kind of evidence you use to decide what is a
3 good public policy. And then, what kind of
4 measurement tools do you use to decide whether
5 it is effective? And these are, indeed,
6 daunting questions for us, it seems to me, as
7 we move forward.

8 As you pointed out, it was
9 perfectly clear that we have all kinds of data
10 that are very hard to understand and
11 correlate. So, one of my questions, I think,
12 that we need to get the Department working on,
13 if they haven't already started, is what are
14 they doing to try to at least have the
15 services come up with some sort of uniform way
16 of reporting and understanding the kinds of
17 systems they have in place?

18 And I don't know whether Colonel
19 Green, you are in a position to talk about
20 that or whether this is something that we need
21 to think about going forward. But when I
22 think about our tasks, I first want to look at

1 what kind of data that we have, and as you
2 said, it is very imperfect at this point, in
3 order to make the kinds of comparison.

4 We can't do much to effect the way
5 the civilians do their business but we
6 certainly can work to understand a better way
7 for the Defense Department to do its business.

8 CHAIR HOLTZMAN: Poor Kyle.

9 LT COL GREEN: Well, the Response
10 Systems Panel made a number of requests for
11 information from DoD and the services. And so
12 we have that information.

13 A lot of the data gathering or
14 data that was provided to the Response Systems
15 Panel came from materials that the services
16 were gathering for their annual sexual assault
17 reports through DoD SAPRO. So, we did not
18 make specialized requests for data, for the
19 most part, from the services.

20 But I will tell you that staff has
21 been talking about it and, sir, we recognize
22 exactly what you said. There are a number of

1 specific tasks that it is clear we are going
2 to have to get very specific data from the
3 services for information.

4 There are some of the tasks, for
5 example, the mandatory minimum policy, that
6 Congress has tasked you to look at the effects
7 of the mandatory minimum with the requirement
8 for a dishonorable discharge to be imposed on
9 anyone convicted of a qualify offense under
10 Article 120. That provision only took effect
11 on June the 24th. So, just as Mr. Sullivan
12 said, data for that is not going to be
13 available for some time.

14 But some of the issues related to
15 sentencing and those types of data, we met
16 with the service representatives last week in
17 our offices and started to talk about the
18 needs for data. But I think the panel will
19 need to identify very specifically, the types
20 of data we need and then extend that request
21 to the services to provide that. Whether or
22 not that is data the services are keeping and

1 will have available dealing with information
2 in the past or whether they will have to start
3 keeping that data, it is going to be a case by
4 case or a type of data question that we will
5 have to explore to be certain.

6 CHAIR HOLTZMAN: And Kyle, along
7 with that, I mean we have also been asked to
8 take a look at the trends in sexual assault
9 punishments, aside from the fact that we can't
10 figure out what the punishment is for, in some
11 cases. Isn't it true that in some of these
12 cases, there is not a transcript? Am I
13 correct? And so if that is true, how would we
14 get that information as far as how the
15 appropriateness -- how to judge the
16 appropriateness of the sentence?

17 LT COL GREEN: Yes, ma'am, there
18 is a minimum threshold for a sentence that is
19 imposed that establishes whether a courts-
20 martial has to be transcribed and a verbatim
21 record is maintained. But the recordings and
22 the results of the trial, if they are not done

1 verbatim, are done in a summarized fashion.

2 So, a courts-martial record will
3 exist wherever there is a conviction.

4 CHAIR HOLTZMAN: Well what about
5 administrative actions, non-judicial
6 punishments, summary proceedings? What kind
7 of transcript is there?

8 LT COL GREEN: Right and there is
9 no -- those are not -- no transcript has been
10 made of any of those proceedings nor are there
11 transcripts made of Article 32 hearings,
12 unless specific provisions are made for that
13 in an individual Article 32 case.

14 So, what you will have from an
15 Article 32 is a summarized record that is
16 prepared by the investigating officer with
17 summarized versions of statements from
18 witnesses, usually sworn as affidavits,
19 equivalents to that, along with a summary of
20 findings from the investigating officer but
21 you won't have a verbatim transcript or a
22 verbatim record of those proceedings.

1 MR. STONE: If I may, again, I was
2 not a regular part and fully familiar with
3 what the Response Systems Panel did, although
4 I was familiar with its existence and some of
5 its work, of course, so I guess I am asking
6 this as an informational question for whomever
7 can answer it.

8 I understand that they recommended
9 unitary sentences and that has consequences
10 that are confusing to us. But was there
11 consideration of --

12 CHAIR HOLTZMAN: The panel did not
13 recommend unitary sentences. The panel
14 recommended that the unitary sentence system
15 be changed --

16 MR. STONE: Okay.

17 CHAIR HOLTZMAN: -- so that the
18 specific sentence for a specific crime that
19 the person was convicted of be recorded.

20 MR. STONE: Okay.

21 CHAIR HOLTZMAN: That was the
22 recommendation.

1 MR. STONE: Yes because I was
2 going to say in federal criminal trials and
3 state criminal trials, all the time there are
4 special verdict forms when you want to know
5 what a jury is doing when they have been
6 presented with lesser included offenses, for
7 example. And if they just return a verdict,
8 you don't know whether or not because they
9 could have -- outside the military, because a
10 judge simply conviction or acquittal, there
11 are hung juries. And the question is can you
12 retry on certain offenses.

13 So, it is not uncommon to ask the
14 court for a special verdict form and the jury
15 has to check off a little bit more than just
16 acquitted or convicted. And it seems to me
17 that you want to -- one way possibly, and I
18 didn't know if it was discussed before, to get
19 around this unitary sentence or non-unitary
20 sentence is simply say that is fine, but you
21 have a special verdict form and you have to
22 indicate, in addition to your unitary

1 sentence, whether these are the same sentence
2 -- you know for each conviction is this a five
3 and a five, or is this a five and a three
4 concurrent, or is this a two and a three
5 consecutive? And it seems to me that will
6 allow both statistics to be kept, comparisons
7 to be made without necessarily interfering
8 with the whole unitary sentence idea.

9 And so I didn't know if that was
10 discussed but I will throw that on the table.
11 Because it seems to me that given all of this
12 here, we have a huge number of issues in front
13 of us. And if we can narrow down some of
14 them, I think that will be great. We can
15 focus on the most troubling.

16 And going from there, the second
17 thing that strikes me, and again it is a
18 question -- and first my disclaimer is my
19 biography shows for those who looked at the
20 material that I spent four decades working for
21 the Criminal Division of the U.S. Department
22 of Justice in many different capacities. And

1 so I know that they have experts who have
2 looked at the counting problem in the Bureau
3 of Justice Statistics. They have a whole
4 division devoted to that. There are people
5 who are public policy experts, who are
6 statistical experts. Did anybody consider
7 telling them, this is their responsibility and
8 we will be happy to give them input? But
9 since they are crime statistics, if a rape
10 occurs on a base, they need to be counting it.
11 And the services will be happy to assist them
12 but this is really their responsibility which
13 we will, the military will assist with.

14 And I am sure they will have a way
15 to organize and ask questions which we could
16 facilitate. And again, move that mostly off
17 our plate and give it to them.

18 CHAIR HOLTZMAN: That was a
19 recommendation specifically to include the
20 Bureau of Justice Criminal Statistics of the
21 Army.

22 MR. STONE: Excellent.

1 CHAIR HOLTZMAN: So, that was a
2 specific recommendation. Not necessarily they
3 maintain the statistics but that the military
4 work with them and utilize their experience as
5 part of a means of developing a proper way of
6 keeping statistics that accord a view on
7 crimes.

8 MR. STONE: I guess I would make
9 them maintain the statistics because they
10 can't really be reporting on crime in the U.S.
11 if they are not including what is going on on
12 military bases within the U.S.

13 CHAIR HOLTZMAN: But that is not
14 our mandate. Our mandate isn't what the
15 Bureau of Crime Statistics does in terms of
16 its reporting. Our mandate is to make sure
17 that the military reports statistics so that
18 we can respond to their concerns. Just to
19 clarify what I --

20 MR. STONE: And I guess this is a
21 staff question. Have we thought about asking
22 the Bureau of Justice Statistics to have an

1 observer at all of our open meetings?

2 LT COL GREEN: No, sir, we have
3 not explored that yet.

4 JUDGE JONES: Just to go back to
5 your discussion about unitary sentences, we
6 did get this far with the Response Panel.
7 Obviously, the way a judge sentences in
8 federal court is great because you know
9 exactly how much time, as you were talking
10 about, is given for each crime and maybe it is
11 consecutive, maybe it is concurrent but you
12 have an entire list, crime by crime by crime.

13 And the discussion that we had was
14 that would be great if we had that. And of
15 course the problem wouldn't be so much a
16 problem when a judge, a military judge was
17 doing a sentencing, but when you have a panel
18 sentencing, then how difficult will it be for
19 civilians to be given the necessary
20 instructions so that they will be able to come
21 up with the kind of sentencing that judges are
22 used to doing?

1 And it is kind of interesting to
2 me, I don't think there are that many -- well,
3 I guess trials are trials but I think most
4 cases are disposed of by a judge as opposed to
5 a panel. I don't think too many people are
6 asking for panels in the military. But of
7 course when you have them and they do
8 sentencing, it is a real problem. And I think
9 there, it is a problem of, again, trying to
10 figure out a simple way to train civilians to
11 do unitary -- to turn a unitary system into
12 this is what we found guilty on this one and
13 this is what the person should get on it.

14 I don't know. I think we need to
15 look at that more. I mean when you only three
16 or five people on a panel that is finding
17 guilt and also adjudicating a sentence, I am
18 not sure exactly how they are coming to these
19 conclusions and how they might be able to
20 articulate what they are doing. All juries
21 compromise. We all accept that with respect
22 to finding guilt. And presumably, they may do

1 the same thing with sentencing.

2 So, it is just complicated. I
3 mean judges do the same thing as well. I
4 think it may be training. But obviously, it
5 is impossible to know what sentences are being
6 meted out in sexual assault cases, if we have
7 more than sexual assault charges and we have
8 no idea what the person was actually sentenced
9 on.

10 MR. STONE: I think we could find
11 comparable state forms. I know they exist in
12 Maryland that even the judges use that have
13 count, conviction and, underneath it, sentence
14 up to maximum of. The judge fills it in and
15 then the next count and the next count. And
16 it just means the jury by majority vote, I
17 guess, has to decide what they, as a jury,
18 accept. And I guess it could either by two-
19 thirds if we wanted that, but it seems to me
20 majority is the way it will be decided on
21 sentencing, once they have reached conviction.
22 And they just fill out a simple form with a

1 very few numbers that they have to put in,
2 however they want to throw the dice up in the
3 air and how they come down. I mean we won't
4 ask them for their reasoning. We don't ask
5 judges for their reasoning.

6 And I guess that reflects also on
7 whether or not there should be sentencing
8 guidelines so that it could say maximum of,
9 enter this crime, it has been calculated, the
10 guidelines are two to four, maximum of five,
11 something like that. Judges get that now I
12 most states, in many states, and federally and
13 that is a help. And I think educated people
14 who are not lawyers understand it and can
15 understand it with very little trouble.

16 And I do think for all those
17 statistics and other purposes, including if a
18 count is reversed, you want to know what they
19 got on the other counts, so everyone can feel
20 that there is a certain fairness if one count
21 is reversed and only one count remains
22 effective in terms of sentence.

1 I think that if it hasn't been
2 looked at, I will be happy to try and get some
3 forms.

4 CHAIR HOLTZMAN: Well, the real
5 question is we just came out with our Response
6 Panel just reported June 27th. And obviously,
7 the Pentagon has many ways of implementing our
8 recommendations, if they will accept them or
9 they can reject the recommendation. I don't
10 know if they have even had a chance to review
11 it in this short period of time. I hope it
12 would be one of the top items on their agenda
13 but I do think that they have a few other
14 things going on in the world.

15 Maybe it has not made the top
16 place on their agenda but it is a very
17 important question because whether in having
18 to deal with addressing the unitary sentencing
19 will affect our ability to do our work. But
20 they could implement it in various ways,
21 including this suggestion. But I don't know
22 where they stand on it. That may be

1 definitely one of the things, Kyle, you need
2 to look at is what the military is doing with
3 regard to all of the areas that intersect with
4 our work and the obligations we have been
5 given, the responsibilities we have been given
6 by Congress.

7 LT COL GREEN: Right. Yes, ma'am.
8 And it is preliminary information. I think
9 you make a point that is important. The
10 recommendations having just gone to the
11 Secretary of Defense, I believe he has not
12 received them. What I have heard is that that
13 process has just been passed out to the
14 services for examination and consideration and
15 initial response. My understanding is once
16 that happens, then the Department will
17 determine what recommendations of the Response
18 Systems Panel are accepted for implementation,
19 which are accepted for further consideration,
20 and which are rejected.

21 But our expectation is that that
22 process for just even vetting and looking at

1 those responses is probably a six-month review
2 process before we will know from the DoD what
3 the initial outcome regarding the RSP
4 recommendations.

5 MR. STONE: Excuse me for saying
6 so but I don't know that this panel can wait
7 six months if what we are going to do depends
8 on any of their views on which recommendations
9 they accept and reject because we have reports
10 due and they expect us to make progress. So,
11 I just wonder if one of the things you could
12 find out, maybe from Mr. Sullivan during the
13 break, is approximately when they will at
14 least get back to us with the ones they know
15 they want to accept flat out at this point, so
16 we can work with those.

17 CHAIR HOLTZMAN: Well remember,
18 the panel has a longer time frame, at least as
19 of the moment. I should preface that. This
20 is a very important point. I'm not sure that
21 you all know what you got yourself into.

22 At the moment, we have several

1 years to complete our work. The Response
2 Panel initially had 18 months to complete its
3 work but the Congress decided we are just so
4 important that they lopped off six months.
5 And then they decided that oh, well, they had
6 another few issues that they wanted to give us
7 at the same time.

8 So, I don't know what our time
9 frame on the end will be but there is plenty
10 on our plate that doesn't require them to act
11 on for us to start thinking about things and
12 making recommendations.

13 For example, I thought one of the
14 things that we could focus on we will start
15 this afternoon is the sexual assault statute
16 itself. And we don't need any action from the
17 Pentagon on that at the moment. So, I think
18 that even though that is a very complicated,
19 and delicate, and difficult task, that at
20 least is something. And there are other tasks
21 that we don't need the statistical information
22 to proceed.

1 But there is no question that if
2 they don't -- because the Response Systems
3 Panel had some of the same responsibilities as
4 we have here. We said we simply couldn't do
5 that because the unitary sentencing system
6 made it impossible for us to provide that
7 information. So, Congress is aware of that,
8 if they read our report. And being aware of
9 that, we just do the best we can under the
10 circumstances.

11 MR. STONE: Well, then you will
12 excuse my sort of lack of patience on some of
13 these things, I guess the answer is that I see
14 sexual assault victims going through trauma
15 every day and that is why on the whole, since
16 we can't stop the offenses from happening, I
17 think the sooner we can improve the system,
18 the happier everybody will be.

19 CHAIR HOLTZMAN: Well every one of
20 us, I think, on the panel shares that view.

21 Any other questions?

22 VADM TRACEY: I'm not sure I have

1 seen this in a comprehensive enough way in the
2 materials we have that there are sets of
3 changes that are taking effect over -- have
4 been done since the beginning of the decade
5 and are continuing today. If we could get a
6 time line of what took effect when, so when we
7 are making some of these assessments we can
8 sort of calibrate sort of how much time there
9 has been for an action to be reflected in the
10 data that we are looking at.

11 I think there are pieces and parts
12 of that, at least I haven't seen it yet in any
13 kind of a comprehensive layout of changes took
14 place in 2005, others took place in 2013 but
15 won't take effect until the end of 2014. Some
16 take place after that. Can you help us kind
17 of figure that out?

18 LT COL GREEN: Yes, ma'am. One of
19 the issues, obviously, is the magnitude of the
20 change. I think Mr. Sullivan talked about 36
21 changes and some being done. But we will try
22 to provide a summary. And he did that with

1 some of the recent legislation. There are
2 tables we will provide.

3 CHAIR HOLTZMAN: No, it is
4 complicated and particularly, some of these
5 things aren't taking place. I mean one thing
6 we did mention was it was special victims
7 counsel, which we are supposed to take a look
8 at, JPP is supposed to take a look at. That
9 has been in effect not for a whole year yet.
10 What can we look at? We should start to look
11 and I think we might be able to be helpful in
12 the sense that we will be looking at what
13 systems they are using to evaluate and perhaps
14 ask some independent people what they think of
15 those systems. Because that is what the
16 Response Panel recommended. I think that
17 would be useful to do.

18 But we won't really know a whole
19 -- we won't really have a whole year's worth
20 of information about it, except in the Air
21 Force we started earlier, for months.

22 VADM TRACEY: It may be useful

1 though to think about what does "goodness"
2 look like. If it is wildly successful, what
3 does that look like and what are you comparing
4 it to, to judge that you are achieving --

5 CHAIR HOLTZMAN: Absolutely. That
6 is why it is really important to take a look
7 at how they plan to assess this program. And
8 that is one of the things that I think we can
9 do without changing their whole system and
10 waiting for that to happen.

11 JUDGE JONES: I was just going to
12 say that really the things that would come up
13 every time we were trying to assess something
14 was the notion of well what is the impact it
15 is having on victims. And I think Rose was
16 famous for saying we need to have victim
17 satisfaction surveys. And of course, it is
18 not that easy if we are dealing with victims.
19 But we definitely need -- I think we could now
20 begin to ask the question of how are you
21 assessing not just the victims special counsel
22 but also the other side of the coin, the

1 victims' capabilities, which is the
2 prosecution side of it. And again, there may
3 not be, there it would be difficult for
4 statistics but we may be able to, one, see if
5 they are doing any type of survey, appropriate
6 survey, to figure out how victims are
7 reacting.

8 But two, we might, particularly
9 since we are being asked to look at trends
10 with respect to the development, utilization,
11 effectiveness of special victims capability,
12 for trends I think we might do what we did on
13 the RSP panel, which was interview a sample.
14 You know whether we go there or they come to
15 us, get some more in-depth information from
16 some of the special victims capabilities at
17 the installations that have them. And see
18 now, I guess we did it six months' or eight
19 months' ago, see now what additional
20 information we can get.

21 CHAIR HOLTZMAN: Do we have any
22 other points?

1 LT COL GREEN: Just I guess I
2 would raise, in terms of the time lines, and,
3 sir, you mentioned this in terms of the
4 reports, obviously the statutory obligation
5 for the panel is its first report is due 180
6 days after this meeting. And then what the
7 statute requires is annual reports thereafter
8 for the life of the panel.

9 And I believe what that means is
10 that your initial impressions or any initial
11 statements you want to make by that first
12 report and then annual surveys of the data.
13 And we have laid that out in terms of a time
14 line just in terms of what we believe the
15 statute implies in terms of our obligation.

16 CHAIR HOLTZMAN: I'm not sure,
17 however, that my reading of the requirement
18 about the report means that we have to report
19 on everything that is within our jurisdiction.
20 I think we can use our judgment to report in
21 areas that we have focused on and have
22 something to say that is meaningful.

1 It also mandates the response of
2 the Congress and the Pentagon more focus as
3 well because it is one thing to read short
4 recommendations on a 20-page report as opposed
5 to a 200-page report and five recommendations
6 versus 126 or 132, depending on what page of
7 the Response Systems Panel report you
8 mentioned. So, that is another possibility.
9 I don't think they are required, personally,
10 to report on everything. I think we can focus
11 and try to.

12 And that is one of the things we
13 have been working with the staff on the areas
14 where the information is available and where,
15 for example, not on the Article 32, that is
16 not even going to start until December 14th,
17 but where the activity is going on now, as you
18 have concerns about. Or we can have enough
19 information that we can begin to make some
20 serious and valuable recommendations.

21 JUDGE JONES: And you know after
22 our report came out, the subcommittee to the

1 House Armed Services Committee, the Military
2 Personnel Subcommittee, I guess, had us brief
3 them, almost the entire RSP panel was there.
4 And the first question that was asked by the
5 Chair was well, how can you measure progress
6 in this fight against sexual assault.

7 So, while it is true we don't have
8 the statistics, I think with the task of
9 looking at these programs, even if we don't
10 have statistics and going back in, getting
11 impressions, seeing how they are being
12 assessed and maybe coming up with some initial
13 assessments of either progress or failure, if
14 we can start doing before we get the
15 statistics. And that is what people want to
16 know. Are these programs going to work? Are
17 they working? Is it helping?

18 MR. STONE: And I think one
19 measure of progress is going to be how quickly
20 has the proper chain of command looked at and
21 responded and enacted or rejected the RSP
22 recommendations. That is a measure of

1 progress.

2 MR. TAYLOR: I would like to come
3 back to one point that the Chair made. And
4 that is, that I think if you look collectively
5 at some of these requirements, there is some
6 low-hanging fruit. It had several on the
7 second trends and statistics, withholding
8 disposition authority, assessing
9 implementation of the 2012 SECDEF memo. So
10 that is a matter of figuring out how many
11 times that has happened, what kind of report
12 do you have access to about where that is
13 happening.

14 And also perhaps with number four,
15 the sentences reduced or set aside on appeal.
16 That doesn't call for an analysis of the facts
17 of the case, which the other two do. And I
18 think they are a lot tougher.

19 So along the lines of
20 Representative Holtzman said, it does seem
21 that we should be able to provide what would
22 be a reasonable response within the period of

1 time we have to work, as opposed to a more
2 exhaustive response.

