UNITED STATES DEPARTMENT OF DEFENSE

JUDICIAL PROCEEDINGS SINCE FISCAL YEAR 2012
AMENDMENTS PANEL

PUBLIC MEETING

THURSDAY
AUGUST 7, 2014

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 MCCOVERY, Deputy Staff Director
DALE TREXLER, Chief of Staff
JULIE K. CARSON, Legislative Analyst
JOANNE K. GORDON, Attorney Advisor
KRISTIN B. MCGORY, 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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(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.
As you can see from the agenda, the panel has held an administrative session this morning. The purpose of that session was to provide administrative briefings and administer the oath of office to the panel members.

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

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

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

I understand that we have not
received any requests for public comment for this session.

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

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

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

However, before we begin this meeting, I want to say how privileged I feel to serve on this and how privileged I feel to serve with Judge Barbara Jones, who was an excellent chair of the preceding panel, the Response Systems Panel, and how privileged I feel to serve with the excellent and very experienced members of the panel who have been also appointed by the Secretary of Defense to serve.
I also want to thank the interim Dean Greg Maggs and the faculty and staff of George Washington University Law School, who have allowed the panel to use these very fine facilities for this meeting and to thank the staff of the judicial proceedings panel for helping us to get to this point.

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

The panel consists of five members, who are appointed by the Deputy Secretary of Defense on June 8, 2014. In
addition to myself and Judge Jones, whom Maria
Fried noted that were previously on the
Response Systems Panel, we are joined by Vice
Admiral Patricia Tracey, U.S. Navy, Retired,
Thomas Taylor, and Mr. Victor Stone.

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

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

In addition to reviewing Article
120 of the Uniform Code of Military Justice,
we must also assess other legislative and
policy changes that have been implemented to
improve prosecution of and reduce sexual
assault crimes in the military. We are
committed to working efficiently to provide
timely and thoroughly considered
recommendations.
As many of you know, our work here follows a long-year assessment by the Response Systems to Adult Sexual Assault Crimes Panel, which completed its review and submitted its report on June 27, 2014. I expect this panel to use information gathered by the Response Systems Panel and will consider its report, analyses, and recommendations as we conduct our own assessment.

The Response Systems Panel received substantial information and heard a wide range of perspectives from both inside and outside DoD, including those who have been victimized by sexual assault. And we very much look forward to hearing again from many people and organizations to receive different perspectives on the topic that we are tasked to consider. We will need and rely on the cooperation, support, and help of so many people who have even a much deeper understanding than we do of how these programs and procedures are working within the military.
and what work can be done to improve the handling of sexual assault in the military.

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

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

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

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

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

After lunch, we will begin our review of Article 120 and the prosecution of rape and sexual assault offenses.
Our first panel will discuss how rape and sexual assault are prosecuted in different jurisdictions throughout the United States and how the laws have evolved and changed. Ms. Carol Tracy from the Women's Law Project and Ms. Charlene Whitman and Mr. John Wilkinson from AEquitas, I hope I pronounced that properly, will discuss their examination of the definitions and other sexual assaults in the legal system, including text and terminology used in different jurisdictions.

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

Our second afternoon session will focus specifically on the evolution of Article 120. Mr. Sullivan will return to explain the 2007 and 2012 amendments to the statute.
followed by perspectives from former and current judge advocates and attorneys who have experience with each of the different versions of the statute.

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

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

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

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

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

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

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

MR. SULLIVAN: Thank you very much, Madam Chair, and welcome and good morning to the members of the panel.
The Chair has described the rather ambitious proposal that I am going to go through for the next 50 minutes but what I plan to do is stop at 10:55 no matter where I am to solicit any questions. Normally, I would make myself available offline to address other issues but because of the FACA restrictions, obviously, we can't do that. So, at 10:55 I am going to stop to provide an opportunity for dialogue.

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

So, the military justice systems covers the conduct of roughly one and a half million active duty members of the military and that is larger than the populations of 11 states and the District of Columbia, just to give you a feeling for the scope of the
And the military justice systems exercises jurisdiction over active duty service members 24 hours a day, 365 days a year. Whether the service member is on leave, on duty, or in a non-duty status, they are covered by the Uniform Code of Military Justice.

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

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

Civilians accompanying the U.S.
forces in the field in either time of war or contingency operations are subject to UCMJ jurisdiction. There has only been one such prosecution since the Vietnam War. So, these are very rarely used but the authority is there.

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

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

I always like to go back to the basics. Where does this authority come from?

Well, it comes from the United States
Constitution which gives Congress the power to
make rules for the government and regulation
of the land and able forces. And Congress has
enacted that through the Uniform Code of
Military Justice, which we will look at in
detail today.

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

In 1950, Congress passed the
Uniform Code of Military Justice, passed in
1950, signed into law by President Truman but not effective until May 31, 1951.

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

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

And one of the most important things to understand is that convening authorities, who are generally military
commanders, decide the appropriate level of disposition of charges within the military justice system. It is currently a command controlled system. Obviously, you are going to be discussing the work of the RSP. That was a question of considerable consideration by the RSP, should there be changes to that. But as the UCMJ is structured today, it is a command controlled system.

So, these commanders can choose one of four levels of disposition of charges, in addition to less formal responses, such as extra military instruction or counseling or even administrative discharge. There are four levels of disposition provided by the Uniform Code of Military Justice: non-judicial punishment, summary courts-martial, special courts-martial, and general courts-martial.

So, we will look at those in turn.

Non-judicial punishment can only be imposed by a military commander or commanding officer or officer in charge.
Service members can generally decline to have their cases resolved by non-judicial punishment. There is an exception for those that are embarked on or attached to vessels. Their NJP works very differently between the services. The services execute NJP in very different manners. And a non-judicial punishment is not a criminal conviction. So, it does not have collateral effects, such as sex offender registration, loss of right to own firearms, loss of voting rights is not a criminal conviction.

Maximum punishment include correctional custody for 30 days but that is very rarely used today; restriction for up to 60 days. And the particular maximum punishment depends upon both the rank of the individual imposing the NJP and the rank of the individual receiving NJP. There are differences. These are the maximum punishments that might apply in any particular case.
Also, for service members that are attached to or embarked upon vessels, NJP would authorize non-judicial punishment. Punishment that is not used infrequently is three days confinement on bread and water.

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

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

So, that concludes non-judicial punishment.

Now, we will go to the next level,
summary courts-martial. Only enlisted members may be subject to summary courts-martial. Every service member can refuse summary courts-martial, even those attached or embarked upon a vessel. Typically, when a service member refuses summary courts-martial, typically but not invariably, their case will then be referred to a special courts-martial.

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

Maximum punishments include confinement for 30 days, restriction for up to two months, and reduction to the lowest enlisted pay grade. A summary courts-martial
cannot order a discharge, although it is not infrequent that a service member that is convicted by summary courts-martial will then be administratively discharged. But the summary courts-martial itself cannot adjudge a discharge.

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

The accused at a special courts-marital can choose either to have a judge-
alone trial, a bench trial, or a trial in front of a panel of members. The members are the military equivalent of a jury. There are very real constitutional differences between a members panel and a jury, one of which is the members panel is hand-picked by the convening authorities. The commander hand selects the members that will provide the role of the jury on the courts-martial. A special courts-martial panel must have at least three members.

And unlike NJP and summary courts-martial, the procedures that are used for special courts-martial are very similar from service to service. There are some differences. For example, the JAGMAN in the Navy provides some differences from AR 27-10 in the Army but they are very similar procedures. A lawyer could easily go from an Army to an Air Force to a Coast Guard courts-martial and function quite well among those four.
So, the maximum punishments for a special courts-martial include a bad conduct discharge, which can only be adjudged against an enlisted member. An officer can neither be confined nor discharged as a result of a special courts-martial conviction. But the key maximum punishment that is special are bad conduct discharge, confinement for up to 12 months, and forfeiture of two-thirds pay per month for 12 months, and, for enlisted members, reduction to the lowest enlisted pay grade. Those are typical sentences that are in play in a given special courts-martial.

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

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

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

And once again, the procedures for general courts-martial, while there are some narrow differences among the services, are quite similar from service to service.
The maximum punishments for a general courts-martial include a dishonorable discharge or a dismissal for officers, confinement for up to the maximum authorized for a particular offense -- so, for example for rape, the maximum authorized sentence is confinement for life without eligibility for parole; a courts-martial can adjudge up to that maximum -- forfeiture of all pay and allowances, reduction to the lowest enlisted grade but for enlisted only -- an officer cannot be reduced in rank as a result of courts-martial conviction -- and where it is statutorily authorized, death. So, for example, we have service members on military death row today, all of whom were convicted of premeditated murder.

So for special and general courts-martial, the rule is that two-thirds majority vote is required to convict. And if there is less than a two-thirds majority vote, the result is acquittal. No hung juries. There
is a vote. Either it meets the requirement
for conviction or it doesn't. Resulted in
either a conviction or an acquittal.

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

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

So, I wanted to give you a feel
about how many of these we do a year. So, for
fiscal year 2013, there were 1,240 general
courts-martial among all five armed forces.
There were 1,213 special courts-martial, 1,101
summary courts-martial, and more than 62,000
non-judicial punishments, about two-thirds of
which were conducted by the Army.

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

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

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

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

So, once the investigation is complete, then the charges will go to the -- in our hypothetical, the wing commander refers the charges up to the Numbered Air Force Commander, recommending that there be a general courts-martial. Then the Numbered Air Force Commander will decide whether to refer those charges for trial. And so the Numbered Air Force Commander can refer those charges to a general courts-martial. And then as we said before, the Numbered Air Force Commander will
hand select the members that will be the equivalent of the jury for that courts-martial.

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

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

Now, traditionally, a commanding officer had unconstrained discretion to either set aside findings of guilty or to reduce the punishment adjudged. However, Congress significantly narrowed that discretion in the National Defense Authorization Act for Fiscal Year 2014 for offenses that occur on or after
June 24, 2014. The commander has much narrower discretion than commanders historically had.

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

Once that appeal is done, the losing party can then seek review from the Court of Appeals for the Armed Forces. Now, the Court of Appeals for the Armed Forces, its jurisdiction is largely discretionary. It largely gets to pick and choose the cases it reviews. So, if the accused loses at the Air Force Court, the accused files a petition with the Court of Appeals for the Armed Forces,
much like a Cert Petition, asking the court to consider the case. And then the court rejects most of the cases. They hear about 15 percent of the cases that are raised for its review.

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

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

If and only if the Court of Appeals for the Armed Forces hears a case, is
one of those 15 percent where they decide to
hear it or it has been certified as a case and
there is also mandatory jurisdiction if the
CCA approves a death sentence, that must be
reviewed by them. If and only if CAAF reviews
the case, it also falls within the
discretionary jurisdiction of the United
States Supreme Court.

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

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

VADM TRACEY: A couple. Just
remind me in this example is the squadron
commander O-3, O-6? General flag officers
have kind of a seniority.
MR. SULLIVAN: Kyle, what is the
general rank of a squadron commander?

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

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

Okay.

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

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

MR. SULLIVAN: That is correct.

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

Yes, sir?

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

MR. SULLIVAN: Correct. So, the way the statute is written, the Supreme Court does not have statutory jurisdiction, certiorari jurisdiction over any case where a panel sought CAAF review and CAAF said no, we choose not to review that. So, about 85
percent of the military justice cases that are raised to CAAF will never qualify for Supreme Court review.

Yes, ma'am?

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

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

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

So for example, a service member that remains confined after this process can file a habeas petition. They are quite often filed in the Federal District of Kansas because the United States disciplinary
barracks is in Kansas. They are also confined in other places but Kansas is the preferred locus.