3 CHAIR HOLTZMAN: Yes, I agree. We
4 should be focusing on what we can do, what we
5 can reasonably do that will make a difference.
6 And that is also substantive. I mean I think
7 just responding, though, I mean taking your
8 point, which I think is a good one, about
9 sentences reduced or set aside on appeal, but
10 without any analysis of that, could that be
11 misleading? I mean we have to take a look at
12 what the information looks like and see
13 whether more needs to be done with it.

14 So, it may seem like low-hanging
15 fruit but then it may seem like, as we call
16 it, a can of worms.

17 VADM TRACEY: Well, this is a
18 cross-work comparison to the most recent JPP
19 reports. So, setting the baseline in our
20 February report would seem to be something we
21 have to do, is set the baseline so that the
22 subsequent report can have something to

1 compare to.

2 CHAIR HOLTZMAN: Yes, I think that
3 may be accurate.

4 Any further discussion on this
5 subject? Any questions or points anybody
6 wants to make?

7 JUDGE JONES: One quick thing, I
8 guess.

9 CHAIR HOLTZMAN: Judge Jones.

10 JUDGE JONES: We are supposed to
11 review and assess instances when victims'
12 prior sexual conduct was considered or it
13 being inadmissible in Article 32, for instance
14 as it was introduced and impact the evidence
15 had on the case. I guess there we just need
16 to begin a gathering of a lot of information
17 and figure out how we do that. That is going
18 to take a while just to gather and then we can
19 all look at it and talk about it, reach some
20 conclusions. But maybe that is something --
21 you have to find the lines where we better
22 start looking now because we won't be able to

1 analyze.

2 CHAIR HOLTZMAN: Absolutely. We
3 need to start looking at all of these areas.
4 The point is we are not going to get the
5 information back that we need, in some cases,
6 in a timely fashion.

7 And I think also the question on
8 the Article 32 is the extent to which there is
9 a transcript. Right? So, that is going to be
10 how you establish, how you respond to this
11 without a transcript is going to be a very
12 interesting challenge.

13 MR. STONE: I guess one
14 possibility is that we promulgate several
15 questions that we ask the deciding authority
16 in those cases to answer for our panel. It
17 could be discretionary but where there is no
18 transcript, we could have five or six
19 questions we would like them to answer for us
20 about the case so that at least when we get
21 their summary, it covers some of those
22 questions you think that we need answered.

1 CHAIR HOLTZMAN: Well, right,
2 especially because it is not just that we have
3 to assess.

4 MR. STONE: Yes, because getting
5 transcripts is expensive, time-consuming, and
6 then reading them and analyzing them is even
7 more time-consuming. So maybe we can push
8 some of that information we need out to the
9 deciders while we are trying to assess.

10 CHAIR HOLTZMAN: Right. Or maybe
11 not just the deciders, the prosecutors and
12 defense counsel and so forth, the special
13 victims counsel.

14 But that process needs to start, I
15 agree with you. And probably what we will do
16 is ask the staff to develop a questionnaire
17 and I think if the panel wants to review it,
18 that might be a good place us to start on all
19 of these areas. We could give some input into
20 the kinds of questions.

21 MR. STONE: Whenever I take a
22 training course, I don't like it that I am

1 filling out that evaluation of which lectures
2 were good. It takes time and it seems
3 burdensome but I know they need it. And that
4 is almost the same thing here, a very short
5 four or five questions that we need. It is
6 almost like the evaluation of a training
7 course so that we then can take a peek at that
8 later and see, at least in summary form, if it
9 is a case where we wanted to order a
10 transcript, if there was an oral record.

11 CHAIR HOLTZMAN: And the other
12 thing about this, too, bear in mind, is that
13 this whole proceeding is going to change very
14 soon and there isn't going to be very much in
15 the situation where a victim's prior sexual
16 conduct will come in in any way shape or form
17 in an Article 32 proceeding.

18 So it is kind of like what is the
19 implication of this for the future. These
20 proceedings aren't going to be taking place
21 anymore.

22 MR. STONE: Right. Well, we may

1 not want to do that for the Article 32
2 proceedings, we may only want to do it for the
3 actual trials.

4 CHAIR HOLTZMAN: That's right.
5 And the other question is how far back do they
6 want us to go.

7 LT COL GREEN: The statute
8 requires analysis since the statute became in
9 2012. So FY13 is really the first pool of
10 data that the panel is tasked with looking at.

11 CHAIR HOLTZMAN: FY13 on both
12 items, item seven, the evidence of the
13 victim's prior sexual conduct in Article 32
14 proceedings and in courts-martial proceedings.

15 LT COL GREEN: Right.

16 CHAIR HOLTZMAN: There is only one
17 -- you are going back one year, not to the
18 beginning of time.

19 LT COL GREEN: Correct.

20 VADM TRACEY: But don't we have to
21 compare to something? So is there data from
22 the work that has been to date that suggests

1 what the assessment was of the effect of using
2 that information in an Article 32 hearing was
3 so that we can compare the subsequent results?
4 We are just going to report on what we think
5 is the effect?

6 I think Mr. Taylor's comment on
7 how do we know what is where here.

8 LT COL GREEN: The baseline
9 information, yes, ma'am.

10 I can't speak for the services but
11 I am not aware of any analysis that has been
12 done of Article 32 information that has been
13 used for this.

14 And I know in talking with the
15 service representatives and we presented them
16 a list of your taskings and asked them for
17 their impressions of that. And I think for
18 them, a lot of this tasking that you have been
19 assigned are not necessarily -- don't
20 necessarily reflect information they have been
21 tracking.

22 CHAIR HOLTZMAN: It is not going

1 to be an easy task. Any other issues to
2 discuss now?

3 LT COL GREEN: Lunch is next on
4 the agenda and then we will have the one
5 o'clock briefings and start talking about the
6 evolution rape and sexual assault laws across
7 the United States.

8 CHAIR HOLTZMAN: Thank you.
9 Thanks, everybody.

10 (Whereupon, the above-entitled
11 matter went off the record at
12 12:02 p.m. and resumed at 1:06
13 p.m.

14 CHAIR HOLTZMAN: Welcome back to
15 the Judicial Proceedings Panel. We are now
16 fortunate to hear from two witnesses in
17 person, three witnesses in person, and we will
18 be hearing from Professor Schulhofer by phone
19 in a minute.

20 This panel is focused on the
21 evolution of rape and sexual assault laws in
22 the United States, and our panelists are Ms.

1 Tracy -- I'm sorry, Ms. Carol E. Tracy of the
2 Women's Law Project, Ms. Charlene Whitman, and
3 Mr. John Wilkinson of AEquitas. Did I
4 pronounce it correctly?

5 MR. WILKINSON: That's correct.

6 CHAIR HOLTZMAN: Thank you. And
7 then, as I mentioned, Mr. Schulhofer will
8 speak by phone when we've finished.

9 So are we starting with Ms. Tracy
10 first?

11 MS. TRACY: I believe so.

12 CHAIR HOLTZMAN: Okay. Please
13 proceed.

14 MS. TRACY: Yes. And in the
15 interest of trying to confine myself to 10
16 minutes, I'm going to read my testimony.

17 I'm Carol Tracy, and I'm the
18 Executive Director of the Women's Law Project.
19 We're a Pennsylvania-based public interest law
20 center that engages in high-impact litigation,
21 policy advocacy, individual counseling, and
22 education to improve the legal health and

1 social status of women who work on a broad
2 range of issues, including reproductive
3 rights, violence against women, gender
4 discrimination in education, athletics,
5 insurance, and employment, as well as family
6 law and family court reform.

7 Our work includes pursuing
8 innovative strategies to improve police
9 response to sex crimes on both a local and a
10 national level. Our work in this area began
11 in Philadelphia in 1999 when The Philadelphia
12 Inquirer revealed a scandal involving the
13 police department's failure to investigate sex
14 crimes, and that work has led to an
15 unprecedented advocate review of sex crimes
16 case files each year for the past 15 years.

17 We also initiated a call for the
18 change in the FBI's antiquated definition of
19 "rape" in its Uniform Crime Reporting System,
20 and successfully requested hearings before the
21 Senate Judiciary Subcommittee on Crime and
22 Drugs to address the national crisis that we

1 learned about that was revealed again when the
2 media coverage demonstrated that many cities
3 were failing to adequately investigate sex
4 crimes.

5 At the request of the National
6 Research Council of the National Academies,
7 the Women's Law Project, in collaboration with
8 AEquitas, prepared a paper Rape and Sexual
9 Assault in the Legal System, which you have.
10 I think we are going to get an updated version
11 of it, and this paper describes in detail the
12 common elements of rape and other sexual
13 assault laws used in the states, territories,
14 federal government, and the UCMJ. And it
15 provides the context in which the laws have
16 developed and continue to evolve.

17 Rape and sexual assault laws can
18 be complex and confusing. Terminology is
19 confusing because such terms as rape, sexual
20 abuse, sexual assault, and others have
21 different meanings in different jurisdictions.
22 Significantly, the term "consent" is defined

1 differently in each state.

2 Across the states, sex crimes are
3 named and defined differently and range from
4 sexual penetration to acts of sexual violence
5 that do not involve penetration, such as
6 sexual contact and exposure. In some states,
7 special terminology has been applied to refer
8 to the sexual penetration of men and anal
9 penetration of women, including sodomy and
10 deviant sexual intercourse.

11 The complexity of sex crimes laws
12 derives from the historical background of bias
13 against women. The legal history of rape is
14 particularly ignominious. Under English
15 common law, from which our laws developed,
16 rape is a crime against property, not person.
17 A woman's reproductive capacity in the form of
18 her chastity is considered property, and was
19 essential to establishing patriarchal
20 inheritance rights.

21 A woman's sexuality was owned by
22 her father and transferred to the man who

1 became her husband. Rape laws protected the
2 economic interest of men. Therefore, rape was
3 originally considered a theft of property.
4 The bodily integrity of the woman was
5 irrelevant.

6 The consequences of the
7 underpinning of rape law were that unmarried
8 women could only be considered to have been
9 raped if they were virgins, rape of married
10 women by their spouses was not a crime because
11 the law presumed a broad notion of consent to
12 all of a woman's sexual activity with her
13 husband through her wedding vows. Under these
14 theories, men could not be raped, and rape of
15 orifices other than the vagina was not legally
16 recognized, and rape of a non-virginal woman
17 was not a crime.

18 As incorporated in American
19 jurisprudence, the basic elements of rape are
20 generally carnal knowledge, which is male-
21 female penetration, use of force beyond the
22 penetration itself, and against her will,

1 meaning lack of consent.

2 In order to establish that the act
3 is against the will of the woman, it was
4 necessary to establish that force was used.
5 And to establish force, it was necessary to
6 show how much a woman resisted.

7 This historical view of rape and
8 its categorization as a property crime also
9 perpetuated their belief that women lie about
10 being raped. Sex crime statutes were enacted
11 that incorporated the historic goal of
12 protecting male interests and led to numerous
13 procedural anomalies unique to rape. Those
14 included requiring prompt attention to law
15 enforcement, requiring the corroboration of
16 the victim's testimony by independent
17 testimony, and/or evidence of serious physical
18 injury, allowing information regarding the
19 victim's past sexual history and character to
20 be admitted into evidence, and permitting
21 cautionary instructions which impugned the
22 victim's credibility to juries.

1 These rules and requirements,
2 imposed only in rape and sexual assault cases,
3 severely disadvantaged and stigmatized rape
4 complainants and rendered a successful
5 prosecution extraordinarily difficult.

6 The legal system's hostile
7 treatment of rape cases and rape victims was
8 unique and in marked contrast to its response
9 to other assault crimes. With respect to
10 rape, the legal system emphasized the victim's
11 character, behavior, and words, in order to
12 ascertain whether the victim consented. For
13 other assault crimes, however, the legal
14 system focuses only on the actions of the
15 accused to establish criminal activity. For
16 example, the crime of battery, such as a
17 punch, is established based solely on the
18 perpetrator's actions and their intent, and
19 the victim's response to being punched is
20 irrelevant. The victim may not resist or
21 express unwillingness to being punched to
22 establish a crime, nor is the victim's history

1 of being punched relevant. Lack of consent is
2 assumed.

3 Rape, on the other hand, under the
4 traditional review, occurred not because of
5 the action of the assailant but on the basis
6 of the victim's perceived influence upon, and
7 response to, the perpetrator's action.

8 Sweeping sex crime law reform
9 began in the 1970s in this country. Feminists
10 rejected the notion that women are the
11 property of men, without independent legal
12 status or rights, and demanded changes in the
13 law. As a result of this activism, most
14 states have expanded the definitions of sex
15 crimes to eliminate disparities based on
16 gender and marital status. They have also
17 rescinded the requirements of resistance,
18 corroboration, and reporting requirements, and
19 prohibit the introduction of a woman's past
20 sexual history.

21 It is now well established that
22 penetration of orifices other than the vagina

1 is a felony. Issues of force and consent
2 continue to change, but clear trends in the
3 evolution of the law are identifiable. The
4 definition of "force" is broadening beyond
5 overt physical force alone, to include other
6 modes of coercion.

7 There is an increasing recognition
8 that penetration without consent or any
9 additional force beyond penetration is a
10 serious sexual offense. These trends
11 demonstrate the growing understanding that
12 unwanted and unconsented to bodily invasion is
13 the core wrong that sex crimes laws must
14 address.

15 The FBI's broadening of the UCR
16 definition of rape to include penetration
17 without consent and without force also
18 reflects these trends.

19 Additional law reform is needed.
20 Vestiges of archaic requirements remain in
21 some laws and hamper the prosecution of rape.
22 All jurisdictions retain a crime of

1 penetration with force, but some still do not
2 recognize rape without force and without
3 consent.

4 Some jurisdictions allow
5 consideration of the promptness of complaint,
6 resistance, and physical injury for some
7 purposes such as determining the credibility
8 of the victim. While marital rape is now a
9 crime in all jurisdictions, differences in
10 treatment persist with regard to both rape of
11 spouses and intimate partners.

12 In addition, consideration of
13 prior sexual history with the accused is
14 allowed in some jurisdictions. Such
15 provisions reflect the persistent but
16 erroneous notion that rape is about a sexual
17 relationship and not about an unwanted, non-
18 consensual bodily invasion.

19 These provisions and erroneous
20 beliefs about victims and about the nature of
21 rape distract lawmakers from the real harm
22 that criminal law must address -- the invasion

1 of bodily integrity and the dynamics of rape
2 that must be recognized by the law. Rape is
3 not about regulating normative sexual
4 relationships, but about regulating crime.

5 The persistence of myths and
6 biases about rape and sexual assault that are
7 inconsistent with the true dynamic of sex
8 crimes influences how police, prosecutors,
9 judges, and juries enforce and interpret laws.
10 Criminal justice professionals and other
11 participants in the judicial process are not
12 immune from bias in their handling of rape and
13 sexual assault.

14 In the past few decades,
15 researchers, state task forces, and judicial
16 organizations have studied and made findings
17 about gender bias in the court system. They
18 have found evidence of judges, court officers,
19 prosecutors, and juries who displayed
20 stereotypical views, insensitivity to, and
21 ignorance about sex crime victims, and
22 disbelieved and blamed victims, most

1 frequently when the victim knew the
2 perpetrator, a circumstance that is true in
3 the vast majority of sex crimes.

4 Researchers have found that jurors
5 have inaccurate understandings of rape victim
6 behavior that influenced their decisions.
7 Many judges and jurors expect proof of
8 resistance and injury to overcome a consent
9 defense, even when the law requires neither
10 resistance nor corroboration.

11 Victims are viewed as more
12 credible if weapons are used or victims are
13 injured, even though these factors are not
14 present in most rapes. As a result of these
15 biases, juries often fail to convict intimate
16 partner rapists.

17 Confronting judges and juries with
18 the same biases held by police, prosecutors
19 face a daunting task in achieving convictions.
20 Rape cases can be difficult to prove, and
21 alcohol and drug facilitated rapes may involve
22 impaired memory and observation as well as

1 biases against intoxicated victims. Rather
2 than trying to overcome the misconceptions and
3 challenges, prosecutors often decide not to
4 prosecute.

5 The ultimate result of all of this
6 is that when the criminal justice system
7 refuses to respond adequately to a complaint
8 of rape because myths lead them to disbelieve
9 victims, then victims do not report, rapists
10 are not caught, arrested, or prosecuted, and
11 perpetrators are likely to reoffend.

12 Thank you.

13 CHAIR HOLTZMAN: Thank you very
14 much.

15 Ms. Whitman, Mr. Wilkinson, how
16 are you going to proceed?

17 MR. WILKINSON: I'll go ahead and
18 start. Charlie here, who is one of the co-
19 authors of our paper that my remarks will be
20 based on, is also here to answer any questions
21 about statistics or anything that is included
22 in the paper.

1 Good afternoon, everyone. Thank
2 you so much for inviting us here to speak. My
3 name is John Wilkinson. I'm an attorney-
4 advisor with AEquitas, which is the
5 prosecutor's resource on violence against
6 women. We are funded by the Office of
7 Violence Against Women at the Department of
8 Justice. We are the primary training and
9 technical assistance provider for state and
10 local prosecutors on sexual violence, domestic
11 violence, human trafficking, stalking, any
12 violence against women crimes that are going
13 on.

14 And we partnered with the Women's
15 Law Project to produce this paper, which
16 you've asked us to present some of the
17 findings from the paper.

18 Just a little bit about AEquitas,
19 our mission is to improve the quality of
20 justice in gender-based violence cases by
21 refining prosecution practices that increase
22 victim safety and offender accountability.

1 AEquitas' staff is comprised of former
2 prosecutors with over 100 years of collective
3 experience prosecuting such cases. We conduct
4 legal research, we provide 24/7 case
5 consultation, serve as mentors and instructors
6 at training events. We publish resources that
7 focus on strategies to approach and go after
8 violence against women crimes, multiple
9 resources that we have.

10 We provide research that is
11 informed and incorporates strategies that are
12 easy to implement, practical to implement, for
13 prosecutors in the field, resulting in a
14 prosecutor's ability to sustain effective
15 practices and promote systemic change.

16 I am here this afternoon to offer
17 testimony on behalf of our organization, which
18 we did this project with the Women's Law
19 Project, assessing rape and sexual assault
20 laws across the 50 states, five territories,
21 and the District of Columbia, as well as the
22 federal and military systems.

1 In addition, I am relying upon my
2 own experience and my office's collective
3 experience in training military and civilian
4 prosecutors and allied professionals
5 practicing in these jurisdictions.

6 In the development of this paper,
7 each jurisdiction's law was reviewed. And
8 although improvements can be made to simplify
9 the laws, there are few, if any, jurisdictions
10 in which the jurisdiction's laws are
11 preventing the offender from being held
12 accountable.

13 The biggest barrier to justice in
14 these cases is the failure to accurately
15 evaluate, to thoroughly investigate these
16 cases, so that we have the information and the
17 tools necessary to evaluate them and proceed
18 appropriately.

19 Upon review of the laws, it is
20 important to remember that terminology may
21 differ, and that common understandings of
22 certain terms cannot be relied upon. It is

1 important to review the statute's definitions
2 and the case law that interprets those
3 definitions to figure out exactly what these
4 things mean.

5 Based on our review of all of the
6 50 states, all of the different jurisdictions,
7 simple language seems to be the most effective
8 way to communicate what a statute is meant to
9 address. Even comprehensive statutes can be
10 written in a manner that is direct and easy to
11 apply the law. So we can use simple language
12 so that everyone knows what is prohibited,
13 what is expected, and how we apply that law.

14 All of the 50 states, we
15 determined that there were similar elements
16 and acts that were covered by all of the laws
17 in all of the 50 states, or most of the
18 states. Not every state has the same laws,
19 and not everything is covered, as Carol
20 mentioned.

21 Penetration is a category of
22 crimes that is covered in all of the 50

1 states. It includes penetration of the
2 vagina, anus, mouth, by the penis or other
3 bodily part, or penetration of the vagina and
4 anus by an object. Only slight penetration is
5 typically required and should be required.

6 It is not recommended that there
7 be additional elements requiring a showing
8 that the penetration be committed for the
9 purpose of sexual arousal, gratification,
10 abuse, degradation or humiliation. Forced,
11 non-consented to, or penetration upon a victim
12 who lacks capacity to consent should be
13 enough, rather than have that additional
14 element in penetration crimes.

15 All of the states criminalize each
16 of the penetrations, with few exceptions.
17 Different states have different gradations of
18 crime based on the activity that has occurred.
19 Historically, non-penile vagina penetration is
20 the highest level of grade of crime. Other
21 kinds of penetration historically have been
22 minimized or have a lower level of gradation.

1 Digital penetration or penetration with an
2 inanimate object sometimes is a lower graded
3 crime in some of the states.

4 Force -- all of the states have
5 some component that addresses force. They all
6 criminalize forcible penetration, but there
7 are variations in how force is defined and
8 analyzed among these statutes. Generally, a
9 lack of consent resulting from force to
10 overcome the will of the victim is
11 criminalized in various states.

12 Traditionally, statutory
13 definitions of force equal physical force,
14 violence, force required to overcome the
15 victim's resistance, stated or implied threats
16 that place victims in fear of immediate death
17 or serious physical injury to the individual
18 or to a third party, or retaliation.