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

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

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

All right, so now I want to take a look at the punitive articles. There are 65 punitive articles, though many of those punitive articles include multiple offenses,
so there are many more than 65 offenses within the UCMJ. But there are 65 punitive articles. And many of them are military-specific offenses, such as absence without leave or UA, as we call it in the Department of the Navy, desertion, violation of a lawful order, or misbehavior before the enemy. Many of them are typical common law offenses like murder, rape, burglary, and robbery.

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

So the three broad types of offenses it brings in are first, all disorders or neglects to the prejudice of good order and discipline. So that is typically called conduct prejudicial to good order and discipline. Second, conduct of a nature to discredit the armed forces. Service discredit
conduct. And third, any federal crime that isn't capital. Any 18 USC offense, any 21 USC drug offense that isn't capital can be tried by courts-martial under the third provision, crimes and offenses not capital. And what we often see are state law violations that are tried by courts-martial through the Federal Assimilative Crimes Act. So, one of the non-capital offenses that can be tried by courts-martial is the Federal Assimilative Crimes Act, which gives the federal government the opportunity to try a violation of state law that occurs in a federal enclave within a particular state. So that is a commonly used example.

So, within the Manual for Courts-Martial, the President has identified specific offenses under Article 134. Now, these are nonexclusive. There can always be a novel Article 134 that is charging some misconduct that nobody thought of before until that particular accused became creative. But the
President has identified certain Article 134 offenses. He identified 52 of them and then I am giving you some examples.

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

Then there are also there are common civilian-type offenses. Negligent homicide is one offense that the President has designated for trial under Article 134. Kidnapping, so there no specific UCMJ kidnapping statute. If you have kidnapping, it gets prosecuted under Article 134. Obstructing justice, pandering and prostitution, although there is a specific UCMJ offense for forcible pandering in Article
120, as we will see this afternoon, and then communicating a threat. So, those are some examples.

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

CHAIR HOLTZMAN: Do they include sexual assault?

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

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

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

And so again, so one sex crime
that is included is pandering and
prostitution, yes.

And so now we are getting into
delegation of authority to the President.

There are two important delegations. One is
Article 36. So, Congress didn't want to
specify all of the procedure rules and
evidentiary rules for a courts-martial, so
they delegated to the President the authority
to make procedural rules, including rules of
evidence for courts-martial. And they said to
the President, look, to the extent
practicable, apply the same rules that apply
in federal district courts and to the extent
that that is not inconsistent with the UCMJ.

And then there is a second broad
delegation of authority to the President and
that is the authority to prescribe maximum
punishments for offenses. So almost every
UCMJ punitive article, most of them, the vast
majority of them say simply that the offense
shall be punished as a courts-martial may
direct. And it is up to the President to
designate a specific maximum punishment, say
this offense carries a bad conduct discharge
and confinement for six months. This offense
carries a dishonorable discharge and
confinement for life.

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

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

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

And one more thing I want to
mention before wrapping up the military
justice overview is just a note on overlapping
jurisdiction. It is important to keep in mind
that almost any time a military service member
commits a non-military specific offense, let's
set aside for the moment breaking restriction,
or a pass offense, or desertion, or AWOL, or
UA. So, setting those aside, almost any time
a military service member commits an offense,
they are subject to prosecution in multiple
jurisdictions.

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

If a military member commits an
offense on a military base with exclusive
federal jurisdiction, then it is going to
depend on exclusive federal jurisdiction. A
military member commits an assault and battery in the Pentagon. That offense could be tried by courts-martial or it could be tried in U.S. District Court for the Eastern District of Virginia.

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

Overseas, service members generally can be tried, who violate the law for again, a non-military specific offense, unless they are in an area, in an occupation status or combat zone where the individual wouldn't be subject to the host nation laws, let's say they are in Japan, part of our U.S. Forces in Okinawa, and they commit an offense off-base, that offense could be tried in
Japanese court or it could be tried by courts-martial.

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

So, that concludes the portion of this discussion that will be the military justice overview. Any questions about that?

Yes, please.

MR. TAYLOR: Yes, thank you very much for that. I was a little interested in the number of summary courts-martial compared to the others and wondered if you would comment a little bit about what the current practice is on who is the officer who conducts
the summary courts-martial and also whether there is a right to counsel, given the fact that confinement can be to up to 30 days.

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

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

LT COL GREEN: It typically is a JAG.

MR. SULLIVAN: So again, as I said, the way that these are done from service to service vary considerably. But typically the summary courts-martial officer is not
going to be a judge advocate. It is going to be a line officer.

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

There was an interesting article in the Marine Corps Gazette a number of years ago called "The Lost Battalion" that talked about the very real difficulties that arise
from having a large number of people under appellate review.

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

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

So, there is this influential article called "The Lost Battalion" that says basically we have a battalion with the Marines that we can't have people doing real duty because they are on this appellate leave
status. And as a result of that, commanders began to look for ways to get rid of lower level misconduct through ways that would not result in the Marine Corps being charged with somebody on appellate leave. And so this summary courts-martial board waiver came into play as a result of that.

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

MR. TAYLOR: Thank you.

MR. SULLIVAN: Yes, please?

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

Can you just tell me something about what happens if a defendant says I am not interested in an Article 1 prosecution; I
demand an Article 3 prosecution? Does he have
any right to say that or are there Supreme
Court cases that say he doesn't? I presume
they challenged that later by habeas and said
I never got my Article 3 right, saying I never
got a jury, I never got this?

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

And there was a time from 1969 to
1987 when the Supreme Court, by case law,
O'Callahan v. Parker had imposed an additional
requirement for subject matter jurisdiction to
say the offense must be related to military
service. And so from 1969 to 1987, you had
this additional service connection
requirement. That requirement, however, was
overturned by the case of Solorio v. United
States in 1987, which again, stands for the
proposition that merely being on active duty
is sufficient for the exercise of courts-martial jurisdiction. And there was an interesting dissent by Justice Marshall, where he was construing the Fifth Amendment exception for cases arising in the land of naval forces for the grand jury provision. But again, that was a dissent. So again, the majority rule was clear. If you are on active duty, you can be court-martialed, whether it is connected to military service or whether it violates another civilian offense or not.