19 Most expansive definitions of
20 force are starting to include coercion, going
21 beyond the overt physical force, codifying
22 coercion as a fundamental element of the

1 crime, so that we are no longer required
2 simply to have some sort of physical brute
3 force at play.

4 Another way states are going is to
5 say that sufficient force has been established
6 by the act of penetration itself, just the
7 amount of force required to commit the
8 penetration. Typically, force is that which
9 is required to overcome the victim' will.
10 Sufficient force often found there -- often
11 found that where there is a big size
12 differential between victim and perpetrator or
13 age difference or a specific relationship that
14 causes power dynamics to be unbalanced.

15 So we recognize that force may
16 result -- be a result of how these victims are
17 situated and certain circumstances that are
18 peculiar to that particular case, but it's
19 recognized in the statutes. Courts look to
20 the context of the assault to determine if
21 evidence establishes force.

22 Consent is another area that is

1 addressed by most of the states. Did the
2 victim have capacity to consent? Age is an
3 issue when you talk about capacity to consent.
4 Is there a minimum age beyond which it is per
5 se criminal to engage in sexual intercourse
6 with an individual because that individual
7 lacks the capacity to consent? Is there a
8 disability at play in an individual that it
9 might render their ability to consent not
10 being present? And those are tricky cases,
11 but most states have statutes that address
12 that situation.

13 Unconsciousness, a person who is
14 unconscious typically, most states would say,
15 simply cannot consent to sexual activity.

16 Intoxication is the one where it
17 starts to get tricky. Most every state has a
18 statute that addresses intoxication. Not all
19 of them direct -- address voluntary
20 intoxication directly. There is -- everybody
21 has involuntary intoxication covered, and most
22 every state through case law, not specifically

1 through the statutes, has a way to go after
2 voluntary intoxication, which we find tend to
3 be some of the toughest cases, because you
4 have a built-in credibility issue, you have
5 judgment against victims who are voluntarily
6 intoxicated by juries, and that becomes a
7 tough uphill battle, not so much because of
8 the statutes but because of juror attitudes
9 and perhaps prosecutor skill in addressing
10 those issues.

11 You may have to proceed under
12 different sections, depending on how your law
13 is written in your state, to go after that
14 voluntary intoxication. Only 10 states
15 specifically use the term "intoxication" for
16 victims who are voluntarily intoxicated, as
17 well as those who are involuntary -- or
18 voluntarily intoxicated to the extent that
19 they are incapable of consenting to sexual
20 activity.

21 Forty states use the term
22 "intoxication" that require a victim to be

1 involuntarily intoxicated, but they still have
2 ways to go after the voluntary intoxication
3 cases, even though when we talk about
4 intoxication it's referring to involuntary
5 intoxication.

6 In these cases, the details matter
7 and drive the analysis. You have to figure
8 out what's going on, what happened in that
9 case. So whatever the statute says, too
10 intoxicated to consent or you are moving under
11 another prong, force or physically helpless,
12 some states characterize it as that, as
13 mentally incapacitated or physically helpless,
14 you must look at all of the details to meet
15 the elements and persuade the jury.

16 Was consent freely given?
17 Eighteen states criminalize penetration
18 without consent and without force, and this is
19 another trend that is going on. The
20 definitions differ across jurisdictions,
21 sometimes including force in the very
22 definition.

1 Conveying permission, positive
2 cooperation in the act, or attitude consistent
3 with freewill and with knowledge of the nature
4 of the act, is sometimes used to determine
5 consent. Lack of consent, if it's induced by
6 fraud or compulsion, compulsion to submit due
7 to the use of force or coercion, there would
8 be no consent in those situations. That would
9 be lack of consent.

10 Some states require knowingly --
11 that the perpetrator knowingly knew or had
12 reason to know the victim did not consent or
13 that the victim was in fact intoxicated. A
14 victim's lack of resistance, or current or
15 prior social relationship, or manner of dress
16 does not equal consent in most all of the
17 states.

18 Affirmative consent is a minority
19 position of a few jurisdictions, meaning that
20 there has to be evidence that there was
21 affirmatively consent given to engage in sex.
22 Whether it's through verbal consent or through

1 acts that demonstrate that there was consent
2 to a sexual act.

3 Victim-perpetrator relationships
4 are also criminalized in many of the states,
5 that there may be an incapacity to consent
6 based on a relationship. And that could be a
7 familial relationship; it can be an incest
8 type of crime. It can be a person who is in
9 authority that may not -- may render consent
10 by the inferior member of that relationship.
11 They are unable to consent to the sexual
12 activity.

13 You find this in corrections where
14 a corrections officer is incapable of engaging
15 in sex with an inmate. An inmate cannot
16 consent to that kind of sexual behavior.
17 Those are special relationships, and we often
18 refer to them as persons in authority.

19 Some states have the sexual
20 arousal, gratification, degradation,
21 humiliation, or abuse prong to their statute.
22 And it -- the circumstances are generally how

1 we are going to figure out whether that has
2 happened or whether we are able to prove that
3 prong or not. And when we are talking about
4 penetration crimes, it is not really necessary
5 that is what the crime is about and the
6 circumstances certainly reveal that. That is
7 sometimes an additional uphill battle and is
8 something that needs to be looked at carefully
9 for other crimes.

10 Marital status is covered by all
11 of the jurisdictions now, that that is no
12 longer a defense to sexual assault. And the
13 relationship, though, may end up in the crime
14 being rated at a different level because of
15 that.

16 Same sex is also covered by most
17 of the states. Some states cover it
18 specifically; other states cover it under
19 their general statutes, and everywhere you are
20 pretty much able to go after same sex sexual
21 assault in every jurisdiction.

22 Multiple perpetrators -- some

1 states are looking at laws that cover multiple
2 perpetrators. Typically, we would go after
3 them under a conspiracy theory or an accessory
4 theory in the law.

5 So the laws are one big piece of
6 the puzzle here, and you certainly want to
7 assess your laws and make sure that you have
8 effective laws that we can use to go after
9 folks. But probably more important is the
10 implementation of those laws. And you can
11 have the best tools around, but if you don't
12 have people who are skilled at implementing
13 those tools and using those tools to hold
14 offenders accountable, the best law isn't
15 going to be of much help.

16 The more people understand the
17 law, but also the dynamics -- and Carol talked
18 about some of those dynamics -- and how they
19 are perpetrated, how these crimes are
20 perpetrated, how perpetrators use the myths
21 and misconceptions to not only accomplish the
22 crime but to cover their tracks afterwards,

1 because they know that people are going to
2 have trouble believing a woman who got
3 voluntarily intoxicated is telling the truth
4 about a sexual assault, that she may not
5 remember. People are very willing to believe
6 these things.

7 The prosecution is less about the
8 laws. There are several states that have good
9 components of laws, others that do not, but
10 good practice still wins the day in those
11 areas.

12 Understanding and addressing
13 victim behavior is one of the keys. Why
14 victims might delay reporting, why victims
15 might not fight back and resist, are very
16 important. When you say -- tell a juror or a
17 jury panel that they are going to hear a rape
18 case, the image that appears in their head
19 instantly of course is the stranger rapist who
20 uses force, drags someone into the bushes, and
21 uses brutal force or a weapon to commit the
22 rape. That is not the majority of our cases.

1 They are non-stranger cases, and those are the
2 ones that we have to address, and that victim
3 behavior is the key. We don't want people to
4 fall into the trap of making false credibility
5 assessments because they don't understand how
6 victims behave.

7 Trauma-informed care in
8 interviewing is a critical piece.
9 Understanding that victims of sexual assault
10 have suffered a traumatic experience and may
11 not respond the way someone whose car was
12 stolen might respond. And so care in
13 interviewing that individual, so that they
14 stay engaged in the process, don't drop out,
15 that we don't blame the victim for things that
16 they may have done, such that they feel that
17 they are to blame for the crime itself, needs
18 to be involved in our investigation of these
19 cases.

20 Also, we want to provide as many
21 resources and support to victims when they
22 have suffered the trauma of a sexual assault

1 as we can, including health care, but also
2 advocacy and counseling when it is necessary.
3 That is what's going to also help us win the
4 day when it comes to trying these cases in
5 court, because a stronger victim makes a
6 stronger witness for me.

7 Thorough investigations are key,
8 so I can assess a case, understand what
9 happened, understand which laws are going to
10 apply, and how to use those laws to hold the
11 offender accountable, offender-focused
12 prosecution strategies are key. We don't want
13 to be on defense the whole time trying to
14 explain or defend why our victim did what they
15 may have done in that traumatic moment. We
16 want to focus on what the offender did.

17 And when we look and investigate
18 with an offender focus, we find more evidence,
19 that there is planning, that there are
20 schemes, that there is targeting of
21 individuals, things that I can argue to a jury
22 to demonstrate that this didn't just happen.

1 This wasn't bad judgment. This wasn't a
2 drunken night. This was an intentional,
3 perpetrated crime.

4 Collaboration is also key in these
5 cases. We definitely need to work closely
6 with our advocates, prosecutors, police, and
7 at least medical, at least those four, to
8 appropriately respond and address the crime of
9 sexual assault. These are the main things.

10 The UCMJ Article 120 is a pretty
11 comprehensive code section, and it covers a
12 lot of these areas that we have talked about
13 that many of the states cover in various and
14 different ways. And so it does cover a good
15 number of these things.

16 But, again, the tool is only going
17 to be as good or as useful as the person using
18 it and who has the skill to use it. So we
19 really think that implementation piece is
20 probably the more important piece to the code
21 section piece.

22 CHAIR HOLTZMAN: Thank you very

1 much.

2 Our next -- Ms. Whitman, are you
3 making a comment? Okay.

4 Our next witness -- do we have it
5 set up?

6 LT COL GREEN: Mr. Schulhofer is
7 by phone.

8 CHAIR HOLTZMAN: Yes, is by phone.
9 Professor Schulhofer. Professor, welcome to
10 our panel, even by remote. You may proceed.
11 Can you hear us?

12 PROF. SCHULHOFER: I do. Thank
13 you very much for inviting me to speak today,
14 and I appreciate your allowing me to
15 participate by telephone. I'm very sorry I
16 can't be there in person, but I hope you can
17 hear me. Can you hear me clearly?

18 CHAIR HOLTZMAN: Yes. Very well.
19 Everybody on the panel can hear?

20 PROF. SCHULHOFER: I was asked to
21 discuss the American Law Institute's project
22 to revise the sexual assault provisions of the

1 Model Penal Code. And as you know, the MPC is
2 not formally enacted as law anywhere in the
3 United States, but it has been a model for
4 state legislation and the courts often refer
5 to its text and commentary as sources of
6 authority.

7 So the MPC was officially
8 promulgated in 1962, and its sexual offense
9 provision, Article 213, is even older than
10 that. It was actually drafted in the 1950s.
11 So Article 213 is dramatically out of date,
12 and the need to revise it has been apparent
13 for quite some time.

14 Some of its most glaring flaws
15 include gender language, Victorian vocabulary.
16 213 endorses a very broad marital rape
17 exemption. It also approves antiquated
18 procedures, such as prompt complaint
19 requirements, corroboration requirements, and
20 so on.

21 However, those are kind of the
22 obvious flaws. The more fundamental problem

1 is that the whole structure of Article 213 is
2 based on the traditional notion that rape is
3 a crime involving physical force or threats of
4 violence. And to some extent, this continues
5 to be the law in many American states. But it
6 is now very widely recognized that this
7 approach is far too narrow. So it's widely
8 recognized that the sexual offenses should
9 include all forms of sexual penetration
10 without genuine consent.

11 So apart from concerns about
12 specific details, the major impetus for
13 revision is to move Article 213 away from its
14 emphasis on purely physical threat and instead
15 to ground it in a protection against any
16 interference with freedom of sexual choice.

17 The ALI approved this revision
18 project in the spring of 2012, and they
19 appointed me as reporter, which means only
20 that I lead the research and the drafting, I
21 lead the consultation with different ALI
22 advisory committees, but the ultimate

1 decisions will be made by the American Law
2 Institute membership as a whole.

3 So far we have produced quite a
4 bit of material, and I think I have a sense of
5 where we're headed. But for the time being,
6 none of our work product carries any official
7 ALI endorsement. I'd say we are at least a
8 year in prep, two years away from having a
9 document with formal ALI approval.

10 I would like to give you a very
11 brief overview of the kind of issues we are
12 working on. I should probably mention first
13 that although our research takes a coarse look
14 at how these issues are being addressed in the
15 states, and we take into account what appear
16 to be the prevailing or more successful or
17 more widely adopted approaches, but we are not
18 tied in any way to what might happen to be the
19 prevailing view.

20 In fact, in many significant ways,
21 I suspect that we will probably endorse what
22 would currently be a minority view that seems

1 to us one that can be perhaps an emerging
2 trend or one that ought to be followed, even
3 if it hasn't yet been widely recognized.

4 So in terms of the issues that we
5 are working on, one very tough set of issues
6 is the evidentiary issues, especially rape
7 shield provisions like Federal Rule 413, as
8 well as evidence of the defendant's prior
9 crimes under Federal Rule 414. Of course,
10 general prior sexual activity of the
11 complaining witness is ruled inadmissible
12 under these provisions, but there are a lot of
13 exceptions. Some of them are more doubtful.
14 Some exceptions are essential to a fair trial
15 and is essential to accurate fact finding. So
16 those lines are difficult.

17 But the largest, I would say the
18 most basic set of issues, is in the area of
19 substantive crime definition, because the
20 shift from physical force and resistance to a
21 consent-based defense requires us to confront
22 a wide range of different kinds of impediments

1 to genuine consent. So we have to decide
2 which impediments should or should not trigger
3 criminal liability.

4 And we also have to give high
5 priority to the sentencing categories, because
6 the new code will apply to a variety of
7 disparate behavior, and we have to be sure
8 that what we cover is readily comprehensible,
9 and we also have to be sure that we
10 differentiate in an appropriate way between
11 more serious and less serious kinds of abuse.

12 So, overall, the drafting effort,
13 I would say we have three distinct kinds of
14 challenges. First is drawing good substantive
15 boundaries; then organizing those judgments in
16 a way that lawyers, as well as ordinary
17 people, can understand. And, thirdly, when we
18 extend the criminal law to less violent forms
19 of abuse, we have to make sure that grading
20 and authorized punishment don't exceed the
21 gravity of these new offenses.

22 As we work through these issues,

1 we seem to be headed towards having five
2 distinct types of sexual offenses -- rape,
3 intercourse by coercion, or imposition, or
4 exploitation, and, lastly, intercourse without
5 affirmative consent. I would like to say more
6 about those in a minute, but those are the
7 five penetration offenses. And we will also
8 have parallel provisions for contact offenses
9 short of penetration.

10 In terms of rape, what we -- I
11 suspect we will probably use the label "rape"
12 roughly speaking to cover offenses involving
13 physical force. Coercion is abuse by non-
14 violent threats or abuse of authority and
15 disregard of expressed refusal to consent. In
16 other words, the "no means no" situation.

17 Imposition is abuse without any
18 threats or superior authority, simply by
19 taking advantage of a person's incapacity,
20 such as when the person is a minor or if they
21 are severely drunk or mentally disabled.

22 As Mr. Wilkinson just said a

1 minute ago, the area of intoxication is
2 extremely important because it involves a
3 large number of situations, and also one where
4 it is very important to have -- we think if
5 the law is going to work effectively, it is
6 important to have a comprehensible line that
7 makes clear how much intoxication is too much,
8 and how much isn't, because it is also that
9 realm of perfectly consensual sexual activity
10 when people have something to drink.

11 So imposition is abuse without any
12 threats or superior authority. That can
13 include, in this incapacity area, not only
14 when someone is a minor or severely drunk,
15 also when they are mentally disabled. So
16 these kinds of abuses are covered even if the
17 victim didn't say no. And, in fact, even if
18 the victim expressly said yes, you could --
19 attempts of imposition, sexual intercourse by
20 imposition would be covered in these areas.

21 The fourth one, exploitation,
22 involves abuse of professional trust as well

1 as certain specific forms of deception --
2 relatively few, but well identified forms of
3 deception. And, again, those would apply even
4 if the victim ostensibly expressed some form
5 of consent.

6 And then the final -- the fifth
7 category would be intercourse without
8 affirmative consent, and that addresses the
9 situation in which the victim was passive,
10 perhaps because of fright or intoxication. My
11 sense is, as Mr. Wilkinson suggested, in fact
12 we rely heavily on their survey.

13 It's not the prevailing view that
14 this conduct should be punished simply because
15 there is no affirmative expression of consent,
16 but these situations where a victim may be
17 passive because of fright or inability to
18 speak coherently because of intoxication,
19 those situations would be covered even when
20 the victim didn't expressly resist or say no.

21 So they didn't expressly give
22 affirmative consent either, and the judgment,

1 then, would be that to proceed under those
2 circumstances was abusive.

3 I don't like the complexity of
4 this structure with five distinct provisions
5 or five distinct types of crimes, but there
6 seems to be no good alternative. The reform
7 is leading us to see the need to extend the
8 criminal law to reach distinct kinds of abuse.
9 And if we lump them together, we don't really
10 simplify anything; we are just as likely to
11 create confusion. And there is also a danger
12 of punishments that would run far out of
13 proportion to the seriousness of these less
14 violent offenses.

15 We have one other problem on our
16 agenda -- sex offender registration and
17 community notification. I assume that the
18 UCMJ doesn't deal with that problem, but our
19 work on that issue might become relevant to
20 yours in one respect, because we find a lot of
21 reason to worry that federal laws and many of
22 the state law provisions for registration and

1 notification are considerably overbroad.

2 And there is a lot of reason to
3 worry that these laws tend to backfire and may
4 actually make communities less safe. And if
5 that's right, then it becomes important for
6 the UCMJ offenses to be classified in ways
7 that wouldn't inadvertently trigger
8 inappropriate burdens in terms of registration
9 and notification.

10 So there is a bit more I could
11 say. Our current tentative draft is about 130
12 pages long, but I think I will skip the rest
13 for now.

14 I am very grateful for this chance
15 to discuss our work. I hope we can continue
16 these communications.

17 Thank you.

18 CHAIR HOLTZMAN: Thank you very
19 much, Professor.

20 Shall we start with questions from
21 the panel? Judge Jones.

22 JUDGE JONES: Have any of you --

1 perhaps you have, Professor, I don't know --
2 taken a look at our task, which is to look at
3 the current version of Article 120 and think
4 about it in the context of improvements?

5 PROF. SCHULHOFER: I'm sorry. Was
6 that addressed specifically to me?

7 JUDGE JONES: Yes, it was.

8 PROF. SCHULHOFER: Okay. Thank
9 you. I should say, I did hear your question,
10 but I heard it only very vaguely. I heard the
11 witnesses very clearly, but when the Chair was
12 speaking and when you were speaking, I could
13 only distantly hear that. So I don't know if
14 anything could be -- if we're just aware of
15 that as this --

16 JUDGE JONES: Thank you. I'll try
17 to speak louder.

18 PROF. SCHULHOFER: I took a look
19 at the UCMJ, and I can see what you're dealing
20 with. To my case, I think there is -- I saw
21 many issues, but I haven't sat down to
22 consider what I would do with it. In many

1 respects, I think it might not be that much
2 different from what we would consider
3 appropriate with respect to state law
4 offenses, although in certain respects the
5 military context clearly would be different.

6 JUDGE JONES: Off the top of your
7 head, do you see -- and I'm really speaking
8 very generally -- do you see any value to
9 taking the penetrative offenses and separating
10 out the non-penetrative offenses? Is there
11 something that you see as a value to that?
12 I'm trying to figure out what value that might
13 have, and it is something that we -- you know,
14 has been suggested.

15 PROF. SCHULHOFER: Yes.
16 Incidentally, could you tell me, please, which
17 panel member was speaking?

18 JUDGE JONES: Oh, I'm sorry. This
19 is Barbara Jones.

20 PROF. SCHULHOFER: Oh, Judge
21 Jones. Thank you very much. So, in general,
22 it has been traditional to separate. And I

1 think the principal value of doing that is to
2 be very clear about grading questions, because
3 the penetrative offenses typically are
4 considered much more serious.

5 There is, to be sure, a continuum
6 because some of the contact offenses can be
7 quite serious, but they also extend to
8 touching that can be less serious. It can be
9 a less dramatic step in terms of when an
10 offender should be on notice that he has
11 really crossed an absolutely unacceptable
12 line.

13 One of the reasons why I believe
14 we would be heading towards an offense of
15 intercourse without affirmative permission,
16 even though that's not the currently
17 prevailing view, is that that's a step that no
18 one should take without having affirmative
19 permission.

20 It is much harder to see that in
21 the context of touching that might be a kiss
22 on the cheek or a brush against the backside

1 or something of that kind. So, yes, I think
2 our judgment would be that there is -- that it
3 would be very important to try to keep those
4 offenses separate.

5 JUDGE JONES: Have you actually
6 gone to the category that you just talked
7 about of -- the category of conduct and
8 thought about whether -- and, again, this may
9 be more of a military code issue than with
10 your Model Penal Code, but to -- considering
11 whether some definitions may not or some acts
12 may not be criminal. Have you looked at that
13 end of the spectrum?

14 PROF. SCHULHOFER: Do you mean,
15 Judge, the question of the -- whether some
16 types of conduct, whether we should come to a
17 normative judgment that the criminal law
18 should reach so far but not further?