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

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

So for example, you had a case called Weiss v. United States, where the court
said a service member does not have a right to
be tried by a military judge with a fixed term
of office, as an example. And they said while
the due process clause does apply to the
military, it applies differently. And what
process is due is determined in a different
manner than under the Medina v. California
standard for federal review of state criminal
justice procedures. It is a much more
deferential review than what is already a
deferential review in the review of state
criminal procedures.

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

MR. SULLIVAN: Sir, the Supreme
Court has said the Sixth Amendment jury right
does not apply. The Fifth Amendment has a
specific exemption for the grand jury right.
However, the Sixth Amendment right to counsel
does apply and the courts have so held.

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

First amendment rights do apply.

Equal protection rights do apply. So, there
is quite a lot of jurisprudence for the
Supreme Court about applicability of the Bill
of Rights. What we can expressly say is it is
not a case that the Bill of Rights is
categorically inapplicable because the Supreme
Court, again, has applied them.

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

So for example, Article 31
provides a right against self-incrimination.
And interestingly the Congress's adoption of Article 31 preceded Miranda but it includes a rights warning. So, there is a statutory rights warnings requirement that preceded Miranda in Article 31. And interestingly, the Supreme Court cited that in the Miranda case.

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

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

So, some of this case law are applied pretty much just as they would be in
civillian courts. Some apply differently and
some, like the Sixth Amendment right to jury,
inapplicable.

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

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

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

So, the most recent bill which
substantially affect the UCMJ was the National
Defense Authorization Act for Fiscal Year
2014. Title XVII of that bill addressed
sexual assault prevention. There were 36
sections in Title XVII, 16 of them included military justice reforms.

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

But out of these 16 different provisions, we can sort of boil it down to two essential points. And that is that the NDAA for FY2014 significantly enhanced victims' rights within the military justice system and it significantly constrained convening authority's power and discretion, as we mentioned before about what they can do post-trial is constrained but also what they can do pretrial was also greatly constrained. And in
the few remaining minutes, I will run through some of those changes.

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

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

So, one of the very important reforms was the enactment of a statutory victims' rights act. And it is modeled after the Victims' Rights Act that is in U.S. Code at 18 USC 3771. And it generally follows the same rights that are provided to victims in
federal criminal trials with certain
modifications where there are military
differences in procedures that make the 18 USC
3771 rules not directly applicable.

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

Congress codified the program in
Title XVII and then also expanded it. So for
example, the original programs, the Air Force
pilot program, for example, was limited to
adult sexual offenses. Congress required that
Special Victim Counsel also be made available
where a juvenile was the victim of the sexual
offense, and certain other offense, including
And interestingly, when the Marine Corps instituted this, the Marine Corps simply said we will make a victim legal counsel available for a violation of any offense. You know burglary, you have a right to a victim legal counsel within the Marine Corps.

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

Also, currently, the services vary in terms of whether they audio record Article 32s, for example, the Air Force and Coast Guard do not. Congress ordered that all the
services must audio record the Article 32 and
the victim has a right to review that
transcript.

Congress also required that the
Article --

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

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

And then Congress also required
that unless there is an operational necessity,
that the Article 32 investigating officer will
be a judge advocate. Right now, in all the
services except for the Army right now,
typically the Article 32 IO is a judge
advocate. However, in the Army, typically the
Article 32 IO is not. Congress said look,
unless there is an operational requirement,
you must have a judge advocate. However,
Secretary Hagel had already said for a sexual
assault case, all of the services must use
judge advocates for the Article 32 IO, with no exceptions. So, for sexual assault cases, that rule already is in effect today.

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

Jurisdiction over penetrative type sexual offenses, an attempt to commit penetrative type sexual offenses was limited to a GCM. And general courts-martial convening authorities' decisions not to review such charges are now subject to higher level
So, if the staff judge advocate advises the general or admiral hey, don't refer these charges and the general or admiral doesn't, that has to be reviewed by the next level of command. If the staff judge advocate said hey, general or admiral, refer these charges and the general or admiral says no, that has to be reviewed by the Service Secretary.

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

Yes, please?

MR. STONE: You just mentioned that one of the changes was that defense counsel are required to seek interview of sexual assault victim through the trial
counsel. I should have thought, even before this statutory amendment that that would have been an ethical violation for an attorney to do that, go around a person who is represented, around their counsel and go directly to that person.

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

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

So, before this, it was statutorily permitted. In fact, Article 46 of the UCMJ said that the defense and the government shall have equal access to evidence, including witnesses. And this was an amendment to Article 46. Before this,
defense counsel could and regularly did go
directly to the victim.

Now, interestingly, in the Senate
Armed Services Committee past version of the
NEA for FY2015, the Senate Armed Services
Committee has adopted a change to this
provision. It is not the House bill but in
the Senate bill this would be changed to say
instead of going through the trial counsel,
the defense counsel must go through the
attorney for the victim. So, if they have a
special victim counsel, they would go through
the special victim counsel. If they have
retained counsel, they go through retained
counsel but it would marry up with the typical
ethical rules you mentioned before, which is
that counsel may not communicate with a
represented party concerning the matter of
representation without going through the
counsel.

So again, the Senate version would
take the prosecutor out of this and say
defense counsel, you have to go through the victim's lawyer.

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

MR. SULLIVAN: That's right.

MR. STONE: So, I still don't quite understand why that was necessary in 2014 or in the 2015 bill, given the ethical rules that they just have to follow if they want to be a member of a bar. And I presume even the lawyers in the military have to pass some state bar. If they find themselves disbarred or disciplined, they then couldn't be a military prosecutor. So, I guess what I am wondering is is it your view that this overrides the ethical obligations of military lawyers and if that is not passed, let's say it is debated and not passed, that then they
can avoid counsel and still say Congress didn't pass it, therefore, this ethical obligation is of no force and effect?