19 JUDGE JONES: I guess that's what
20 I'm talking about. I mean, to give you some
21 context, there were points where the -- our
22 Response Panel did have some concern that some

1 conduct that was being captured, at least in
2 the work gender-relations survey, was not
3 actually criminal. It was contact but may not
4 have been criminal. It might have been
5 harassment, and there was a -- we were
6 concerned there might have been a fuzzy line
7 there. And maybe that's just a problem with
8 the survey instrument and not -- not the Penal
9 Code or the -- in your case or the Uniform
10 Code of Military Justice in ours.

11 I was just wondering if there had
12 been any discussion about that. Yes. That --
13 did that end of the spectrum?

14 PROF. SCHULHOFER: Yes, actually,
15 quite a bit. I think you've put your finger
16 on a very serious problem. It's certainly a
17 problem in terms of surveys because people
18 don't often understand what is meant, that
19 even if you ask, "Have you been raped?" and
20 one of the notorious problems in surveys has
21 been that people who clearly -- who describe
22 conduct that clearly involved forcible, non-

1 consensual penetration, did not think that
2 they had been raped because they were
3 operating under -- for example, if they were
4 on a date, they might think, well, then,
5 automatically it couldn't have been rape.

6 So on one side of the line people
7 often have an extremely unduly narrow view of
8 what the law clearly prohibits, and then on
9 the other side, as you say, there might be
10 instances where people might think some sort
11 of hostile work environment -- they might
12 think that actions in that context were
13 criminal when they aren't.

14 So you have that kind of a
15 question, but we -- I think you are also
16 putting your finger on the point about when we
17 decide what the law should cover, how much is
18 it appropriate to extend criminal prosecution
19 into areas where you have imbalance of
20 authority and potential for abuse of
21 authority.

22 And that is a subject that we had

1 quite a bit of discussion about and quite a
2 bit of discussion about how to draw that line,
3 because there are very clear dangers of abuse
4 in these situations of asymmetric power. And
5 I would think especially so in the military.

6 But, on the other hand, we wanted
7 to be sensitive to not overextending the
8 criminal law, not to get too far ahead of
9 social norms, and also to respect people's
10 right and need for relationships that really
11 are mutually consensual.

12 MS. WHITMAN: Hi. This --

13 CHAIR HOLTZMAN: Yes. Ms.
14 Whitman, is it?

15 MS. WHITMAN: Yes. Thank you. I
16 just wanted to address your question in
17 context of what we looked at. When we first
18 started doing this research on rape and sexual
19 assault across the country, we sat down with
20 our staff who John mentioned have extensive
21 experience in violence against women crimes.
22 We sat down with Women's Law Project and other

1 professionals to really look at what they saw
2 when they were investigating and prosecuting
3 cases.

4 And so just considering the
5 conduct covered -- going back to what John had
6 mentioned about language being clear and
7 concise and simple, it goes down to that --
8 it's helpful for language in the statute, and
9 then the next step is how it is applied by the
10 courts. And so we have done some looking and
11 are continuing to do research on how courts
12 have applied definitions of force and consent
13 and thinking about what is the sufficient
14 level of force.

15 And even though on their faces the
16 statutes might not appear as flexible, we have
17 seen the application to be more comprehensive
18 in some states. And so it really goes down to
19 how the statutes are implemented, how the
20 prosecutors go forward with their cases, the
21 investigation. So just in considering how
22 much conduct is covered, simple language can

1 cover a lot of conduct. It just depends on
2 how it's implemented. But that's something we
3 have looked at and considered. So just wanted
4 to add that point in.

5 JUDGE JONES: Just to keep going
6 for a moment on this, one of our tasks is to
7 assess Article 120, and then it goes on to
8 say, "With recommendations for improvements in
9 the implementation of the statute." And it
10 says, "Consider advisability of amendment to
11 cover situation where one commits sexual act
12 upon another by abusing one's position in the
13 chain of command to gain access to or coerce
14 the other person."

15 And, Professor Schulhofer -- is
16 that correct, Schulhofer?

17 PROF. SCHULHOFER: Yes,
18 Schulhofer. Thank you.

19 JUDGE JONES: I think that's just
20 what you were talking about, the inequality in
21 -- well, here we have -- in the military rank
22 or a leader versus a new recruit, shall we

1 say. Where are you at with respect to that
2 analysis, if anywhere?

3 PROF. SCHULHOFER: Yes. Well,
4 what we have, with everything that I've been
5 saying, I have -- can give you a sense of
6 where our work tends to be heading. And I'm
7 probably giving too much weight in that to my
8 own personal view.

9 JUDGE JONES: We'll take it,
10 though.

11 PROF. SCHULHOFER: None of this
12 has yet been endorsed officially. In that
13 respect, we have looked a lot at different
14 relationships of power and authority.

15 One area I think we feel quite
16 clear about making criminal per se, without
17 regard to any threats or evidence of coercion,
18 but just any sexual relationship would be
19 criminal per se, when it involves a supervisor
20 of some sort and a person who is subject to
21 some sort of state-imposed restrictions on
22 liberty. So that would include certainly an

1 inmate and a guard.

2 It is quite common in situations
3 where an inmate may be -- agree -- very
4 directly agree to have sex with a guard in
5 return for what may be fear of harm or may be
6 in anticipation of favorable treatment,
7 favorable privileges. Either way, those
8 relationships should be criminal per se. And
9 we would extend the same concept to a
10 situation of a person, for example, on
11 probation with respect to their parole
12 officer.

13 In the civilian context, I don't
14 think it's likely that we would say a
15 relationship between an employee and an
16 employment supervisor would be impermissible
17 per se, but we would have a criminal offense
18 that would apply -- what we would call sexual
19 intercourse by coercion -- if an employment
20 supervisor, anyone acting in an official
21 capacity, implied that there were either job-
22 related sanctions or benefits tied to sexual

1 consent. That would be -- we would treat that
2 as criminal coercion per se.

3 But the relationship would not be
4 criminal in the absence of evidence that it
5 was unwelcome; in that sense, parallel to
6 current federal sexual harassment law which
7 punishes quid pro quo sexual conduct, but a
8 relationship between a supervisor and a
9 subordinate would not be criminal per se, and
10 it would not be criminal if there had been no
11 indication that the sexual interest was
12 unwelcome.

13 JUDGE JONES: So you would require
14 that the sexual interest was unwelcome in the
15 employer-employee situation. The guard-
16 prisoner, the parole-probation, where the
17 prisoner and the probationer are basically in
18 a situation where their liberty is restricted,
19 would be completely per se, correct? Even
20 if --

21 PROF. SCHULHOFER: Precisely.
22 Yes.

1 JUDGE JONES: Okay. And where
2 would you put --

3 PROF. SCHULHOFER: I'm not saying
4 we haven't thought in detail about the
5 military situation, and there is no reason why
6 -- I mean, your panel could very well think
7 that the military situation was just unique to
8 itself. If there were some analogy, I'm not
9 sure whether the right analogy would be to an
10 ordinary employment situation or whether it
11 would be to a situation like a probation
12 officer and a parolee.

13 Certainly, in many military
14 contexts, particularly within the chain of
15 command, there would be a sense in which the
16 subordinate is subject to pervasive
17 restriction on their liberty over which the
18 superior officer has some control.

19 JUDGE JONES: Well, that will be
20 something that we will definitely be talking
21 about. I don't have any other questions,
22 except --

1 MS. WHITMAN: I just wanted to
2 make another addition to complement what
3 Professor Schulhofer was saying. And related
4 to coercion, Carol mentioned that coercion is
5 being included more and more, and it's
6 something that we're seeing. And right now
7 we're doing some research on coercion in
8 sexual assault cases, which it's in the
9 middle, but we're happy to share it with you.

10 Just I've seen that in how force
11 is applied in case law, how consent is looked
12 at, and there are military cases already that
13 also look at the relationship between the
14 perpetrator and the offender, considering
15 their rank.

16 So I think it's something that
17 exists currently in some -- to some extent.
18 So just seeing how that might be working out
19 in other states and within the military
20 already.

21 Just wanted to add that.

22 JUDGE JONES: Maybe I misheard

1 you. Did you say there were cases out there
2 involving this in state courts?

3 MS. WHITMAN: Yes. And it's
4 something considered -- judges primarily
5 consider the totality of the circumstances
6 when it comes to consent and force and what
7 that might mean in each case. And I know it
8 goes back to just what is presented to the
9 court for each individual case by case.

10 JUDGE JONES: Thank you.

11 CHAIR HOLTZMAN: Thank you.

12 Admiral?

13 VADM TRACEY: I don't have any
14 questions right now.

15 CHAIR HOLTZMAN: Mr. Stone?

16 MR. STONE: Yes. This is Victor
17 Stone. I guess, Professor, the first question
18 that occurs to me is you had said it depends
19 on the social norms involved. And we are
20 dealing with a situation here, it seems to me,
21 that is very different from civilian society's
22 social norms.

1 When we are in a combat zone, and
2 people may think they are lucky that they are
3 living today and didn't get blown away earlier
4 in the day, and their life expectancy is very
5 questionable by the end of the week, it seems
6 to me that is a very different set of social
7 norms. The easiest case is the one you
8 mentioned when it's a superior officer, but
9 I'm much more concerned with the case when
10 it's two officers of the same rank or it's not
11 clear that the victim isn't the superior
12 officer.

13 And I guess I'm wondering whether
14 you have any materials that you can share with
15 us that look at people in these incredibly
16 stressed situations and whether or not there
17 are different exceptions or defenses or
18 definitions of consent which are a little
19 broader and help us address, a) the fact that
20 they're in an ongoing relationship, b) the
21 fact that their ongoing relationship may be a
22 co-dependent team to keep them all safe, and

1 c) it's not something that they can easily
2 decline sometimes. That relationship is not
3 going away.

4 And it also occurs to me it may be
5 a relationship in an organization where the
6 only way they can continue to face the danger
7 they are in is that they consume a lot of
8 alcohol or just have a lot of adrenaline
9 flowing in order to keep their readiness up,
10 because they are -- you know, they are facing
11 a situation that is not typical in civil
12 society.

13 Do you know of any materials, or
14 have you any views on that? And I guess I'll
15 ask all of the panel members who commented if
16 they have something to address that -- the
17 uniqueness of that here.

18 PROF. SCHULHOFER: Well, perhaps I
19 should start, although I think you also wanted
20 the other panel members to comment on that.
21 We have -- we do look at that in a number of
22 ways. Yes, we do.

1 Whether stress -- I'm not sure if
2 I'm reading correctly between the lines of
3 your comment, but there might be an
4 implication that being in a stressful
5 situation somehow operates to mitigate or
6 excuse what might otherwise seem to be sexual
7 overreaching.

8 And we have other contexts in
9 which that situation arises, and I think we
10 would be quite clear that stress, if that's
11 what you mean, you know, as a mitigation or an
12 excuse would certainly not normally enter the
13 picture in terms of whether conduct was
14 criminal or not. It might be a mitigating
15 factor in sentencing.

16 On the other hand, it might be
17 appropriate to say that precisely because
18 situations are stressful there might be more
19 of an institutional obligation to establish
20 clear boundaries and to take on board from the
21 beginning, ex ante, the nature of that kind of
22 a dynamic, and to set boundaries so that that

1 doesn't lead to abuse.

2 We see -- with respect to alcohol,
3 for example, plays a pervasive role in the
4 setting of colleges with young people, and of
5 course they are not, you know, in a life or
6 death combat situation by a long shot. But we
7 do find that for different reasons young
8 people who have very little experience with
9 alcohol wind up drinking too much and things
10 get out of hand. And that's something that we
11 are definitely addressing.

12 And from our point of view, I
13 think -- you know, I think Mr. Wilkinson is
14 right that a good prosecutor can deal with
15 situations no matter what the law says. But
16 it seems to us that the law with respect to
17 intoxication is in a hopelessly muddled state.
18 And for that reason, I think it would help
19 prosecution immensely to have some clear idea
20 of what it would mean to say that someone is
21 too intoxicated.

22 There are cases all over the map

1 on that. And in my view, it becomes self-
2 destructive to have a definition that is so
3 broad that at least literally it applies to 90
4 percent of the mutually desired sexual
5 activity that occurs between people who have
6 been drinking.

7 So, and to your last point, I
8 think there is a very inadequate answer to
9 very -- a question that has a lot of very,
10 very difficult dimensions to it.

11 But the last point with respect to
12 social norms, just to be sure that I wasn't
13 misunderstood, I wanted to stress that in our
14 project we -- we look at what other states are
15 doing, what states are doing. In some way, of
16 course, we are guided by that. I think we
17 wouldn't want to take a position that had been
18 fully considered and rejected everywhere.

19 But having said that, we are -- we
20 are loosely guided by the wisdom that's out
21 there, and also very sensitive to the fact
22 that a lot of legislation gets through without

1 very thoughtful consideration of what it
2 really means. So ultimately we are trying to
3 make our own judgment about what works best in
4 terms of victim protection as well as fairness
5 to the accused.

6 And so we consider the prevailing
7 view in the law, and we consider social norms.
8 But we don't want to go so far that we -- for
9 example, to say that sex -- that consent was
10 per se invalid any time that either of the
11 parties had been drinking. That would be
12 preposterous.

13 But also it's important to come
14 back here, and I think this ties very directly
15 into your question, we think that an important
16 function of the law is to communicate norms in
17 situations where what might be generally
18 accepted social behavior doesn't adequately
19 take into account risks to people who are in
20 vulnerable situations. And often a norm is
21 taken for granted by men as well as by women,
22 without -- and a general public that really

1 doesn't appreciate how risky certain kinds of
2 behavior can be, and to what extent the
3 potential harm gravely outweighs the potential
4 benefit.

5 So we want to -- we think the law
6 has an important role. And not being a
7 military person myself, I would think that the
8 UCMJ has a very, very important role in
9 looking at norms and saying, "Gee, this seems
10 to be the norm. But you know what? Boy, that
11 is really dangerous and unjustifiably so."
12 And we should -- very abstractly, but, you
13 know, I think it would be, in my view,
14 appropriate for your panel to look at
15 prevailing practices and say, "Well, there are
16 some areas where something that everybody
17 accepts should not be accepted," and to adopt
18 a provision that would try to communicate very
19 clearly a better standard of behavior.

20 MS. TRACY: I would just like to
21 add to that. It seems to me when we are
22 talking about the history and evolution of the

1 law of rape, within the context of the
2 military of course there is a history of rape
3 being the spoil of war, that the conqueror
4 conquered. One of the victories of war was
5 being able to rape the female population, to
6 despoil the population. It was seen as an
7 anguish of male defeat more than female harm.

8 And, you know, that's centuries of
9 history, centuries of military history. And
10 I would assume that that has been part of some
11 of the conversation in the military, because
12 it's -- there has been a special entitlement
13 that victors of war have had throughout
14 centuries to rape the population of the
15 defeated.

16 CHAIR HOLTZMAN: Mr. Wilkinson?

17 MR. WILKINSON: So in thinking
18 about your example, I think it's tough to try
19 and codify or list every situation that is
20 possibly going to rise up. And so you want
21 your law to be flexible enough and
22 comprehensive enough to cover those

1 situations.

2 And the way you laid that out, all
3 that made me think about are, these are the
4 exact pieces of evidence I would want to
5 examine, look at, and preserve to proceed
6 under a theory of coercion or fear induced by
7 a perpetrator. And I'd want to look -- you
8 know, when you're investigating these cases,
9 you can't just look at the four corners of the
10 incident that happened at the time of the
11 sexual assault. That almost always is going
12 to be a he said/she said situation. You have
13 to look at what happened before that and what
14 happened after that and find out if there is
15 evidence of perpetration, of intention, of
16 planned scheme, trying to render someone
17 vulnerable, or taking advantage of an existing
18 vulnerability.

19 But I don't know that it -- you
20 can list every single situation and codify the
21 answer that will address this this way or that
22 way. If something is happening repeatedly,

1 though, it probably does need to be addressed
2 in some fashion. And whether you narrowly
3 specifically tailor it to -- I know you were
4 just giving one example, but these things
5 happen.

6 And whether it's narrow to that
7 situation or not, because it happens enough,
8 that's one consideration. But I just want the
9 existing law to have enough flexibility, and
10 not so overly broad that it criminalizes
11 unanticipated behavior, but enough flexibility
12 that I could cover that under a theory, a
13 prong, in my law, because I -- as you stated,
14 that seems to me a very realistic situation
15 that is going to happen, and I'd want to be
16 able to go after that when the evidence is
17 there that demonstrates someone did perpetrate
18 this, they did take advantage of that
19 situation.

20 PROF. SCHULHOFER: If I can add a
21 competing, maybe contrasting perspective on
22 that point, which is that this will be an

1 academic as opposed to an experienced
2 practitioner's perspective. And, in
3 principle, the experienced practitioner is
4 right every time.

5 One of my greatest fears when I
6 testify is when somebody addresses me as
7 "Professor," which is a very clear negative
8 implication of that, but to -- to give you
9 another side of -- I think that was Mr.
10 Wilkinson that was just speaking? Is that
11 right?

12 MR. WILKINSON: Yes. Yes, that's
13 right.

14 PROF. SCHULHOFER: Yes. I mean, I
15 really -- you are absolutely right in what you
16 say. At the same time, I think looking at it
17 from an academic -- somewhat academic
18 perspective, one of the things we find coming
19 back to the question of social norms, is that
20 when the law is not absolutely clear, when it
21 seems to be flexible, it doesn't communicate
22 a sufficiently clear message.

1 And particularly when you are
2 pushing back against social norms that tend to
3 be insufficiently protective, in the area
4 where there is vagueness or room for
5 interpretation, it's the narrow interpretation
6 that usually wins out, either at trial or even
7 in prosecutors deciding whether to go forward.

8 So we think that there is value,
9 where it's possible, to come to a clear
10 judgment, that the risks of abuse greatly
11 outweigh any advantage to leaving people at
12 liberty to run their own lives. In situations
13 where the balance of advantage is sufficiently
14 clear, we think there is great value in having
15 a clear, bright line rule rather than leaving
16 it flexible. One example --

17 CHAIR HOLTZMAN: Professor, could
18 I ask you to --

19 PROF. SCHULHOFER: -- to the
20 relationship between a mental health
21 professional, like a psychiatrist --

22 CHAIR HOLTZMAN: Professor?

1 PROF. SCHULHOFER: -- we think
2 that should be absolutely a no-go area. It
3 doesn't -- some states say that this is
4 criminal conduct, if the patient is
5 emotionally dependent, or if the psychiatrist
6 exercises undue authority, or something of
7 that kind. In my view, that's useless.

8 I appreciate that a very good
9 prosecutor could make a case out of that. But
10 when the law is that big, it doesn't
11 communicate a message. And the only -- there
12 is no justification -- in my view, there are
13 very, very cases where a relationship like
14 that ever should be tolerated, so it seems
15 appropriate for a per se rule.

16 And I could think of many other
17 areas of that kind. It may be that a sexual
18 relationship between a member of our military
19 and a civilian in a combat zone should just be
20 per se impermissible under any circumstances.
21 I don't know, but that might be the case.

22 So I think there's --

1 CHAIR HOLTZMAN: Professor?

2 PROF. SCHULHOFER: -- certainly it
3 has been our experience with respect to
4 alcohol-related situations that current law is
5 just much too vague to effectively communicate
6 sufficiently protective standards of conduct.

7 CHAIR HOLTZMAN: Professor, thank
8 you very much. I just was trying to get your
9 attention because our next batch of presenters
10 is coming in, and we still have two people to
11 ask questions. So I would ask all of the
12 members of the panel to try to condense
13 responses, please.

14 Mr. Taylor.

15 MR. TAYLOR: Yes. Thank you very
16 much, Professor, and members of the panel.
17 Your information has been very helpful.

18 If I understood your comments
19 earlier about trends that you are noticing
20 with rape shield and similar laws, I think I
21 understood you to say that prior sexual
22 activity is generally considered inadmissible

1 with some exceptions. Two of the items that
2 this panel has been asked to address are
3 instances in which prior sexual conduct of the
4 alleged victim was considered in a preliminary
5 hearing, and then, secondly, instances in
6 which similar evidence was presented in a
7 court-martial and what impact that had on the
8 case.

9 So I wondered if you would just
10 share your thoughts with us on when, if ever,
11 you think prior sexual activity should be
12 admissible.

13 PROF. SCHULHOFER: Well, I think
14 that to try to respect the instruction that I
15 just got from the Chair -- and I apologize I
16 wasn't able to hear that perhaps you were
17 attempting to -- trying to get my attention in
18 the middle of my prior comment -- I would like
19 to have a chance to address that, but it's a
20 very big and very complicated topic.

21 We have given your staff a copy of
22 our current draft, which has about 30 or 40

1 pages addressing the question of exception.

2 I would just say briefly that there are
3 situations where fairness to the accused
4 absolutely requires admissibility of evidence
5 of a prior sexual relationship.

6 There may be, for example,
7 physical evidence, hair -- hair or -- hair
8 samples or semen or something like that, which
9 is found on the victim, and it may be that a
10 prior encounter on the part of the complainant
11 provides an alternative explanation for that.
12 So that can't be kept out.

13 And the Supreme Court has
14 addressed this issue as well in constitutional
15 terms, so it's complicated to draw that line,
16 but it's also essential. There is no way to
17 avoid it.

18 CHAIR HOLTZMAN: If I could just
19 take the liberty of the Chair, since Mr.
20 Taylor doesn't have another question, do you
21 want to amplify your answer? You've got a few
22 minutes to do that.

1 PROF. SCHULHOFER: Oh. You're
2 speaking to me?

3 CHAIR HOLTZMAN: Yes, sir.

4 PROF. SCHULHOFER: Okay. Thank
5 you. Thank you. In our draft, the current
6 draft, which has been very extensively
7 discussed, we have identified about six
8 specific areas in which prior sexual activity
9 of the complainant should be admissible.

10 One is to provide an alternative
11 explanation for physical evidence. Another is
12 to -- when it is offered to prove the
13 complainant's bias or motive to fabricate or
14 to admit -- impeach admitted evidence by
15 showing specific contradiction.

16 For example, in a case where --
17 there are cases where a victim picked up a
18 young man on the highway, a complete stranger,
19 and had sex with him, and then the allegation
20 was that he forced himself on her. And her
21 testimony was that she would never do such a
22 thing voluntarily. And the defense offered to

1 prove that in fact she had done that --
2 something like that voluntarily on a previous
3 occasion. So evidence to -- that a witness
4 made a specific statement which -- about her
5 prior behavior, that's another instance in
6 which prior inconsistency has to be admitted.

7 There are several others like that
8 when it -- there may be a situation where the
9 evidence -- the notion that somebody would
10 have consensually agreed to the scenario
11 testified, it may be intrinsically implausible
12 to consider the possibility of consent.

13 For example, if a victim has been
14 -- the complaining witness has been handcuffed
15 to the post of a bed, and then penetrated, the
16 facts on their face suggest obvious coercion.
17 And if the defendant wants to prove that the
18 complaining witness has voluntarily agreed to
19 that type of behavior in the past, it puts the
20 defendant's claim of consent in an entirely
21 different light. The jury may simply be
22 assuming that nobody would ever consent to

1 that.

2 So those are the dilemmas that
3 have to be sorted out in a way to preserve
4 their trial, and, at the same time, not to
5 simply assume that if the complaining witness
6 consented to sex with one person in the past
7 that she is likely to consent to other people
8 in the future.

9 MR. TAYLOR: I would just like to
10 give any member of the panel a chance to
11 comment on that.

12 MR. WILKINSON: Thank you. Yes,
13 that is a tricky situation. And when you're
14 talking about rape shield, it's in place for
15 a reason. And the more exceptions you give in
16 some of those sort of remind me of how things
17 were before we had rape shield, and it would
18 let in all sorts of evidence that could be
19 characterized under numerous exceptions that
20 really have nothing to do with the case,
21 except trashing the victim, which is exactly
22 what the practice was.

1 So of course where you have
2 physical evidence that needs to be explained,
3 that absolutely could be an exception. Where
4 you have a prior sexual relationship between
5 the parties, that is a common exception, that
6 you would want to be able to go into that to
7 explain that that may be where the issue of
8 consent came in or was confusing, things like
9 that.

10 But prior exceptions to it, I
11 think, just really run the risk of going back
12 to the way things were and the horrible
13 practices that prevented victims from coming
14 forward in the first place.

15 Additionally, you mentioned
16 preliminary hearing and the use of prior
17 sexual conduct or rape shield implications
18 there. Preliminary hearings, typically
19 credibility is not an issue there. It is
20 simply a fact-finding hearing to determine
21 whether there is enough evidence to go forward
22 to trial. And so to the extent that rape

1 shield would be used to go at the credibility
2 of a victim, it should not be allowed at a
3 preliminary hearing.

4 If it was to explain away
5 scientific evidence or physical evidence that
6 was introduced in a preliminary hearing, then
7 that might be one exception. And any time the
8 prosecution opens the door where a victim
9 makes a statement, affirmative statement, then
10 you could have a hearing to ask the judge,
11 well, now, this is relevant, this needs to
12 come in -- the incident of the individual who
13 was picking up folks along the highway, or
14 whatever, that the judge would be able to look
15 at that.

16 And the other catch-all exception
17 is if it's going to impose a burden on a
18 defendant's constitutional rights, which is
19 sort of a catch-all one. And if it's going to
20 affect his ability to receive a fair trial,
21 then you have that kind of catch-all to let it
22 in.

1 But I worry about lots of
2 exceptions to rape shield and how we treat
3 victims and our history with it, which
4 explains why we have rape shield to begin
5 with.

6 CHAIR HOLTZMAN: Okay. Thank you.

7 I'm going to take the opportunity
8 to ask some questions myself, sir. Thank you.

9 First, to the panel, and in a way
10 following up on Judge Jones' concerns, I know,
11 Mr. Wilkinson, you said that prosecutors can
12 do a lot, even with statutes that may not be
13 perfect. But I think our mandate here is to
14 see what imperfections there are in our
15 criminal -- in the military justice statute,
16 Section 120, and see what we can do to make it
17 better.

18 I don't know if you've had a
19 chance to review that or haven't, but if you
20 wouldn't mind taking a look at it and giving
21 us your comments about where you think it
22 could be strengthened, what is missing. Bear

1 in mind that the statute has been changed now
2 several times in the past few years, so we
3 don't want to drive prosecutors and defense
4 counsel crazy, totally crazy. But if we are
5 going to try to get it right, what do we need
6 to do?

7 And similarly, Professor, and I
8 say that with all compliment, you mentioned at
9 the outset in your remarks that you identified
10 a number of issues in Section 120. Would you
11 mind telling us what those issues are?

12 Obviously, I don't know that we have time for
13 you to go into all of them at the moment, but
14 perhaps you can identify some of the major
15 concerns you have, at least for us now, and we
16 would love to have the opportunity to explore
17 your views on this later. So, anybody who
18 wants to proceed first.

19 PROF. SCHULHOFER: Well, I would --

20 CHAIR HOLTZMAN: Okay. Professor,
21 yes.

22 PROF. SCHULHOFER: -- I would like

1 to see if I can kind of answer briefly. I
2 would be happy to continue discussing this
3 with you at another time. I think, by my
4 watch, we have only three minutes remaining.
5 So it seems to me that the basics that the --
6 the military seems to be -- have started with
7 a conception of rape as a crime of physical
8 force, and then added on to it here and there,
9 and stretched this and amended that, in a way
10 that produces, at least to me, a very
11 confusing structure.

12 And the notion that penetration
13 without consent is, in itself, an offense
14 doesn't come through clearly. You have to
15 patch it together, and I think it's still, in
16 my mind, extremely vague. I guess I go to --
17 I think I go to -- bodily harm is the one that
18 jumped out at me, and bodily harm means any
19 offensive touching, including any non-
20 consensual sexual act.

21 So any non-consensual act is, by
22 definition, bodily harm, and then that

1 definition -- so the concept of non-consent is
2 smuggled into -- I don't say that -- well, I
3 guess I do say it pejoratively. I don't
4 quarrel with the outcome, but I don't think
5 it's -- I think it's very confusing to bury
6 the crime in the definition of bodily harm the
7 way that the UCMJ currently does.

8 That's a very quick and very
9 superficial reaction, but I would be happy to
10 discuss it further.

11 CHAIR HOLTZMAN: Mr. Wilkinson?

12 MR. WILKINSON: Just real quick,
13 and I agree with that bodily harm language,
14 which covers the non-consensual sexual
15 intercourse. But it -- the common
16 understanding of that term would mean
17 something more, and I worry about how that
18 term might be used elsewhere in the UCMJ that
19 conflicts with its use here in 120.

20 So that -- I would want something
21 more clear in that situation. I think it's
22 good that the code covers that activity,

1 though, and covers it with some language.
2 That just wouldn't be the preferred language
3 in my mind, just the term "bodily harm."

4 The persons in authority, which
5 you all have discussed and is obviously a
6 difficult concept in the military, which seems
7 to fit not exactly in the corrections world,
8 in the employment world, but somewhere in
9 between. And then affirmative consent would
10 be another area that you might want to examine
11 to see if -- should we require some
12 affirmative consent, either by words or by
13 actions, to establish that consent was given
14 in these situations.

15 So some of the language and some
16 of those provisions would be the areas that I
17 think I might focus on, because it is pretty
18 comprehensive and it does cover a lot of
19 things.

20 CHAIR HOLTZMAN: Okay. Mr. Stone,
21 if you had a quick question, because we --

22 MR. STONE: Yes. I have a quick

1 question, which I'd just preface by saying
2 that I agree with the Professor that we have
3 to get rid of -- it would help tremendously to
4 get rid of ambiguity. That's part of the
5 reason we're hearing this panel, and Congress
6 is doing what it's doing.

7 And so I don't -- I think to the
8 extent that we further meet and discuss these
9 things, what would really be helpful to me is
10 if any of the people who have testified here
11 today on the panel, live or by phone, could
12 possibly within, say, 21 days give us their
13 markup, their personal markup, of UCMJ 120.
14 And whether that -- they strike out three
15 words and change it, or they rewrite the whole
16 thing, is totally up to them, but I don't want
17 to just discuss; I want to see physically from
18 your perspective what you would do in our
19 context. That would help me tremendously as
20 we try and figure out where we go forward.

21 And so I would invite you, and I
22 would love to receive something in maybe three

1 weeks. Just mark it up and send it in, and
2 then if we have questions we'll be able to get
3 back to you. If we don't -- I think a lot of
4 it will be obvious to us, but, if it's not,
5 then we have something to discuss.

6 CHAIR HOLTZMAN: So we will take
7 more than a markup or other than a markup. If
8 you want to send a paragraph or something
9 else, we'll take that as well. We very much
10 appreciate it.

11 I think our time has expired now
12 for this, so I just want to say thank you to
13 all of the members of the panel for your very
14 informative testimony. And we look forward to
15 your help. The panel is going to need a lot
16 of your help as we go forward.

17 Thanks so much. We'll take a
18 five-minute break. Thank you.

19 (Whereupon, the above-entitled
20 matter went off the record at 2:32 p.m. and
21 resumed at 2:47 p.m.)

22 CHAIR HOLTZMAN: We have a very

1 distinguished panel, one repeat offender.
2 Well, actually, two repeat offenders, if we
3 consider the response panel. Mr. Dwight
4 Sullivan, again, the Office of General
5 Counsel; Mr. William Cassara, attorney at law,
6 Augusta, Georgia, and former member of the
7 Victim Services Subcommittee of the response
8 panel on sexual assault in military; Captain
9 Christian Reismeier -- did I pronounce that
10 correctly, sir?

11 CAPT REISMEIER: It's Reismeier.

12 CHAIR HOLTZMAN: Reismeier, sorry.

13 CAPT REISMEIER: Much closer than
14 most people get, so thank you.

15 CHAIR HOLTZMAN: Well, that's
16 still not 100 percent. And Colonel Timothy
17 Grammel of the United States Army, retired;
18 and Colonel Gary Jackson of the U.S. Air
19 Force. They will be addressing the evolution
20 of Article 120 of the UCMJ, and we're very
21 grateful for your attendance here and for the
22 help that you're going to give us in

1 understanding this problem. And I hope you
2 will also address any thoughts you have about
3 the current iteration of Article 120 and what
4 we may be doing about it, and how we can make
5 it better.

6 Okay. Mr. Sullivan, we'll start
7 with you. The first victim.

8 MR. SULLIVAN: That's right. But
9 I can start by tracing the development of the
10 current Article 120 and then looking at the
11 current -- 120 -- and then looking at the
12 current Article 120 framework.

13 So if we go back to the origin of
14 the UCMJ in 1950, originally Article 120 was
15 a 110-word statute that covered both rape and
16 carnal knowledge. And once like those
17 antiquated statutes that Ms. Tracy described
18 in her testimony, rape was defined as, quote,
19 an act of sexual intercourse with a female,
20 not the person's wife, by force and without
21 her consent. And death was an authorized
22 sentence for rape.

1 Now, there were other UCMJ
2 provisions that covered other sex offenses
3 other than what we just described. So, for
4 example, Article 125 was a prohibition against
5 sodomy, including forcible sodomy, and the
6 term sodomy was construed much more broadly
7 than at common law, to also include not only
8 anal intercourse, but also fellatio and
9 cunnilingus. And then sometimes sexual
10 assaults would also be charged under Article
11 128, which covers assault and battery, and
12 then also would be charged as attempts.

13 Now, this morning we discussed the
14 general article and we discussed how the
15 president has identified certain offenses
16 under the general article. Well, reaching
17 back to the 1951 Manual for Courts-Martial,
18 there were also certain Article 134 offenses
19 that were defined in this area, including
20 assault with the intent to commit rape, and
21 indecent acts with a child under the age of 16
22 years were two of several designated Article

1 134 offenses in the 1951 manual.

2 Now, since that time, Article 120
3 has been amended six times, and we'll look at
4 each of those amendments. So in 1956,
5 Congress codified the UCMJ into Title 10.
6 There were then certain non-substantive
7 changes in the wording as part of that
8 revision.

9 The first substantive amendment to
10 Article 120 was made in 1992, when Congress
11 eliminated the marital exception for rape, and
12 they also made it gender neutral. But it's
13 still defined as only sexual intercourse
14 involving a man and a woman until after 1992.
15 Before 1992, a woman couldn't rape a man.
16 After 1992, a woman could rape a man, but
17 still it was limited to a situation where it
18 was between a man and a woman.

19 As I mentioned, the original
20 Article 120 covered carnal knowledge, which is
21 the military offense of statutory rape. In
22 1996, Congress made certain amendments to

1 Article 120, but they were limited to that
2 carnal knowledge portion of the statute. And
3 then in 2006, Congress substantially rewrote
4 Article 120, entirely rewrote it. In 2011,
5 Congress did so again. And then in 2013, they
6 corrected a typo, literally deleted a period,
7 an extraneous period. So I'm going to ignore
8 the 2013 change for the rest of my remarks and
9 focus on the other ones.

10 It is also important to note that,
11 throughout the history of the UCMJ, there's
12 been no statute of limitations for rape, and
13 no statute of limitations for rape of a child,
14 which means that a court-martial tomorrow
15 could apply any one of three versions of
16 Article 120, depending on when the date the
17 offense was, since we never get too old in
18 this scenario because of the lack of a statute
19 of limitations. So there are three versions
20 that are really in effect today.

21 So let's start by looking at the
22 2006 amendment. So in the National Defense

1 Authorization Act for Fiscal Year 2005,
2 Congress required the Secretary of Defense to
3 review both the UCMJ and the Manual for
4 Courts-Martial provisions regarding sexual
5 assault. And then a Joint Service Committee
6 subcommittee of which Colonel Jackson was a
7 member produced an 809 page report that
8 presented Congress with six options. At
9 first, DoD said, don't change it, don't change
10 it, but if you do change it we recommend
11 option five, which was a modified version of
12 the 18 U.S.C. statutes that were in place at
13 the time.

14 And then in the National Defense
15 Authorization Act for Fiscal Year 2006,
16 Congress did amend Article 120, and the
17 amendment was almost identical to option five.
18 There were certain differences. Particularly,
19 Congress chose not to enact certain provisions
20 that dealt with people under the control,
21 having sexual intercourse with somebody who
22 exercised control over them. But with minor

1 exceptions, Congress enacted what was option
2 five. And at that point, Article 120 became
3 a 2,830-word article that addressed 14
4 different sexual offenses, only one of which
5 retained a consent element. There's a listing
6 of the 14 offenses.

7 A rape conviction could be based
8 on any of five different theories of
9 liability, and these theories of liability are
10 similar to, though not exactly identical, to
11 those in the 2011 amendments that are in force
12 today. So I'll quickly run through those
13 five, but we'll look at these again when we
14 get to the 2011 amendments.

15 So use of force against the
16 victim, causing grievous bodily injury to any
17 person. So you can cause a rape to someone by
18 causing grievous bodily injury to someone
19 else. So, you know, I might assault someone's
20 child as a means of making them having sex
21 with me. That would fall within the
22 definition. Threatening or placing the victim

1 in fear that any person, again not limited to
2 the victim, but any person would be subjected
3 to death, grievous bodily harm, or kidnapping.
4 Rendering another person unconscious,
5 administering them, basically, a date rape
6 drug without that person's knowledge or
7 consent.

8 So the 2006 amendment applies to
9 acts that occurred from the 1st of October,
10 2007 through June 27th, 2012, when the current
11 version took effect for offenses that occurred
12 on or after June 28, 2012.

13 Now, soon after the 2006 amendment
14 was adopted, several trial judges declared
15 portions of it to be unconstitutional. And
16 one Air Force judge, Colonel Don Christensen,
17 who went on to become the chief prosecutor of
18 the Air Force and, in effect, was the
19 prosecutor, he personally prosecuted the
20 Lieutenant Colonel Wilkerson case, when he was
21 a trial judge, he said Article 120 on its face
22 is almost incomprehensible and is probably the

1 most poorly-drafted and poorly-enacted article
2 in the UCMJ probably in the history of the
3 UCMJ.

4 And so in 2010, the Supreme Court
5 finally addressed the constitutionality of the
6 burden shift in a forcible sexual assault
7 case. So let me just very quickly describe
8 the burden shift. So under the 2006 language,
9 the consent was taken away as an element in
10 rape and sexual assault. So the government
11 did not have to prove lack of consent.

12 However, it was still recognized
13 as an affirmative defense if the defense could
14 establish that there was consent. So it was
15 no longer did the government have to prove
16 lack of consent, but the defense could raise
17 the defense of lack of consent. And if they
18 raised sufficient evidence, then the burden
19 would shift back to the government to disprove
20 consent beyond a reasonable doubt. So you had
21 what was called at the time a double burden
22 shift.

1 And so the argument in Neal was
2 that double burden shift was unconstitutional
3 in a forced context, and CAAF said no. They
4 said no 3-2. But one thing is interesting.
5 Note the statute took effect in 2007. It
6 wasn't until 2010 that we got that no. In the
7 meantime, a number of prosecutions were placed
8 on hold because of these trial judges'
9 rulings, and there was considerable delay
10 throughout the system to get to that no.

11 And so one important thing that
12 the 2006 amendment serves as is an object
13 lesson in sort of the dangers of post-
14 statutory rewriting, because you have all
15 these problems, when before we had this
16 statute that certainly was antiquated in many
17 ways, but common law had pretty much had it
18 operating in a manner, judicial decisions had
19 it operating in a manner sort of consistent
20 with what Congress intended by the rewrite
21 but, yet, it produced a number of questions.

22 And then in 2011, the Court of

1 Appeals for the Armed Forces did hold a
2 portion of the statute unconstitutional. In
3 the case of the United States v. Prather, CAAF
4 held that the burden shift was an
5 impermissible, the consent burden shift was an
6 unconstitutional burden shift in a substantial
7 incapacity case.

8 So a number of Article 120 cases
9 deal with incidents in which the theory is
10 that the victim was too intoxicated to
11 consent, and they said that, well, in a forced
12 context, it wasn't unconstitutional. In a
13 substantial incapacity context, it was. And
14 the court also said that the burden shift of
15 initially allocating the defense the burden of
16 showing consent and then shifting to the
17 government the burden of disproving consent
18 beyond a reasonable doubt was a legal
19 impossibility. And two dissenters said it was
20 more than a legal impossibility, it was
21 unconstitutional.

22 So you had those decisions come

1 out. And then also, again continuing with the
2 cautionary tale, in 2012, the Navy-Marine
3 Corps Court came out with a case called United
4 States v. Valentin in which they held that the
5 2006 amendments had done away with the
6 parental compulsion theory of rape. So before
7 the 2006 amendments, a parental compulsion
8 theory -- so you could rape, there could be a
9 rape conviction based on the parent compelling
10 the child to do it without the use of actual
11 force. That had been recognized by case law.

12 But in the Valentin case, the
13 court said that had been extinguished by the
14 plain wording. Now, I don't think anyone
15 thinks that Congress meant to extinguish it.
16 It's just they didn't include that within the
17 recognized theories. And so it's *inclusio est*
18 *exclusio alterius* concept, you know, when you
19 mention the one you don't mention the other,
20 you've excluded the other. So, again, a
21 cautionary tale in rewriting the statute that
22 not all of the common law gloss is brought in

1 with the statute. Sometimes you lose part of
2 that, as was demonstrated by the Valentin
3 case.

4 So as a result of the problems
5 with the 2006 amendments, Congress rewrote the
6 statute again as part of the National Defense
7 Authorization Act for Fiscal Year 2012, which
8 was passed on the last day of December of
9 2011. And that became effective, as we saw,
10 June 28, 2012. This is the version that
11 continues to be in effect today. And this
12 amendment, it made ten statutes, about ten
13 criminal offenses that were spread out over
14 three separate statutes: a rewritten version
15 of Article 120 covering rape and sexual
16 assault, and then a new Article 120(b) which
17 covered offenses against minors, and then a
18 new Article 120 which covered other sexual
19 offenses, and we'll look at those in turn.

20 So the revised Article 120 covers
21 rape, sexual assault, aggravated sexual
22 assault, and abusive sexual contact. The new

1 Article 120(b) covers rape of a child, sexual
2 assault of a child, and sexual abuse of a
3 child. And the new Article 120 covers
4 voyeurism, video voyeurism, forcible
5 pandering, and indecent exposure. It
6 eliminated the burden shift. And, as I
7 mentioned, it used to be the case that rape
8 was a death penalty offense. It eliminated
9 death as a punishment for either rape, or rape
10 of a child.

11 So Article 120, it recognizes four
12 offenses. So, essentially, it took two
13 dichotomies and, through mixing and matching
14 those, you decide which four offenses they
15 are. So you begin by saying is this sexual
16 contact penetrative or non-penetrative? If
17 it's penetrative, it's in the most serious
18 bin. If it's not penetrative, it's in the
19 less serious bin. Then we look at what were
20 the means by which the person got the victim
21 to engage in that conduct? Is it the most
22 serious bin or the less serious bin? And then

1 we mix and match those.