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

But as a general matter, we follow
the state ethical rules and all of the military ethical rules themselves. So, all the services have their own ethical rules. All of them have the provision that you can't communicate with a represented party.

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

So one purpose of this is to make clear that regardless of the wording of the rule, you have got to go through the counsel. But again, what Congress chose to do in 2014, in the NDAA for 2014 was say you have got to
go through the prosecutor. So, that would not
have been the rule previously.

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

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

But it is also important to note
that there are many instances in which a
victim may not be represented by counsel. So,
for example, if a service member talks back to
a commanding officer and so the commanding
officer is the victim of the disrespect, that
commanding officer typically isn't going to be
represented by counsel and the defense counsel
is typically going to feel free to go talk to that commanding officer about the offense. So, the question is, should Congress put between the defense counsel and that commanding officer a visit to the prosecutor's office, where, in a civilian jurisdiction, there would be no comparable requirement to go talk to the AUSA or the assistant state's attorney before you go talk to some victim in the case that doesn't have an order regarding that.

MR. STONE: Focusing specifically on these offenses we are talking about, which are sexual assaults of various natures in the military for a minute, what, if I may ask, absent this Senate action and that bill being passed, what is the view of the Department of Defense General Counsel's Office on the defense counsel or the prosecutor not going through a Victims' Counsel when they know there is a Victims' Counsel appointed? Is your office taking the position that because
that victim is a person and not a party, they are able to do it? Or are you taking the position either for ethical rules or simply internal general operating procedures, they should not do it?

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

The Navy uses person. So in that instance, there would be an ethical
prohibition. Even without statute, there
would be an ethical prohibition against the
defense counsel talking to a victim
represented by an SVC, without going through
the SVC.

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

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

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

MR. SULLIVAN: Sure.

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

MR. SULLIVAN: Oh, sure.
Certainly.

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

MR. STONE: Recommendations.

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

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

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

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

LT COL GREEN: Ms. Holtzman at Tab 4, we have materials that the staff has prepared describing the tasks that you were assigned and the time line assigned to the
Response Systems Panel and then the Judicial Proceedings Panel.

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

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

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

JUDGE JONES: That's all right. I just remembered the only comment I have is, and I see that if you take a look under summary of tasks, they are actually under Section 10, four matters that the panel recommended to this panel to consider. And I actually, I suppose we could discuss each one
of those, although some of it has been covered.

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

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

So take the last one first, was that in federal we go through the prosecutor, who talks to you about what plea bargain they
are thinking of agreeing to, possibly to take
to the judge. And the victim has their input
that way.

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

And in terms of what this panel
might want to consider, it is a very broad
question, I guess, of just a review of how
plea bargaining is done with the focus being
the bargain being created between the accused
and the convening authority, where the
military judge doesn't know what the bargain
is. And that bargain, obviously, if it is one that results in a length of custody, for instance, a term of custody that is lower than what the military judge sentence is, the bargain prevails and the accused is entitled to that bargain.

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

Depositions of victims, now that I am going in reverse, I guess I hadn't realized how much time is going to pass before we even get to an operational new Article 32 system. So, I think that is going to be an interesting topic and maybe we could start thinking about it and get people's ideas, in terms of what does this really mean for the Article 32 system. But we are not going to be able to figure out what is going to happen in practice for quite some time, if we are not even beginning to look at anything until cases
arise after, I think you said December 26th, Mr. Sullivan, December of this year.

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

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

In the federal system, there are
basic rules about what a criminal prosecutor
has to give to a defendant. There aren't any
rules about what they might have to -- what
information they might have to give to
witnesses or the victim witness.

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

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

And with respect to Article 120,
actually Liz and I were talking about that
this morning. And again, that came from not
the Victim Services Subcommittee but our
Comparative Systems Subcommittee. And one of
the thrusts and, I think, one of the most
valuable sets of recommendations came out of
that committee and they related to trying to
figure out a way to make it easier to actually
We were given the role or the task of comparing the military criminal justice statistics, convictions, the number of cases sent to trial, you name it, with the civilian system. And what we quickly discovered is it is very difficult to do because different jurisdictions have different elements for the types of crimes. So, it wasn't easy to compare a sexual assault under the state courts' definitions with the military definitions.

In addition, each of the services has those things differently in how they actually look at what they are counting. And so we made a lot of recommendations about that. And in addition to that, we made an overarching recommendation that the military justice system, while it may well wish to keep the Workplace Gender Relations Survey, should also basically implement a Crime Victims Survey. And the reasoning behind that is
1 because we found or we believe that you can't get good statistics, in terms of how many sexual assaults there are, which forget about what the definition of the sexual assault is, but how many sexual assaults there are in a year based on the Workplace and Gender Relations Survey.

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

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

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

So, I mean that is my quick run through on the four specific things that we
thought this panel might look at. I see we have tons of other things to look at besides those.

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

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

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

For example, the role of the commander was a very controversial issue last year and the panel devoted a lot of attention
to it. Most of the work that we did probably is not really relevant to our activity now,
except that there is a question that we have been enjoined to look at, which has to do with I believe it is clemency. Is that correct?
The withholding and to measure how well and how effective the law has been to withhold the power to refer cases for prosecution to a higher level.

I don't know how easy it is going to be to do that measurement. And this will also affect a junction for us to look at certain crimes and the results of certain sentencing. Because you have what is called a unitary sentencing system in the military, so that if someone is convicted of a variety of offenses, including, for example, rape plus a burglary and the defendant is sentenced to five years, you have no way of knowing whether five years is for the burglary and zero is for the rape or vice versa. So, it is impossible to know, in many instances, what we are
talking about here because, in fact, the
statistics aren't there.

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

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

That feeds into another
recommendation made by the Response Systems Panel, which had to do with the last of the recommendations conducting independent audits and assessments. The panel felt very strongly not only that there ought to be independent assessments but that the methodology for the assessments ought to be developed with expert independent advisors.