2 So rape is penetration by the most
3 serious means. Sexual assault is non-
4 penetration by the most serious means.

5 Aggravated sexual contact is non-penetration
6 by the most serious means. Abusive sexual
7 contact is non-penetration by the less serious
8 means. So that's how we get these four, by
9 mixing and matching penetration versus non-
10 penetration, and the most serious means versus
11 the less serious means. And so we'll look at
12 those in turn.

13 So rape is defined as the
14 penetration of the vulva, anus, or mouth. And
15 then we have a dichotomy, either by the penis,
16 in which case there is no further specific
17 intent element. It's official without any
18 state of mind to satisfy that element, just a
19 penetration of the vulva, anus, or mouth,
20 although you still have to prove the means.
21 So that's one way that you can have the
22 conduct, or penetration of the vulva, anus, or

1 mouth by any part of another person's body or
2 any object. So, essentially, anything other
3 than the penis, with either the intent to
4 abuse, humiliate, harass, or degrade any
5 person, or to arouse or gratify the sexual
6 desire of any person, and then accomplished
7 through one of five means.

8 And so let's look at those means.
9 First, the use of unlawful force against the
10 victim. Second, the use of force causing or
11 likely to cause grievous bodily injury to any
12 person. Again, the victim versus any person
13 difference there. Threatening or placing the
14 victim in fear that any person would be
15 subjected to death, grievous bodily harm, or
16 kidnapping; rendering the victim unconscious
17 or, again, administering to them something
18 that will overcome their ability to control
19 their conduct without the person's knowledge
20 or consent.

21 Okay. So sexual assault then is
22 defined as the penetration of the vulva, anus,

1 or mouth by penis, or penetration of the
2 vulva, anus, or mouth by any part of the
3 person's body accomplished through one of
4 seven theories of liabilities.

5 And so let's look at those seven
6 theories of liabilities. Threatening or
7 placing the victim in fear; causing bodily
8 harm to the victim; making a fraudulent
9 representation that the sex act serves a
10 professional purpose; inducing a belief that
11 the perpetrator is another person; if the
12 victim is asleep, unconscious, or otherwise
13 unaware the sexual act is occurring; the
14 victim is incapable of consenting due to
15 impairment by any drug, intoxicant, or similar
16 subject; and then, finally, the victim is
17 incapable, due to a mental disease or defect,
18 of truly consenting.

19 All right. And then there are two
20 sexual contact offenses: aggravated sexual
21 contact and abusive sexual contact. So that
22 depends upon both sexual contact of the non-

1 penetrative nature, plus one of the forbidden
2 means of perpetration. So the more serious
3 means of perpetration, the one that aligns
4 with rape is the aggravated sexual contact,
5 and the less serious that which aligns with
6 sexual assault is abusive sexual contact.

7 And sexual contact is defined as
8 touching or causing another person to touch
9 either directly or through the clothing the
10 genitalia, anus, the groin, breast, inner
11 thigh, or buttocks of any person with the
12 intent to abuse, humiliate, or degrade, or the
13 touching of any body part if done with the
14 intent to gratify the sexual desires of any
15 person. And that, by the way, that any body
16 part is a broader definition than had been
17 used in 2006, so Congress made this more
18 extensive in 2011 than they had in 2006. And
19 then we mentioned that the sexual contact plus
20 one of those forbidden theories of liability
21 coming from either rape or sexual assault.

22 The president, as we mentioned

1 this morning, it's the president who
2 prescribes the maximum punishments for
3 offenses. And in 2013, the president
4 prescribed the maximum offenses for the new
5 Articles 120, 120(b) and 120 by executive
6 order. And so the maximum punishment for rape
7 is dishonorable discharge, forfeiture of all
8 pay and allowances, and confinement for life
9 without eligibility for parole; for sexual
10 assault, confinement for 30 years; for
11 aggravated sexual contact, confinement for 20
12 years; and for abusive sexual contact,
13 confinement for seven years.

14 Now, in addition to that, Congress
15 also has created a mandatory minimum of
16 dishonorable discharge for offenses that occur
17 on or after June 24th, 2014. So for a
18 penetrative sexual offense, including not only
19 those that we've just examined, but also
20 forcible sodomy, or an attempt to commit any
21 of those, if the accused is found guilty, the
22 sentence for an enlisted member must include

1 a dishonorable discharge, the sentence for an
2 officer must include a dismissal. While it's
3 possible, in some instances, for the convening
4 authority to reduce a dishonorable discharge
5 to a bad conduct discharge, the convening
6 authority does not have the unilateral
7 discretion to reduce an officer's sentence to
8 a dismissal.

9 So in other words, Congress's
10 intent was there will always be an approved
11 punitive discharge for one of those
12 penetrative sexual offenses, or an attempt to
13 commit one of those offenses.

14 And, finally, one of the things
15 that's included in the Manual for Courts-
16 Martial for the various offenses are model
17 specifications, definitions, elements of the
18 offense. The Joint Service Committee has
19 recommended those for the new Article 120 and
20 120(b) and 120 . Those have been published in
21 the Federal Register, but the president has
22 not yet promulgated those by executive order.

1 So that's everything I have. I'll be happy to
2 take any questions.

3 CHAIR HOLTZMAN: Thank you, Mr.
4 Sullivan. Captain Reismeier, sir?

5 CAPT REISMEIER: Yes, ma'am.
6 Thank you, Madam Chair and panel members.
7 Just briefly, by way of background, I'm
8 currently the Chief Judge of the Navy, so I
9 supervise both the trial judges and the
10 appellate judges. I say that because, to some
11 extent, even though I'm not a sitting judge,
12 I'm still in the judiciary, so some of my
13 comments and perhaps recommendations are
14 somewhat constrained by the judicial canons.

15 But with that said, a couple of
16 opening remarks here. I've spent my entire
17 career in the world of criminal litigation and
18 military justice. So I came in as a trial
19 lawyer, and pretty much never left it. I've
20 never been a staff judge advocate. All of my
21 time has been spent simply doing criminal
22 work.

1 The overwhelming majority of my
2 experience is with the pre-2006 version of
3 Article 120, because I left the trial bench in
4 2006. So by the time the versions that have
5 come out that have proven to be a bit more
6 problematic, I was dealing with them at the
7 appellate level or in the criminal policy
8 realm in one of my jobs.

9 So with that as sort of a
10 background regarding my view of this, I can
11 say that, prior to any of these major
12 statutory revisions, Article 120, I never
13 encountered a case that could not be tried
14 effectively under the old Article 120. From
15 a purely litigation point of view, I'm not
16 sure that I could agree -- again, this is only
17 from a purely litigation point of view -- that
18 I can agree that there is any reason to alter
19 what had worked for decades. Despite the
20 rather antiquated language of the statute, it
21 worked quite well.

22 As Mr. Sullivan indicated, the

1 case law that has developed created a judicial
2 gloss that permitted prosecutors to reach any
3 misconduct that had been alleged, permitted
4 defense counsel to defend, with notice that
5 had been developed through decades of common
6 law, any charge that was alleged, and it also
7 permitted judges to thoughtfully instruct
8 based on that same history of case law
9 development. The case law provided
10 incremental change that kept pace with the
11 evolution of practice and criminal theories.

12 A lot has changed over the last
13 eight years. The first major changes in 2006
14 created incredible uncertainty, years of
15 appellate litigation, unconstitutional
16 applications, and cases that were salvaged
17 only by trial judges who did not follow the
18 language of the statute.

19 The second major changes in 2011
20 addressed many of the legal problems that
21 arose from the 2006 amendments, but the
22 landscape remains complicated and unsettled,

1 with overlapping theories in some instances,
2 gaps in some applications, and, from the
3 perspective of some trial practitioners,
4 applications that are, in some instances, both
5 more broad and less broad that may be required
6 or anticipated.

7 Compounding the changes in the
8 substantive criminal law or the changes in the
9 way that the appellate courts have addressed
10 lesser included offenses, that is offenses
11 which are included within the offense charged
12 but not specifically listed on the charge
13 sheet, those changes may have made it
14 impossible to return to the charging schemes
15 that existed prior to 2006 under Article 120,
16 because what were once lesser included
17 offenses may not be lesser included offenses
18 under the existing interpretations by the
19 appellate courts.

20 But even if turning the clock back
21 is not possible, one thing was clear under the
22 old charging regime: everyone knew what the

1 theory of liability was, and charging was
2 clear and uncomplicated. As this review moves
3 forward, it would be useful to know why the
4 older version of Article 120 worked, how
5 exactly the case law provided a workable
6 series of criminal theories under which cases
7 to be tried, what changes would have to have
8 occurred to the statute because of the
9 developing case law addressing notice pleading
10 and lesser included offenses.

11 And then consider how that older
12 version, as modified, would compare with
13 today's statute, not just in terms of the
14 wording of the statute, but in terms of how
15 the practitioners and juries actually function
16 relative to the statute.

17 These changes to Article 120 and
18 the evolution of the appellate case law and
19 addressing the relationship between offenses
20 has created something that is an anathema of
21 criminal law: uncertainty. The uncertainty
22 arises first in the charging decisions as

1 prosecutors struggle to determine what is and
2 what is not a lesser included offense in the
3 charged offense.

4 They struggle to determine which
5 statutory period of liability most closely
6 matches their assumed facts. That forces
7 prosecutors to charge various theories of
8 liabilities for the same criminal misconduct
9 to reach a sustainable conviction. That, in
10 turn, forces defense counsel to face charge
11 sheets that appear to allege more crime than
12 allegedly occurred.

13 Trial judges are forced to
14 determine whether and how the charges can be
15 combined, how to instruct the juries, and what
16 to do when juries return verdicts on charges
17 that are clearly related or potentially
18 contradictory. Ultimately, years later, an
19 appellate court is forced to determine whether
20 the conviction can stand. And only then, once
21 a case is decided on appeal, the result in
22 applications have to be translated back via

1 common law to practitioners who have to
2 determine if their facts match those that gave
3 rise to the emerging landscape.

4 Cases that in years past would
5 have been fairly simple to resolve are now
6 science projects for everyone involved,
7 consuming vast resources and considerable
8 time. Criminal practitioners benefit from
9 predictability. They need to know that what
10 they are doing today will be sustainable under
11 case law that will be created tomorrow.

12 While the law naturally evolves
13 and naturally creates new rules and
14 requirements, layers of statutory changes
15 inserted into a body of law that is still
16 developing in trial and appellate courts is,
17 as one person put it to me, akin to building
18 a plane while flying it.

19 Now, I'm not advocating change or
20 stasis. I'm merely noting that when change
21 occurs in substantive criminal law, those
22 changes necessarily give rise to changes in

1 processes and applications. And when the
2 substantive criminal law continues to change
3 while appellate courts are still creating a
4 body of law to address the last changes, the
5 system will naturally be unpredictable. Some
6 change is good. Some may be required. But
7 before changes are offered, it may be worth
8 considering if it's truly needed, or if the
9 change is being driven by a short-term
10 problem, or an aberrant result that could just
11 have easily been resolved by the evolution of
12 jury instructions, case law, and practice.

13 Speaking with trial practitioners,
14 at least within the Navy, there's a sense from
15 prosecutors that they would prefer some
16 relative stability and the ability to work
17 through the existing statute to find
18 applications that work without, again,
19 altering the fundamentals of the statute.
20 Defense counsel would generally prefer some
21 greater clarity in some of the definitions and
22 perhaps some narrowing of the scope of some of

1 the provisions that they believe reach conduct
2 that may be better considered as hazing or
3 battery. Judges would prefer to practice in
4 a stable system and be able to develop
5 instructions based on case law that find
6 logical, legal, and sound applications
7 grounded in common law.

8 Appellate judges will continue to
9 work through the cases as they find them, but
10 they note that the existing landscape has
11 created a need to resolve more legal issues
12 that existed before any of the changes were
13 enacted, and they struggle to find touchstones
14 and precedent that has been uprooted from the
15 cases that guided us prior to 2006.

16 As decision-makers work through
17 this project, it would be useful to consider
18 the best source for change. Change is brought
19 about by the evolution of common law as slow,
20 steady, and predictable. Changes brought
21 about by statute or rule are instantaneous and
22 create a demand for more common law to develop

1 the gloss of judicial precedent that informs
2 trial practitioners. The task may be to
3 determine what truly requires statutory change
4 because it's the only way to fix the problem,
5 determine what requires time for the system to
6 reach a new equilibrium that will naturally
7 solve the problem, or, ultimately, establish
8 that there is no problem to fix in the first
9 place. With that, I look forward to talking
10 with you today.

11 CHAIR HOLTZMAN: Thank you very
12 much, Captain. Mr. Cassara?

13 MR. CASSARA: Good morning,
14 Congressman Holtzman, Judge Jones. It's a
15 pleasure to see both of you again. Madam
16 Chair, as you were making your comments, you
17 talked about the very distinguished panel, and
18 then there's me. I've actually tried cases in
19 front of all three of these gentlemen at one
20 time in my history.

21 Let me just tell you a little bit
22 about myself so you will know what my

1 perspective is. My name is William, or Bill,
2 Cassara. I am a civilian attorney in Augusta,
3 Georgia with a law practice dedicated to
4 representing service members in court-
5 martials, appeals of court-martials, and other
6 military-related matters.

7 I served six years in the United
8 States Army as Judge Advocate General Corps on
9 active duty, 16 years in the JAG Corps
10 Reserve, retiring about four years ago. And
11 I got to meet both of these distinguished
12 women when I was on the response systems panel
13 for approximately one year.

14 I say this with no inhibition when
15 I tell you that I'm an unabashed defense hack.
16 So I want you to know that that is what my
17 perspective is. My job is to represent
18 service members who are accused of crimes or
19 who have been convicted of crimes. Therefore,
20 you will hear me use the terms "alleged
21 victim" and "alleged perpetrator," and I mean
22 no disrespect by that. But, respectfully, I

1 am the person who gets a call from a family
2 member after they believe that one of their
3 loved ones has been wrongly convicted of a
4 sexual crime, and has been sentenced to
5 confinement in Fort Leavenworth. It is my job
6 to try and get them out of that confinement.

7 My perspective is exactly that. I
8 don't come with stats, statistics, charts. I
9 have empirical data from the service members
10 that I have represented over the years. I'm
11 not here to argue the history of Article 120
12 and where we are, although I will say that I
13 agree firmly with Captain Reismeier's
14 conclusion that we operated very well until
15 six years ago. But that's gone.

16 My concern is simply that the
17 pendulum has now swung too far, that we are
18 putting people on a sex offender registry and
19 convicting people in cases that we never would
20 have done years ago. To date, I have seen two
21 changes in the Uniform Code of Military
22 Justice that cause me great concern. And,

1 again, I'm not here to argue history, but I
2 would like to do this just to sort of give you
3 a framework of where I'm looking at this.

4 One is in the evolution of Article
5 32 investigations. I have had two cases in
6 the last year in which prosecutors came to me
7 and said, quote, we want to kill this case at
8 the Article 32. These were sexual assault
9 allegations, one of which involved four people
10 -- you can use your imagination as to what
11 happened -- three of whom said that the sexual
12 contact between my client and the alleged
13 victim was completely consensual.

14 One of those people was the
15 alleged victim's husband. My client was still
16 charged with a crime of sexual assault and
17 faced an uncertain future until the case was,
18 quote, killed, unquote, at the Article 32
19 hearing.

20 I did another case in which a
21 first sergeant was alleged to have sexually
22 assaulted one of his soldiers. I'm not here

1 to defend a first sergeant having sex with one
2 of his troops. It should not happen, and he
3 should have been punished. But there were two
4 eyewitnesses to the sexual act between the two
5 of them who testified at the Article 32
6 hearing that the sexual contact was completely
7 consensual. Again, the prosecutor's desire
8 was to, quote, kill that case at the Article
9 32 investigation. Under the new Article 32,
10 I do not believe that will happen.

11 My other concern is with the
12 mandatory minimums that have passed. I have
13 great concern about this in two areas. One is
14 I think it discourages plea bargains. It's
15 hard enough to get a service member to plead
16 guilty when they know they're going to be
17 placed on a sex offender registry. It is even
18 harder when they know that they will face a
19 mandatory dismissal or dishonorable discharge.

20 Two, I am very concerned, as I
21 deal with a lot of service members who come
22 back from war with severe traumatic brain

1 injuries and post-traumatic stress disorder
2 that might not arise to the level of a legal
3 defense at court-martial, but would be taken
4 into consideration as a matter of mitigation.
5 I am now concerned that their families will be
6 deprived of their retirement, because they
7 will be faced with a mandatory dismissal or
8 dishonorable discharge.

9 I'm not so naive as to think that
10 none of my clients are guilty, although they
11 will all say so. I'm also not so naive as to
12 think that all of my clients are guilty. So
13 I'd like to point out to you some of my
14 concerns about the new Article 120 and its
15 one-size-fits-all approach.

16 My biggest concern is with the sex
17 offender registration requirements. I am
18 seeing clients go to court-martial where, if
19 convicted, they will be placed on the sex
20 offender registry, in cases that I do not
21 believe anybody envisioned would be the end
22 result. And I will give you a couple of quick

1 examples. I represented a soldier this week
2 who one of the charges against him was that he
3 took a video of himself -- you can use your
4 imaginations as to what that video consisted
5 of -- and jokingly showed it to a couple of
6 his fellow soldiers in a supply area. Had my
7 client been convicted, he would have been
8 placed on the sex offender registry.
9 Fortunately, he was acquitted.

10 I have had cases in which a
11 drunken slap on the backside of a female has
12 been charged as an aggravated or as a sexual
13 assault, an aggravated sexual assault, in
14 using the language that Mr. Sullivan just
15 pointed out, under the touching any body part
16 of a person with the intent to arouse or
17 gratify the sexual desires. Respectfully, I
18 don't know what Congress's full intent was, or
19 what the state's intent is with regards to sex
20 offender registrations. I don't think it is
21 to put that individual on the sex offender
22 registry. And I have seen one case recently

1 in which my client was charged with a sexual
2 assault for kissing a woman against her will
3 to gratify his lust and sexual desires. That
4 is my biggest concern with the new Article
5 120. It's not my only concern.

6 We talked earlier, I heard some of
7 the panel members discussing the issue of
8 intoxication as it relates to sexual assault
9 allegations. Intoxication plays a role in
10 probably 80 to 90 percent of the sexual
11 assault cases that I do. It has become
12 literally a rush to the police, whether it be
13 a male and a female, two males, or two
14 females, as to who can get to the CID, OSI, or
15 NIS office first and file the complaint of
16 sexual assault after a night of drinking and
17 a lack of memory. It is not victim blaming to
18 point these issues out.

19 In the case that I did last week,
20 another one of my clients was also charged
21 with a sexual assault. Again, he was
22 acquitted, but he was charged three different

1 ways under three alternate theories as to the
2 sexual assault allegation. That has created
3 mass confusion amongst panels, and even
4 amongst military judges.

5 One other comment about the new
6 Article 120 that was discussed earlier, the
7 issue of supervisor-subordinate relationships.
8 And I just wanted to clarify one thing for the
9 panel. I think the most common scenarios that
10 we are talking about that in a military
11 environment are in drill sergeant or drill
12 instructors and trainees, and commanders and
13 their soldiers.

14 This consensual activity between a
15 commander and his or her soldier and between
16 a drill sergeant and his or her trainee is a
17 crime in the military. It is already punished
18 under the Uniform Code of Military Justice.
19 I do not believe that we should criminalize
20 consensual sexual conduct between drill
21 sergeants and trainees or between commanders
22 and their soldiers.

1 I can tell you from -- I live very
2 close to Fort Jackson, South Carolina, which
3 is an Army training base. I have handled
4 numerous cases in which drill sergeants have
5 had sex with their trainees, one of which
6 involved several trainees rolling dice to see
7 who would be the first one to sleep with the
8 drill sergeant. I'm not saying that that
9 drill sergeant should not be prosecuted for
10 having sex with a trainee. I am saying he
11 should not be prosecuted under Article 120 of
12 the UCMJ.

13 I believe that any discussion of
14 the revisions to the Uniform Code of Military
15 Justice and Article 120 need to also consider
16 the pressure that military panels and, to some
17 smaller degree, military judges feel in this
18 area. I think it would be completely naive to
19 think that panel members do not feel an
20 increased pressure to, quote, support the
21 command and render convictions in these cases.

22 Years ago, at least in my practice

1 and I think most defense practitioners would
2 tell you the same thing, if you had an Article
3 120 case, it was an automatic panel case. It
4 has almost become the opposite way. I had a
5 military judge tell me recently, a former
6 military judge, that military judges are the
7 last bastion against the pressure that many in
8 the military feel in this area.

9 Respectfully, I believe it would
10 be folly to think that, as a result of the
11 recent actions by Congress, all well intended,
12 but I think it would be folly to think that no
13 service member has been wrongfully convicted
14 under Article 120. My practice tells me
15 differently. As you focus on the changes to
16 the Manual for Courts-Martial, I urge you to
17 consider the rights of the accused and their
18 service to our great nation.