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

Trends in the sexual assault punishment, you know it may be extremely difficult for us to respond to that with the unitary sentencing system that we have. And again, comparison of military, federal, and state court punishment. Again, how do you do that with a unitary sentencing system?
Sentences reduced or sentence on appeal, that is something that we have also been asked to look at.

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

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

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

But also, the panel has asked about and recommended against the adoption
sentencing guidelines or mandatory minimum sentencing.

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

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

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

CHAIR HOLTZMAN: No, I didn't.

JUDGE JONES: I mean did a very deep dive on looking at training of defense and trial counsel compared to the civilian world. You know you can always look at it more. And then I guess our task is to assess trends in training. So, I mean our conclusion was that things were in pretty good shape in the military.
That while it is true that a lot of JAG officers don't have the years of experience that you might find in a district attorney's office in terms of sexual assault prosecutions, they had a tremendous amount of training and that the system of having a senior JAG officer with experience second seating them made for a very qualified prosecution.

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

We did make recommendations with respect to defense side of it that were sort of please ensure that they get adequate resources. There have been a lot of resources put into the Special Victims' capability section, which of course, is prosecutorial and victims' services part of it. And so, we wanted to make sure that the accused were also getting their fair share of resources. And so
that was a -- but we did not find a deficiency in the way that defense counsel in the military were handling their cases.

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

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

And obviously, with the limitation that was placed on Article 60 whether or not
that conflicted and precluded convening authorities from caring for the families of the accused.

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

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

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

JUDGE JONES: And that particular recommendation is an example of what was really just we think an unintended consequence
of the original legislation. I don't think that it necessarily came up that it would be clemency restrictions that would have that kind of impact on the family of the accused. Because I am not sure that it was brought to anyone's attention that that forfeiture would mean that a family of a serviceman accused would not have any support. So, it was just one of those interesting things that you have to keep in mind those unintended consequences, I suppose.

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

One of the things that intrigues me about our task is that as a professor of
public policy, I'm always interested in what kind of evidence you use to decide what is a good public policy. And then, what kind of measurement tools do you use to decide whether it is effective? And these are, indeed, daunting questions for us, it seems to me, as we move forward.

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

And I don't know whether Colonel Green, you are in a position to talk about that or whether this is something that we need to think about going forward. But when I think about our tasks, I first want to look at
what kind of data that we have, and as you
said, it is very imperfect at this point, in
order to make the kinds of comparison.

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

CHAIR HOLTZMAN: Poor Kyle.

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

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

But I will tell you that staff has
been talking about it and, sir, we recognize
exactly what you said. There are a number of
specific tasks that it is clear we are going
to have to get very specific data from the
services for information.

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

But some of the issues related to
sentencing and those types of data, we met
with the service representatives last week in
our offices and started to talk about the
needs for data. But I think the panel will
need to identify very specifically, the types
of data we need and then extend that request
to the services to provide that. Whether or
not that is data the services are keeping and
will have available dealing with information in the past or whether they will have to start keeping that data, it is going to be a case by case or a type of data question that we will have to explore to be certain.

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

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

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

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

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

So, what you will have from an Article 32 is a summarized record that is prepared by the investigating officer with summarized versions of statements from witnesses, usually sworn as affidavits, equivalents to that, along with a summary of findings from the investigating officer but you won't have a verbatim transcript or a verbatim record of those proceedings.
MR. STONE: If I may, again, I was not a regular part and fully familiar with what the Response Systems Panel did, although I was familiar with its existence and some of its work, of course, so I guess I am asking this as an informational question for whomever can answer it.

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

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

MR. STONE: Okay.

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

MR. STONE: Okay.

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

So, it is not uncommon to ask the court for a special verdict form and the jury has to check off a little bit more than just acquitted or convicted. And it seems to me that you want to -- one way possibly, and I didn't know if it was discussed before, to get around this unitary sentence or non-unitary sentence is simply say that is fine, but you have a special verdict form and you have to indicate, in addition to your unitary
sentence, whether these are the same sentence -- you know for each conviction is this a five and a five, or is this a five and a three concurrent, or is this a two and a three consecutive? And it seems to me that will allow both statistics to be kept, comparisons to be made without necessarily interfering with the whole unitary sentence idea.

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

And going from there, the second thing that strikes me, and again it is a question -- and first my disclaimer is my biography shows for those who looked at the material that I spent four decades working for the Criminal Division of the U.S. Department of Justice in many different capacities. And
so I know that they have experts who have
looked at the counting problem in the Bureau
of Justice Statistics. They have a whole
division devoted to that. There are people
who are public policy experts, who are
statistical experts. Did anybody consider
telling them, this is their responsibility and
we will be happy to give them input? But
since they are crime statistics, if a rape
occurs on a base, they need to be counting it.
And the services will be happy to assist them
but this is really their responsibility which
we will, the military will assist with.
And I am sure they will have a way
to organize and ask questions which we could
facilitate. And again, move that mostly off
our plate and give it to them.

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

MR. STONE: Excellent.
CHAIR HOLTZMAN: So, that was a specific recommendation. Not necessarily they maintain the statistics but that the military work with them and utilize their experience as part of a means of developing a proper way of keeping statistics that accord a view on crimes.

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

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

MR. STONE: And I guess this is a staff question. Have we thought about asking the Bureau of Justice Statistics to have an
observer at all of our open meetings?

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

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

And the discussion that we had was that would be great if we had that. And of course the problem wouldn't be so much a problem when a judge, a military judge was doing a sentencing, but when you have a panel sentencing, then how difficult will it be for civilians to be given the necessary instructions so that they will be able to come up with the kind of sentencing that judges are used to doing?
And it is kind of interesting to me, I don't think there are that many -- well, I guess trials are trials but I think most cases are disposed of by a judge as opposed to a panel. I don't think too many people are asking for panels in the military. But of course when you have them and they do sentencing, it is a real problem. And I think there, it is a problem of, again, trying to figure out a simple way to train civilians to do unitary -- to turn a unitary system into this is what we found guilty on this one and this is what the person should get on it.

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

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

MR. STONE: I think we could find comparable state forms. I know they exist in Maryland that even the judges use that have count, conviction and, underneath it, sentence up to maximum of. The judge fills it in and then the next count and the next count. And it just means the jury by majority vote, I guess, has to decide what they, as a jury, accept. And I guess it could either by two-thirds if we wanted that, but it seems to me majority is the way it will be decided on sentencing, once they have reached conviction. And they just fill out a simple form with a
very few numbers that they have to put in, however they want to throw the dice up in the air and how they come down. I mean we won't ask them for their reasoning. We don't ask judges for their reasoning.

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

And I do think for all those statistics and other purposes, including if a count is reversed, you want to know what they got on the other counts, so everyone can feel that there is a certain fairness if one count is reversed and only one count remains effective in terms of sentence.
I think that if it hasn't been looked at, I will be happy to try and get some forms.

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

Maybe it has not made the top place on their agenda but it is a very important question because whether in having to deal with addressing the unitary sentencing will affect our ability to do our work. But they could implement it in various ways, including this suggestion. But I don't know where they stand on it. That may be
definitely one of the things, Kyle, you need
to look at is what the military is doing with
regard to all of the areas that intersect with
our work and the obligations we have been
given, the responsibilities we have been given
by Congress.

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

But our expectation is that that
process for just even vetting and looking at
those responses is probably a six-month review process before we will know from the DoD what the initial outcome regarding the RSP recommendations.

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

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

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
9 So, I don't know what our time
10 frame on the end will be but there is plenty
11 on our plate that doesn't require them to act
12 on for us to start thinking about things and
13 making recommendations.
14
15 For example, I thought one of the
16 things that we could focus on we will start
17 this afternoon is the sexual assault statute
18 itself. And we don't need any action from the
19 Pentagon on that at the moment. So, I think
20 that even though that is a very complicated,
21 and delicate, and difficult task, that at
22 least is something. And there are other tasks
23 that we don't need the statistical information
24 to proceed.
But there is no question that if they don't -- because the Response Systems Panel had some of the same responsibilities as we have here. We said we simply couldn't do that because the unitary sentencing system made it impossible for us to provide that information. So, Congress is aware of that, if they read our report. And being aware of that, we just do the best we can under the circumstances.

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

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

Any other questions?

VADM TRACEY: I'm not sure I have
seen this in a comprehensive enough way in the materials we have that there are sets of changes that are taking effect over -- have been done since the beginning of the decade and are continuing today. If we could get a time line of what took effect when, so when we are making some of these assessments we can sort of calibrate sort of how much time there has been for an action to be reflected in the data that we are looking at.

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

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

    CHAIR HOLTZMAN: No, it is
complicated and particularly, some of these
things aren't taking place. I mean one thing
we did mention was it was special victims
counsel, which we are supposed to take a look
at, JPP is supposed to take a look at. That
has been in effect not for a whole year yet.

What can we look at? We should start to look
and I think we might be able to be helpful in
the sense that we will be looking at what
systems they are using to evaluate and perhaps
ask some independent people what they think of
those systems. Because that is what the
Response Panel recommended. I think that
would be useful to do.

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

    VADM TRACEY: It may be useful
though to think about what does "goodness" look like. If it is wildly successful, what does that look like and what are you comparing it to, to judge that you are achieving --

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

JUDGE JONES: I was just going to say that really the things that would come up every time we were trying to assess something was the notion of well what is the impact it is having on victims. And I think Rose was famous for saying we need to have victim satisfaction surveys. And of course, it is not that easy if we are dealing with victims. But we definitely need -- I think we could now begin to ask the question of how are you assessing not just the victims special counsel but also the other side of the coin, the
victims' capabilities, which is the prosecution side of it. And again, there may not be, there it would be difficult for statistics but we may be able to, one, see if they are doing any type of survey, appropriate survey, to figure out how victims are reacting.

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

CHAIR HOLTZMAN: Do we have any other points?
LT COL GREEN: Just I guess I
would raise, in terms of the time lines, and,
sir, you mentioned this in terms of the
reports, obviously the statutory obligation
for the panel is its first report is due 180
days after this meeting. And then what the
statute requires is annual reports thereafter
for the life of the panel.

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

CHAIR HOLTZMAN: I'm not sure,
however, that my reading of the requirement
about the report means that we have to report
on everything that is within our jurisdiction.
I think we can use our judgment to report in
areas that we have focused on and have
something to say that is meaningful.
It also mandates the response of the Congress and the Pentagon more focus as well because it is one thing to read short recommendations on a 20-page report as opposed to a 200-page report and five recommendations versus 126 or 132, depending on what page of the Response Systems Panel report you mentioned. So, that is another possibility. I don't think they are required, personally, to report on everything. I think we can focus and try to.

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

JUDGE JONES: And you know after our report came out, the subcommittee to the
House Armed Services Committee, the Military Personnel Subcommittee, I guess, had us brief them, almost the entire RSP panel was there. And the first question that was asked by the Chair was well, how can you measure progress in this fight against sexual assault.

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

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

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

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

So along the lines of Representative Holtzman said, it does seem that we should be able to provide what would be a reasonable response within the period of
time we have to work, as opposed to a more
exhaustive response.

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

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

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

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

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

JUDGE JONES: One quick thing, I guess.

CHAIR HOLTZMAN: Judge Jones.

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

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

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

MR. STONE: I guess one possibility is that we promulgate several questions that we ask the deciding authority in those cases to answer for our panel. It could be discretionary but where there is no transcript, we could have five or six questions we would like them to answer for us about the case so that at least when we get their summary, it covers some of those questions you think that we need answered.
CHAIR HOLTZMAN: Well, right, especially because it is not just that we have to assess.

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

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

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

MR. STONE: Whenever I take a training course, I don't like it that I am
filling out that evaluation of which lectures were good. It takes time and it seems burdensome but I know they need it. And that is almost the same thing here, a very short four or five questions that we need. It is almost like the evaluation of a training course so that we then can take a peek at that later and see, at least in summary form, if it is a case where we wanted to order a transcript, if there was an oral record.