19 So I'm often asked, Bill, if you
20 were king for a today -- and I don't get to do
21 this, certainly not at home -- but if I were
22 king for a day, what would I do? I would ask

1 you to consider two changes to the UCMJ. One
2 is -- and they're very closely related, as
3 they both relate to Article 25 of the Uniform
4 Code of Military Justice, as it relates to the
5 selection of panel members for courts-martial.
6 I would ask you to consider recommending the
7 enactment of mandatory -- excuse me -- random
8 panel selection for panel members. As you all
9 know, right now the panel is appointed by the
10 convening authority. This creates the
11 perception, not the reality, that they are
12 there to do the command's work.

13 Secondly, I would ask that you
14 recommend that, in general courts-martial and
15 specifically in sexual assault and Article 120
16 cases, that there be a minimum panel size of
17 12 members, as there is in the civilian world,
18 for a general court-martial, and six members
19 for a special court-martial, as there is in
20 the civilian world. I believe it is an
21 anathema to fundamental fairness to not afford
22 the same protections to our warriors, to those

1 who protect us, as are afforded to the
2 citizens in the private sector.

3 And the other thing I'm asked is,
4 well, what can be done? Madam Chair, you and
5 I spoke about this many times. In my opinion,
6 prevention is the best cure. It is not
7 blaming the victim to admit the reality that
8 it's just a really bad idea to have alcohol-
9 fueled parties in the barracks with 21- and
10 20- and 22-year-old kids.

11 I have a 23-year-old son. I know
12 this will be reported on the record, and he'll
13 probably shoot me for this. But it's a really
14 bad idea to give my son, or any other 23-year-
15 old kid an alcohol-fueled party with members
16 of the opposite sex. If anything, pointing
17 this out is protecting the victims, not
18 demonizing them.

19 Telling someone not to leave the
20 keys in their car in downtown D.C. is not,
21 quote, blaming the victim of an auto theft.
22 It is facing the reality that leaving the keys

1 in your car and the top down on your
2 convertible is just not a really good idea.
3 Having drunken alcohol-fueled parties in the
4 barracks is not a really good idea, and
5 commands are still doing that.

6 So, again, as you consider these
7 changes, please keep in mind the rights and
8 the protections of those who are serving our
9 country. Thank you, Madam Chair.

10 CHAIR HOLTZMAN: Thank you very
11 much, Mr. Cassara. Colonel Timothy Grammel.

12 COL GRAMMEL: Madam Chair and
13 members of the panel, good afternoon and thank
14 you for letting me speak today. I'm going to
15 keep my comments short, because I prefer to
16 answer the questions you have, rather than
17 answering the questions I think you might
18 have.

19 I've been a trial judge for the
20 last ten years presiding over courts-martial.
21 I've prepared some notes for my initial
22 comments, but someone would think I Xeroxed

1 Captain Reismeier's notes and, for fear being
2 charged with plagiarism, I'm going to change.
3 I'm just going to comment on some things other
4 people have said, and erase and delete most of
5 what I had prepared.

6 The main concern for trial judges
7 is to properly instruct the jurors on the law.
8 And it's a challenge to take the language that
9 Congress has given us and then to articulate
10 it in ways that the court members will
11 understand so that they can implement the law.

12 As Captain Reismeier said, the
13 pre-2007 statute was workable. As a trial
14 judge, I call it, you know, 2007 - 2012,
15 because the special date for us is when does
16 the new one take effect, because we always
17 have to check that with charge sheets, to know
18 which statute we're going to use during a
19 particular trial or which statutes in a
20 particular trial.

21 Codifying the statute was good.
22 It was good because it notifies the popular

1 support is or is not criminal. However, the
2 advantage of the old statute was the
3 flexibility they gave the prosecutor. As
4 someone already mentioned, the courts had
5 interpreted that very concise statute in a way
6 that encompassed a lot more, including
7 constructive force. So it included parental
8 compulsion. It included abuse of authority by
9 military authorities. So something that the
10 panel is already looking at was already
11 included within the pre-2007 statute.

12 It gave the advantage to the
13 prosecutor, because the defense was on notice
14 that they needed to prepare for every theory
15 of liability under Article 120. The
16 specification merely said that the accused did
17 rape, and sometimes during trial evidence
18 comes out different than a prosecutor might
19 think it will come out, and there were cases
20 where it was supposed to be all about, perhaps
21 intoxication and, as it turns out, there was
22 enough evidence there for a reasonable fact-

1 finder to determine actually there was force
2 used. So the panel could have been instructed
3 on multiple theories of liability, even under
4 the one specification.

5 I've seen that with the new
6 statute where prosecutors chose their theory
7 of liability, gone into trial, and they don't
8 get an instruction on any theory of liability,
9 because the defense was put on notice only of
10 the one theory.

11 The codification of the rape
12 statute in the 2007 statute was problematic.
13 Several people have already mentioned the
14 issue with burden shifting and the problems
15 that caused. The biggest challenge for the
16 trial judges was how to articulate to the
17 court members the issue of consent and also
18 the affirmative defense of mistake of fact as
19 to consent, how that played in. The structure
20 was extremely cumbersome under Article 120,
21 and it made it very difficult for the trial
22 counsel and the defense counsel and,

1 therefore, for the trial judges to sort out
2 what exactly was in the statute and what was
3 at issue in each case.

4 The current statute is an
5 improvement. There have been a lot of
6 improvements. Obviously, there could be more
7 improvements. It's less cumbersome the way
8 it's structured right now. Certain language
9 was taken out. There was some language in
10 there that served no purpose, but it was
11 confusing to people, and that was deleted.

12 The trial judges have diligently
13 debated how to properly instruct members under
14 the new statute. The biggest challenge is
15 still the issue of evidence of consent and
16 also the affirmative defense of mistake of
17 fact as to consent, and how that plays.

18 The way that many trial judges
19 right now instruct is included in the Military
20 Judges' Benchbook. I think the most current
21 version of that is from late February 2014,
22 and the panel members have that available to

1 you in your materials.

2 Professor Schulhofer mentioned
3 something that is true, and I just want to
4 reiterate that. There is something hidden
5 within the statute that sometimes, because
6 it's hidden, is a detriment to the trial
7 counsel. He was talking about non-consensual
8 sexual intercourse being tried, because of the
9 way bodily harm is defined. It says any
10 sexual act or sexual contact without consent
11 would be bodily harm. So all you need there
12 is you need a sexual act, and then no consent,
13 and it's an offense.

14 There was recently a case that I
15 was presiding over. It was a rape case, and
16 it was contentious. It was an extremely close
17 case, and it was charged as rape by force.
18 And I was prepared to give instruction on the
19 lesser included offense, because I thought the
20 trial counsel would want that under that
21 theory. If they could show the sexual act,
22 you know, and circumstances where there wasn't

1 consent, but they didn't meet the definition
2 of force, then that would have been
3 permissible. But the trial counsel didn't ask
4 for that. I think the reason the trial counsel
5 didn't ask for it, because they couldn't find
6 it because it was buried within the statute
7 and the definition for bodily harm.

8 Defense counsel didn't want it, so
9 it wasn't given. It's the judge's discretion.
10 But, usually, if neither side wants an
11 instruction of lesser included offense, we
12 won't give it.

13 One observation I want to share is
14 that there are great challenges created when
15 a criminal statute has several iterations in
16 a close period of time, especially a criminal
17 statute for which periods of time are alleged
18 within the specification, such as sexual
19 misconduct. Oftentimes, there may be a case
20 where the alleged victim says it happened --
21 there's been real examples of this -- it
22 happened in the middle of the summer of 2012,

1 sometime in June or July of 2012. As I
2 mentioned earlier, there are certain dates
3 stuck in my mind because of when these
4 different statutes took effect. June 28, 2012
5 is the magical date.

6 So you can imagine the challenge
7 for the prosecutor in that case because one
8 statute was one statute was in effect up to 27
9 June, 2012, and the other came into effect
10 after that. And it actually has to be in
11 effect for somebody to be convicted under it.
12 So the judge can create an instruction to
13 present to the members, but it was a great
14 challenge for the prosecutor in that case.

15 As Representative Holtzman
16 mentioned in the last segment, it can drive a
17 prosecutor crazy when you keep changing the
18 criminal statute. I'll say if there are
19 changes that are necessary that need to be
20 made, then they need to be made. But just
21 realize the consequences for the trial
22 practitioners, and minimize the number of

1 changes, if possible.

2 I also echo what the panel had
3 said earlier today about the recommendation
4 that the defense side get their fair share of
5 resources. Fairness is an important component
6 of a healthy military environment, and
7 unfairness, or the perception of unfairness
8 can have a negative impact on good order and
9 discipline. As mentioned earlier, I want to
10 keep the comments brief so, subject to your
11 questions, I'll stop.

12 CHAIR HOLTZMAN: Thank you very
13 much, Colonel. Colonel Gary Jackson.

14 COL JACKSON: Thank you, Ma'am.
15 Thank you all for the opportunity to appear
16 before your panel. I guess I should just
17 start out by saying that these comments are
18 mine and solely mine, and do not reflect the
19 comments of the United States Air Force or the
20 Air Force Judge Advocate General Corps.

21 By way of background, I've been in
22 the Air Force for a little over 30 years, 6

1 years as an enlisted aircraft mechanic, 24
2 years or so as a judge advocate, and I've
3 served in just about every military justice
4 capacity one can serve in the Air Force. I've
5 been a prosecutor. I've been a defense
6 counsel on two occasions. I've been a
7 military trial judge. I've been an appellate
8 military judge in the Air Force Court of
9 Criminal Appeals. I've served as a staff
10 judge advocate on five occasions, two of which
11 as a deployed staff judge advocate, once at
12 wing level and once at numbered Air Force
13 level, and currently the staff judge advocate
14 at Air Force Global Strike Command, advising
15 the commander who has the responsibility for
16 two-thirds of the nuclear triad.

17 I've also had the privilege of
18 serving in the Air Force Military Justice
19 Division, where I was a member of the Joint
20 Service Committee. As you all may be aware,
21 the Joint Service Committee is composed of
22 representatives from all of the services among

1 the DoD, GC, and their charter is to look at
2 UCMJ and the Manual for Court-Martial to
3 examine those, to determine whether or not to
4 make recommendations to the president to make
5 it more effective and more efficient.

6 During that time frame, 2003 to
7 2005 time frame, I was a member of, a working
8 group member of the Joint Service Committee,
9 and I was also a member of a special
10 subcommittee that the JSC created to look at
11 Article 120, and to make recommendations as to
12 whether or not it should be changed.

13 I agree with most of what my
14 colleagues have said about the old Article
15 120. I think it did work perfectly. I'll
16 tell you that my experience with the old
17 Article 120 and the pre-2007 change was as
18 either as a prosecutor, a defense counsel, and
19 as a trial judge. I've had limited experience
20 with the, I guess, second version of Article
21 120, which would be the 1 October, 2007 and 27
22 June, 2012, and that was as an appellate judge

1 in the Air Force Court of Criminal Appeals.

2 I agree with my colleagues that
3 any time that you make changes to a statute,
4 you are creating a learning curve for the
5 practitioners. I also agree with my
6 colleagues, and I think it may have been, Mr.
7 Sullivan that at least touched on this, that
8 we're operating under three versions of
9 Article 120. And it's real difficult for the
10 practitioners, it's real difficult for the
11 judges, and it's real difficult for me, as a
12 staff judge advocate, to advise the general
13 court-martial convening authority that we are
14 actually prescribing what we should be
15 prescribing because, if you get it wrong and
16 jeopardy attaches, then perhaps an accused
17 walks away free.

18 And I will tell you that I've had
19 cases even now, as a general court-martial
20 convening authority, SJA, where the
21 practitioners in the field, they are still
22 getting it right. They are still charging

1 what should be charged, for example, under the
2 first version of Article 120. They're
3 charging either under the second version or
4 the third version. So it gets more -- it just
5 creates more complexity.

6 So how did we get to the 2006
7 change? As you all are probably aware, the
8 NDAA of 20 0-4 requires SECDEF to examine
9 Article 120 and the way that we prescribe
10 sexual assault in the military and, to the
11 extent possible, to bring it more align with
12 18 U.S.C.

13 And so we took about a year --
14 this is the subcommittee. We took about a
15 year to examine Article 120. We looked at all
16 of the state laws, and some state laws or,
17 rather, some states are better are prescribing
18 sexual assault than others. We looked at the
19 Model Penal Code. We looked at 18 U.S.C. We
20 looked at Congresswoman Sanchez's bill, which
21 I think was option three. And we came to the
22 conclusion as a panel that everything that

1 needed to be prescribed we could reach under
2 the old Article 120.

3 We also realized that there was
4 congressional pressure. And if we did not put
5 forth a recommendation to change the then old
6 Article 120, that it was still going to be
7 changed. In essence, Congressman Sanchez's
8 bill was going to pass. And so, as a
9 committee, we opted to go with option five,
10 which is a more beefed-up version of
11 Congresswoman Sanchez's bill.

12 So with that, I'll throw it back
13 to you, and I look forward to your questions.

14 CHAIR HOLTZMAN: Members of the
15 panel, thank you very, very much for your
16 guidance, for your testimony, and for your
17 help. I'll start with Judge Jones.

18 JUDGE JONES: I find everything
19 that you're telling us really interesting, and
20 what I think I would love to have is the
21 opportunity to hear about specific cases that
22 would explain or exemplify exactly what you're

1 talking about in terms of the difficulties,
2 particularly in charging and the lesser
3 offense problem. And maybe what could be done
4 is you could simply cite some to us where we
5 can read the case law because I think I
6 understand what you're talking about, but it's
7 always great to have some case studies to look
8 at.

9 And I don't know that I have any
10 specific questions. Maybe some will come to
11 mind.

12 VADM TRACEY: I think that most of
13 you have indicated that where we are is not
14 very satisfactory from either trial counsel or
15 the trial judge perspective and that every
16 time you change a statute you generate some
17 potential for the kind of conundrum you find
18 yourselves in with people needing to establish
19 case law and the learning curve for all the
20 participants. But we are where we are.

21 What would you suggest is the step
22 that would clean up the current status? If

1 you don't believe that further changes are
2 needed, how do you suggest that the panel
3 would recommend that we move on in order to
4 clarify the situation for the participants or
5 to overcome the challenges that you all are
6 seeing? Is this a matter of training and
7 experience, or are there fixes that you
8 individually or collectively would like to see
9 in Article 120?

10 CAPT REISMEIER: Admiral, I have
11 to answer somewhat carefully again because of
12 my position. But I think I would say this:
13 the least best option is probably having a
14 fourth version of the statute somehow in
15 operation. The reality is that there may be
16 some adjustments that need to be made, but my
17 suggestion would be that the best way to
18 approach that is to figure out what the least
19 disruptive method of that adjustment would be
20 before coming in with a statutory fix.

21 In other words something that
22 could be fixed through case law should be

1 fixed through case law. Something that can be
2 fixed -- I'm using the word fixed, not
3 intending to suggest a value judgment on it,
4 but something that could be, I'll say
5 addressed through case law should be addressed
6 through case law. Something that could be
7 addressed through jury instructions should be
8 addressed through jury instructions.
9 Something that could be addressed through
10 presidential action or drafters' analysis
11 should be done that way.

12 The statutory change is the one
13 that's likely to be the most disruptive and
14 the most difficult to undo if it doesn't work
15 out quite the way that one would hope. And I
16 know that's not a very specific answer to your
17 question, but, again, I go back to something
18 Colonel Grammel mentioned. The beauty of the
19 old statute was that you had certain language
20 that was fixed. You know, it was by force and
21 without consent. The theory of liability was
22 something that left great flexibility, so

1 people could walk in with the specification
2 and look the same, yet have two vastly
3 different cases that were presented. And then
4 members were able to sort through the various
5 theories and come to a conclusion as to guilt
6 or innocence, sometimes based on differing
7 theories, as long as they all got to an
8 answer.

9 Those days are gone. What I think
10 would be useful, again, go back and look at
11 what existed in the case law at the time and
12 then look at what doesn't exist under the
13 statute at this time, one of which is
14 constructive force.

15 You know, we talked and this sort
16 of goes back to the question that Judge Jones
17 posed, which is, you know, when you look at
18 the potential conflicting theories, the
19 problem with the way it's laid out right now
20 is that the battery theory, which arguably is
21 simply penetration without force, just
22 consensual, when prosecutors put that on a

1 charge sheet along with force and the members
2 come back and acquit of the battery version,
3 somebody has to figure out whether they have
4 impeached the verdict as to the force one.
5 There are just plain problems on the face of
6 the statute that anybody actually attempting
7 to use it is going to recognize.

8 So at the end of the day, it goes
9 back to my comment that the solution is not to
10 come up and figure out, as a bunch of lawyers,
11 what do we think the best way in a vacuum
12 would be because of the problems with the
13 statute. It's to look at how this actually
14 works at the jury level and at the level of
15 instructions from the judges before attempting
16 to make any more modifications. I'm just not
17 sure that we're there yet. Maybe in 2017
18 we'll be there, but I'm not sure that's
19 something we'll get to today.

20 VADM TRACEY: Because of a lack of
21 cases to --

22 CAPT REISMEIER: Yes, yes, ma'am.

1 VADM TRACEY: Thank you.

2 MR. CASSARA: Ma'am, I'd like to
3 sort of expound on something that Colonel
4 Grammel said. One of my biggest concerns is
5 with the lack of training being afforded to
6 defense counsel and, to some degree, also to
7 trial counsel. But from the defense counsel
8 perspective, in all of the services we now
9 have special victims prosecutors, we have
10 special victims counsel, and we have defense
11 attorneys. There are no special defense
12 attorneys. There are no -- you know, there's
13 a lot of training that goes in.

14 But the reality of it is that,
15 while there many, many fine lawyers in the
16 United States Army, Air Force, and Marine
17 Corps defense services and I'm honored to try
18 cases with many of them, they are also
19 generally very inexperienced and do not have
20 anywhere near the resources that the
21 prosecution team has. A prosecution team will
22 fly in a special victim prosecutor who has

1 probably tried dozens of sexual assault cases
2 in the last year, the defense attorney may
3 have tried one or two.

4 But I also think that additional
5 training for the prosecution would be helpful,
6 and I point to really two different areas.
7 One is in charging decisions as to whether
8 cases should be charged or referred in the
9 first place. And secondly is in the way that
10 cases are charged, and I would go back to what
11 Captain Reismeier just said. In a case that
12 I was just telling you about where my client
13 was charged with having sexually assaulted
14 another individual in three different ways all
15 within a 30-minute time frame, touching him X,
16 Y, Z, doing X, Y, Z, and the prosecutor
17 charged it under the three different possible
18 theories of liability. So you now have a
19 nine-specification charge sheet in what was
20 one act. I mean, according to everybody who
21 was involved in the case, it was one act.

22 Again, the case was not tried by a

1 panel, but had it been I can't imagine the
2 difficulty of the military judge in drafting
3 instructions for that panel. I can't imagine
4 the difficulty of a panel of even
5 understanding what happens in a case like
6 that.

7 And I think you run into two fears
8 from both sides of the fence. One is does the
9 panel just say we don't have a clue,
10 therefore, we're not going to convict him of
11 anything; or does the panel say we don't have
12 a clue, but he obviously did something wrong
13 so we have to tag him for something? And I
14 really think that, at its root, is a lack of
15 training on both sides of the fence.

16 Again, just because of my personal
17 bias I fully admit to, I am very concerned
18 about the lack of resources for defense
19 counsel in these fairly complex sexual assault
20 cases.

21 COL JACKSON: Hopefully, this is
22 something more than just happy to glad, but I

1 think it would help if we were to bifurcate
2 the penetrating offenses away from the non-
3 penetrating offenses. I don't know whether or
4 not you all have looked at the Manual for
5 Court-Martial and how Article 120 is laid out,
6 but it has, essentially, all the offenses, all
7 the sexual offenses. And this is what
8 practitioners, this is what trial counsel is
9 looking at when they're deciding how best to
10 charge a particular offense.

11 You know, you have one article
12 that talks about rape and sexual assault that
13 involves obviously a sexual act. But then you
14 have the same article talking about abusive
15 sexual conduct, which involves sexual conduct
16 as opposed to a sexual act. And you have to
17 keep running back and forth, back and forth to
18 the particular definitions of sexual act and
19 sexual conduct, trying to apply it to the
20 alleged facts to make a determination whether
21 or not you can prescribe it.

22 I think it would help, personally

1 I think it would help practitioners if you
2 were to bifurcate the non-penetrating offenses
3 out of Article 120 and put it under some other
4 article. That way, I think folks will be more
5 attuned to know that if they're talking about
6 rape as rape is traditionally looked upon, a
7 penetrating offense, they're going to go to
8 that particular article, as opposed to trying
9 to somehow squeeze it into some other type of
10 theory, I guess.

11 COL GRAMMEL: One recommendation
12 for the panel. It sounds like, from hearing
13 your earlier discussions, the process is going
14 to be a longer process anyhow. So this will
15 contribute to this is to let the statute play
16 out the way it is now and see whether Congress
17 agrees with the way the military has
18 interpreted that statute.

19 I think it was clear earlier is
20 prosecutor, defense counsel, and the judge,
21 under the pre-2007 statute, that worked well
22 because it was flexible and covered the areas

1 that needed to be covered. However, as
2 Admiral Tracey said, we're not there anymore,
3 so we're somewhere else.

4 The current statute is better than
5 the last statute. It is better than the 2007
6 to 2012 statute. So there have been
7 improvements made. So we are now where we're
8 at. The judges worked hard and tried to come
9 up with instructions. If you want to know,
10 you know, how does this play out in trial, you
11 can look at the instructions. You know, not
12 every judge does that. Judges have discretion
13 on how they instruct the members. But that's
14 going to give you a very good feeling for
15 what's happening inside the courtrooms.

16 And Congress can look and say,
17 "You know what? That's not what we meant.
18 The judges interpreted our statute wrong," and
19 Congress can correct that by changing the
20 statute and that's clear.

21 The same with the appellate
22 courts. The appellate courts can start to

1 issue opinions in this area, and, if the
2 appellate courts interpret the statute that
3 Congress gave differently than the way
4 Congress wants it, then they can go back and
5 congressionally repeal the case law.

6 So let it play out. Obviously,
7 there are going to be some tweaks. It's clear
8 there are some, whether it's adding another
9 theory of liability or tightening up what some
10 of the other witnesses had talked about. I
11 think there are tweaks that can be made
12 without a comprehensive change to the whole
13 scheme. I don't think the scheme is so broken
14 right now that we need to throw it all out and
15 come up with something totally different and
16 really drive all the trial practitioners
17 crazy. I think you can tweak it without doing
18 that.

19 JUDGE JONES: Any suggestions for
20 tweaking would be greatly appreciated.

21 MR. STONE: I've been listening,
22 and I have a background that involves being

1 involved in a wholesale change which did not
2 come about, although it was volumes and
3 volumes to Title 18, civilian criminal
4 statutes, and there were several attempts, as
5 you may know, over the years to completely
6 rewrite the statutes. And they met with many
7 of the same objections you're raising that
8 we'd be in deep trouble because all of a
9 sudden we just threw out all the case law and
10 we're all starting over.

11 But, nonetheless, pieces and bits
12 were changed, and I had something to do with
13 those legislative changes to fill gaps and
14 holes. So I appreciate what you're saying,
15 and I recognize you have a difficult job
16 because the statute keeps getting changed on
17 you.

18 I basically have heard two things,
19 one from the judges, as I'm listening, and one
20 from the defense practitioner, and I'd like to
21 repeat them back and have you correct me if
22 I'm wrong. The first thing I heard, I think,

1 is that, almost uniformly, while the current
2 statute is not optimal, substantively you'd
3 like us to leave it alone and not start
4 changing elements and definitions and
5 theories.

6 But procedurally you've outlined
7 at least, I wrote down six things, and the
8 defense counsel related some too, that we
9 could change without touching the elements of
10 the offense. And they included things like
11 penalties. Defense counsel mentioned these
12 forfeitures automatically of salary. Number
13 of members on a panel, again, doesn't affect
14 the elements. Maybe having a special verdict
15 form that showed whether or not, in some of
16 these battery and force offenses, what the
17 jury was saying so that it didn't seem
18 contradictory. Lawyers experience, more
19 training, again, doesn't affect the elements.
20 Charging process. Maybe we should recommend
21 that prosecutors with less than five years
22 experience as a bright line have to have

1 somebody above them with more than five years
2 experience sign off on their work so that we
3 know they charged it the right way.
4 Bifurcating the way the jury has to look at
5 what's been submitted to them. Again, none of
6 those require changing theories of the
7 offense, I don't think, or substantively where
8 we are, which would raise all kinds of
9 problems.

10 So I thought I heard, if I'm
11 getting it right, that, given where we are,
12 maybe we should, your preference is that we
13 leave it alone. I don't have a lot of
14 confidence that Congress will figure out how
15 to change this in 2017 because I don't think
16 most congressman have military legal
17 experience that they would need, and their
18 staffs typically don't either. It's really
19 the exception, rather than the rule. And I
20 think they know that, which is why this panel
21 is here because they're trying to have us get
22 the expertise necessary to help you.

1 But I think, as a group, I hear
2 you saying you can live with the 2012
3 substantive stuff if we clean up some of the
4 procedural issues. And if I'm wrong, I hope
5 you will respond and tell me I'm wrong.

6 The only other thing that I heard,
7 and I, frankly, would like defense counsel or
8 any of the others who think you've got an
9 answer to throw to us because -- problems we
10 know. I want to hear solutions. Defense
11 counsel, and I appreciate your role and your
12 unique problems, has noted that these alcohol-
13 fueled parties in the barracks lead to a lot
14 of problems. And I'm sitting here thinking
15 are you hoping that we're going to have
16 lemonade-fueled parties, or are you hoping
17 we're going to have alcohol-fueled parties not
18 in the barracks, as happened in the Naval
19 Academy problem, or are you hoping that we're
20 going to have same-sex parties only? Are they
21 supposed to play checkers? What do you
22 propose fills that gap among people who've had

1 a really maybe hard or stressful time, whether
2 it's in a combat zone or basic training, and
3 they want to let off some steam? Where do you
4 see us proposing something to address that?

5 MR. CASSARA: I'll be happy to
6 take your question, sir. I live in Augusta,
7 Georgia. There's a very busy road, Washington
8 Road, that is littered with very cheap hotels
9 that's about ten minutes from base. On Sunday
10 morning on my way to church, I can pick out
11 the people who are likely to have gotten into
12 trouble the night before. There are literally
13 gaggles of soldiers walking across the street.
14 And you're right, sir. We are never going to
15 completely eliminate that. But I do believe
16 that there are some common sense changes that
17 we can make, and Congresswoman Holtzman and I
18 discussed some of this at the RSP.

19 A case that I recently got
20 involved in was a Super Bowl party sanctioned
21 by the command, a keg party, with nobody, the
22 rule was nobody over the rank of E5 was

1 allowed. I'm not the smartest person in the
2 world. Heck, I'm not even the smartest person
3 at this table, and I know that's a very bad
4 idea. To have an alcohol-fueled party in
5 which you do not allow anybody over the rank
6 of E5 to attend, to me, is fraught with peril.
7 And in that case, it generated at least one
8 allegation of sexual assault that I was aware
9 of.

10 There are limitations, I believe,
11 that can be placed on, you know, basic
12 training soldiers, AIT soldiers, or I forget
13 what the Air Force calls them, AIT, but, you
14 know, tech school, in terms of their liberty,
15 in terms of -- there are, I think, common
16 sense limitations which don't lead the service
17 members to think, well, we're just being
18 treated like babies but which also can protect
19 potential victims of a sexual assault.

20 One of the other things that we
21 had discussed at the RSP was perhaps changing
22 the way that the Class VI stores operate.

1 Class VI stores, I'm not sure if you're aware,
2 but that is the military's liquor store. On
3 many bases, the Class VI store is open 24
4 hours a day. I'm not naive, again, enough to
5 think that a soldier member might just not go
6 off base to get alcohol if the Class VI is
7 closed, but I'm also realistic enough to think
8 that having an alcohol store open at three in
9 the morning on a military base may not be a
10 very good idea.

11 MR. STONE: Well, for the purposes
12 of this panel, I don't know that the JPP panel
13 has a mandate to fix some of those --

14 MR. CASSARA: Oh, I thought that
15 was your question, sir.

16 MR. STONE: Well, it was, it was.
17 But I guess what I hope is if you have some
18 ideas that fit with our mandate, you'll throw
19 them back at us because I think my concern is
20 not that you may not have some good ideas but
21 I'm not sure we're able to reach those. So
22 I'd appreciate --

1 MR. CASSARA: Yes, sir.

2 CHAIR HOLTZMAN: Mr. Taylor?

3 MR. TAYLOR: Thank you. I will
4 note that I think I read in publication
5 sometime in the last couple of months that the
6 Secretary of Defense has asked the services to
7 assess the impact of alcohol as part of the
8 culture, so I think this is something that
9 people are taking seriously because they
10 recognize it's part of a larger problem.

11 Captain Reismeier, one of the
12 things that I thought was really interesting
13 about your comments, and I thought the whole
14 panel did a great job of highlighting their
15 particular interests, was something I think I
16 heard you say which is there's no
17 predictability in the current situation. And
18 what I understood was that the prosecution
19 would prefer some time to gain experience, the
20 defense counsel would like better definitions,
21 and the judges need to resolve some of the
22 issues.

1 So I guess I'm wondering how would
2 those three lead to predictability?

3 CAPT REISMEIER: Again, I go back
4 to -- not because I think we can actually turn
5 back to the clock, but, if you look at what
6 existed prior to the change, there was
7 stability because everyone knew what the law
8 meant. You know, I can remember in law school
9 asking the question why some of the language
10 still exists in some of the property exchange
11 documents, and the answer from the professor
12 was because nobody wants to change it. It's
13 been that way since Merrie Olde England, and
14 everybody is afraid that if you change it the
15 document may no longer be valid.

16 There is some value to not
17 changing things because it does allow you to
18 predict with pretty good certainty what's
19 going to happen based on what happened
20 yesterday. The problem is that, whether you
21 go back to, you know, the 2007 version or you
22 look at the current version, such a small

1 amount of case law exists on which people can
2 make good judgments as to how to move forward
3 that it just takes time. So we're literally
4 having discussion about whether to change
5 something where the offenses are really just
6 now beginning to get into the criminal
7 pipeline, and we're already saying, well,
8 okay, so how should we change it? I think it's
9 very difficult to say this is how we ought to
10 change it without first seeing what it is that
11 we're changing and then also figure out is
12 that the best way to actually change it.

13 I understand why the defense would
14 like more clarity in some of the issues. In
15 part, it well defines the territory on which
16 the offense stands. And to the extent that
17 it's not well defined, there is lack of
18 predictability for them. They don't
19 necessarily know whether their conduct falls
20 into what's alleged in the statute.

21 Now, the prosecutors, again,
22 they're figuring out how to deal with this

1 statute. They're figuring out how to charge
2 things in a way -- at least they think they
3 are. We'll find out as the appellate courts
4 chew into this. But they think they're
5 figuring out ways to be able to charge this so
6 that they get to a result that they think is
7 going to be sustainable. The judges just
8 would like the chance to work through all
9 this.

10 I'm not sure if that's a direct,
11 I'm not sure if that's an answer to the
12 question. But stability is what criminal law
13 is -- if you don't have stability, then you
14 never really know whether your criminal law is
15 effective. So I guess I just start from the
16 point of view that I think we want stability.

17 CHAIR HOLTZMAN: I have a few
18 questions. First, Colonel Jackson, you
19 suggested that it was important to separate
20 out the penetrative and non-penetrative crimes
21 or charges into two separate statutes.
22 Actually, you said take the non-penetrative

1 crimes, penetrating crimes out of 120. Why is
2 it important to take it out of 120? What
3 difference would it actually make? Because
4 this is one of the charges that Congress has
5 given us to look at, and I'd appreciate the
6 response from other members of the panel to
7 this, as well.

8 COL JACKSON: Yes, ma'am. I don't
9 know if you have a copy of the current Article
10 120 in front of you, but I think if you look
11 at it -- can I see yours? So if you look
12 under, it should be page Roman numeral IV, 68
13 through 70. That contains both the
14 penetrative sexual assault --

15 CHAIR HOLTZMAN: Roman numeral IV?

16 COL JACKSON: Yes, you probably
17 don't have that actual copy of the manual.

18 CHAIR HOLTZMAN: I have something
19 that says Article 120, rape and sexual assault
20 --

21 COL JACKSON: Yes, ma'am. So if
22 you look at that, that has not only rape and

1 sexual assault but it also has the abusive
2 sexual conduct, which is the non-penetrative
3 type of offense. And if you notice, when
4 we're defining rape and sexual assault, we're
5 looking at whether or not a sexual act had
6 occurred or has occurred, whereas --

7 CHAIR HOLTZMAN: I'm not following
8 you yet because I don't have -- do I have that
9 on this statute? I have aggravated sexual
10 conduct. Is that what you're talking about --

11 COL JACKSON: No, ma'am. I'm just
12 looking at the general articles, Article 120.
13 It says rape and sexual assault generally.

14 CHAIR HOLTZMAN: I know. That's
15 what I have --

16 JUDGE JONES: Subheading C and D,
17 aggravated sexual contact and abusive sexual
18 --

19 CHAIR HOLTZMAN: Okay, fine.
20 That's where you're at. Okay.

21 COL JACKSON: Right. And so when
22 you look at the definition of rape and sexual

1 assault, it starts out with a sexual act
2 having been occurred or having occurred. When
3 you look at abusive sexual conduct, you're
4 talking about sexual conduct.

5 I've seen, and I believe what's
6 happening out in the field, especially when
7 you're dealing with junior counsel, is that
8 when they receive a report of investigation
9 talking about alleged misconduct and they're
10 looking at trying to charge an offense either
11 as rape, sexual assault, or abusive sexual
12 conduct, they're going back and forth between
13 --

14 VADM TRACEY: Conduct or contact?

15 COL JACKSON: Contact. I'm sorry.
16 I stand corrected. They're going back and
17 forth and trying to determine what they're
18 looking at. I think it becomes much more
19 confusing if everything is contained under one
20 particular article, as opposed to breaking it
21 out and perhaps even creating an Article
22 120(d), for example. So that way, the

1 practitioners know that when they're dealing
2 with a penetrating type offense, they're going
3 to go to one particular article. And then
4 when they're dealing with a non-penetrative
5 type of offense, they're going to go to an
6 Article 120(d), for example. I think it's
7 less confusing.

8 CHAIR HOLTZMAN: How do the other
9 members of the panel feel about that? Mr.
10 Sullivan?

11 MR. SULLIVAN: I would caution
12 against any statutory change that isn't
13 absolutely necessary. And so, you know, we
14 can figure out the 120 -- it's difficult as it
15 is because there's a 120 and there's also a
16 120(a), which is stalking, and there's a
17 120(b) -- but I think we can figure out the
18 difference between a 120(a), 120(b), versus a
19 120 and a 120(d).

20 But Colonel Grammel identified a
21 very important point previously, and that is
22 let's hypothesize that Congress were to change

1 it to create a new 120(d). Then you're going
2 to be in a situation again where it's
3 necessary for the prosecution to prove beyond
4 a reasonable doubt, in that scenario, for a
5 120(d) prosecution that the act occurred on or
6 after the date of enactment of 120(d) versus
7 occurring, versus it being a 120 or a 120(d)
8 under the previous statute.

9 So you're just creating
10 opportunities for reasonable doubt to creep in
11 and result in an acquittal in an instance
12 where if the statute had just been left alone
13 there would have been a conviction, like we
14 saw in the Valentin case. Again, we've seen
15 this before, so we're not even talking about
16 hypotheticals here. We've seen it play out.

17 So, again, I would caution against
18 any statutory change that isn't viewed as
19 absolutely necessary, and I would say that a
20 reorganization of the statute isn't necessary.
21 That's something we can deal with through
22 training.

1 CAPT REISMEIER: I would agree
2 with Mr. Sullivan. I mean, in a perfect
3 world, it might be nice to cabin these some so
4 that people don't have to sift through so much
5 language to find out which one is theirs. But
6 at the end of the day, they're going to have
7 to read it all whether it's separated out or
8 not because they still have to figure out
9 which version it is. And while it might be
10 nice to separate it, you know, the reality of
11 having offenses that span -- you know, every
12 one of us have probably seen that. It
13 typically comes up with child victims who
14 remember, okay, that one lived in the blue
15 house Fairy Street. We can tell when that
16 was, but the child doesn't know, and it may
17 span a significant amount of time having to
18 figure out which version or how many versions
19 the statute applies.

20 I would agree with Mr. Sullivan.
21 That's, again, the least best option.

22 COL GRAMMEL: Yes, I would advise

1 against separating it out, unless it had some
2 kind of significant impact. If we're looking
3 at conduct that we didn't think should be
4 reported to be registered in a sex offender
5 registration or something like that, we got to
6 pull it out that had some impact besides what
7 label we put on it, then that would be fine.
8 But I don't think we're looking at that.

9 The 2007 was overly cumbersome.
10 And the way things played out, taking out the
11 child offenses out of our 120 like we did,
12 that made it look much easier for all the
13 trial practitioners. What we're left with now
14 is workable. It is a little bit of a
15 challenge, but I don't think the benefit of
16 pulling it out outweighs the danger of
17 confusing everyone.

18 So I would recommend, I guess --
19 if there is a tinkering with the aggravated
20 sexual contact and abusive sexual contact,
21 when we look at the definition for sexual
22 contact, someone made mention, I think it was

1 Mr. Cassara who mentioned a case where someone
2 was charged with abusive sexual contact for
3 kissing someone. We have to all wonder do we
4 really think that deserves to be prosecuted
5 under Article 120? Should that really be a
6 sex offense that someone has to register for
7 the rest of their life? And if not, then we
8 might say, well, tightening up that definition
9 -- because the danger is when we have a
10 criminal statute that's too broad, what
11 happens is we're putting a lot of discretion
12 in the hands of the commanders down there. So
13 what happens is, the way it happens for most
14 people, the commanders, you know, do something
15 else. But if that commander doesn't like that
16 person, then that person who is not liked is
17 going to be prosecuted. It's indiscriminate.
18 And if there's no one, if we think, well, no
19 one is going to be charged with that, then we
20 should tighten up the definition so it just
21 doesn't happen at all.

22 But I think when any trial

1 practitioners read the definition that says,
2 you know, touching any body part with an
3 intent to gratify your sexual desires, I mean,
4 we can think of hypotheticals where it's
5 absurd. But if the absurdity can be removed
6 from the definition then I think it adds
7 respect to the law.

8 MR. CASSARA: I would agree with
9 Colonel Grammel. I would also add that there
10 may be another way to do that without changing
11 Article 120. Currently, when a service member
12 is convicted in a court-martial, there is a
13 list of qualifying sex offender registration
14 offenses. It's not all of Article 120, but
15 it's pretty doggone close to it. And perhaps
16 the panel would want to look at whether we
17 want to change that methodology of reporting
18 to exclude the kiss, the drunken slap.
19 Obviously, we can't understand or predict
20 every possible scenario, but I would echo what
21 Colonel Grammel said, which is I think all of
22 us would agree that somebody who kisses

1 somebody against their will may be a cad, but
2 I don't know that we need to know that they
3 moved into my neighborhood to protect my
4 children and I don't think they need to be on
5 the sex offender registry.

6 CHAIR HOLTZMAN: Let me just ask
7 you one other question which has occurred to
8 me looking at these statutes. We have a
9 separate sodomy statute. Is there a reason
10 for it still? I mean, I know there was one,
11 but why do we need it today?

12 MR. SULLIVAN: There was a
13 suggestion to repeal it. In fact, the Senate,
14 I believe, voted to repeal it. But the
15 bestiality is included within it, and so a
16 concern was raised when it was in the House
17 that if 125 were repealed that would legalize
18 bestiality within the military.

19 And so I will say that the Joint
20 Service Committee has proposed a change to
21 Article 134 to include a comprehensive animal
22 abuse provision within 134 that would cover

1 bestiality. If the president approves that
2 suggestion, then there would no longer be a
3 necessity for 125 to fill any gap.

4 CHAIR HOLTZMAN: Any disagreement
5 with that?

6 COL GRAMMEL: No. And absolutely,
7 I think it absolutely needs to be done just to
8 remove sodomy, except for bestiality, from 125
9 and keep bestiality one way or another,
10 whether it's as 125 or under 134, because an
11 added problem that we run into here is a lot
12 of the case law for Article 125 is similar to
13 our old 120 rape statute. So that whole
14 constructive force and all that case law, a
15 lot of that applies to sodomy. So you could
16 charge sodomy under 120 or 125 and the law on
17 consent and the said factors says in
18 constructive force and things like that, it
19 differs which way you charge it, and it's
20 really probably too much. It's unnecessary.
21 With the forcible sodomy being covered under
22 Article 120, forcible sodomy under 125 is just

1 unnecessary.

2 CHAIR HOLTZMAN: Doesn't it create
3 a double standard in a way as to how it's
4 being prosecuted, whether you want to
5 prosecute it under the old case law or under
6 the new case law? And why should that be
7 available?

8 LT COL GREEN: Right. I would
9 absolutely, as a trial counsel, I would look,
10 and it may differ on the case and see what the
11 evidence is, I would pick out which statute I
12 could prosecute better, 125 or 120, and I'd go
13 under that statute. It's unnecessary because
14 I think it's covered by Congress under Article
15 120.

16 CAPT REISMEIER: If I may, one
17 thing I think that we have to look at would be
18 the effective dates to make sure that you
19 don't end up with a gap in coverage because
20 the effective date of Article 120 is set. If
21 Article 125 goes away, you know, depending on
22 when the misconduct occurred, you just got to

1 make sure you don't create a void in the
2 criminal law, assuming you want to reach it.

3 CHAIR HOLTZMAN: Okay. I don't
4 think I have any other questions. Anybody
5 else on the panel? Thank you very much. And
6 if you have any further thoughts on the
7 tinkering side, let us know. Thank you very
8 much. Let's take a five-minute break.

9 (Whereupon, the above-entitled
10 matter went off the record at 4:15
11 p.m. and resumed at 4:21 p.m.)

12 CHAIR HOLTZMAN: I think, unless
13 anybody has got some extraordinarily important
14 remarks to make, we can adjourn. And our next
15 meeting is on September the 19th.

16 MR. STONE: Do we have the 15
17 minutes public comment, or has no one --

18 CHAIR HOLTZMAN: No one -- there
19 is no public comment. So we are adjourned.
20 Thank you very much to all the panel members.

21 (Whereupon, the above-entitled
22 matter went off the record at 4:21 p.m.)

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C E R T I F I C A T E

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In the matter of: Judicial Proceedings Panel
on Military Sexual Assault

Before: DOD

Date: 08-07-14

Place: Washington, DC

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