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

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

MR. STONE: Right. Well, we may
not want to do that for the Article 32 proceedings, we may only want to do it for the actual trials.

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

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

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

LT COL GREEN: Right.

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

LT COL GREEN: Correct.

VADM TRACEY: But don't we have to compare to something? So is there data from the work that has been to date that suggests
what the assessment was of the effect of using that information in an Article 32 hearing was so that we can compare the subsequent results? We are just going to report on what we think is the effect?

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

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

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

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

CHAIR HOLTZMAN: It is not going
to be an easy task. Any other issues to discuss now?

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

    CHAIR HOLTZMAN: Thank you.

Thanks, everybody.

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

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

    This panel is focused on the evolution of rape and sexual assault laws in the United States, and our panelists are Ms.
Tracy -- I'm sorry, Ms. Carol E. Tracy of the Women's Law Project, Ms. Charlene Whitman, and Mr. John Wilkinson of AEquitas. Did I pronounce it correctly?

MR. WILKINSON: That's correct.

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

So are we starting with Ms. Tracy first?

MS. TRACY: I believe so.

CHAIR HOLTZMAN: Okay. Please proceed.

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

I'm Carol Tracy, and I'm the Executive Director of the Women's Law Project. We're a Pennsylvania-based public interest law center that engages in high-impact litigation, policy advocacy, individual counseling, and education to improve the legal health and
social status of women who work on a broad range of issues, including reproductive rights, violence against women, gender discrimination in education, athletics, insurance, and employment, as well as family law and family court reform.

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

We also initiated a call for the change in the FBI's antiquated definition of "rape" in its Uniform Crime Reporting System, and successfully requested hearings before the Senate Judiciary Subcommittee on Crime and Drugs to address the national crisis that we
learned about that was revealed again when the media coverage demonstrated that many cities were failing to adequately investigate sex crimes.

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

Rape and sexual assault laws can be complex and confusing. Terminology is confusing because such terms as rape, sexual abuse, sexual assault, and others have different meanings in different jurisdictions. Significantly, the term "consent" is defined
differently in each state.

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

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

A woman's sexuality was owned by her father and transferred to the man who
became her husband. Rape laws protected the economic interest of men. Therefore, rape was originally considered a theft of property. The bodily integrity of the woman was irrelevant.

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

As incorporated in American jurisprudence, the basic elements of rape are generally carnal knowledge, which is male-female penetration, use of force beyond the penetration itself, and against her will,
meaning lack of consent.

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

This historical view of rape and its categorization as a property crime also perpetuated their belief that women lie about being raped. Sex crime statutes were enacted that incorporated the historic goal of protecting male interests and led to numerous procedural anomalies unique to rape. Those included requiring prompt attention to law enforcement, requiring the corroboration of the victim's testimony by independent testimony, and/or evidence of serious physical injury, allowing information regarding the victim's past sexual history and character to be admitted into evidence, and permitting cautionary instructions which impugned the victim's credibility to juries.
These rules and requirements, imposed only in rape and sexual assault cases, severely disadvantaged and stigmatized rape complainants and rendered a successful prosecution extraordinarily difficult.

The legal system's hostile treatment of rape cases and rape victims was unique and in marked contrast to its response to other assault crimes. With respect to rape, the legal system emphasized the victim's character, behavior, and words, in order to ascertain whether the victim consented. For other assault crimes, however, the legal system focuses only on the actions of the accused to establish criminal activity. For example, the crime of battery, such as a punch, is established based solely on the perpetrator's actions and their intent, and the victim's response to being punched is irrelevant. The victim may not resist or express unwillingness to being punched to establish a crime, nor is the victim's history
of being punched relevant. Lack of consent is assumed.

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

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

It is now well established that penetration of orifices other than the vagina
is a felony. Issues of force and consent continue to change, but clear trends in the evolution of the law are identifiable. The definition of "force" is broadening beyond overt physical force alone, to include other modes of coercion.

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

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

Additional law reform is needed. Vestiges of archaic requirements remain in some laws and hamper the prosecution of rape. All jurisdictions retain a crime of
penetration with force, but some still do not recognize rape without force and without consent.

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

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

These provisions and erroneous beliefs about victims and about the nature of rape distract lawmakers from the real harm that criminal law must address -- the invasion
of bodily integrity and the dynamics of rape
that must be recognized by the law. Rape is
not about regulating normative sexual
relationships, but about regulating crime.

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

In the past few decades,
researchers, state task forces, and judicial
organizations have studied and made findings
about gender bias in the court system. They
have found evidence of judges, court officers,
prosecutors, and juries who displayed
stereotypical views, insensitivity to, and
ignorance about sex crime victims, and
disbelieved and blamed victims, most
frequently when the victim knew the
perpetrator, a circumstance that is true in
the vast majority of sex crimes.

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

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

Confronting judges and juries with
the same biases held by police, prosecutors
face a daunting task in achieving convictions.
Rape cases can be difficult to prove, and
alcohol and drug facilitated rapes may involve
impaired memory and observation as well as
biases against intoxicated victims. Rather than trying to overcome the misconceptions and challenges, prosecutors often decide not to prosecute.

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

Thank you.

CHAIR HOLTZMAN: Thank you very much.

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

MR. WILKINSON: I'll go ahead and start. Charlie here, who is one of the co-authors of our paper that my remarks will be based on, is also here to answer any questions about statistics or anything that is included in the paper.
Good afternoon, everyone. Thank you so much for inviting us here to speak. My name is John Wilkinson. I'm an attorney-advisor with AEquitas, which is the prosecutor's resource on violence against women. We are funded by the Office of Violence Against Women at the Department of Justice. We are the primary training and technical assistance provider for state and local prosecutors on sexual violence, domestic violence, human trafficking, stalking, any violence against women crimes that are going on.

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

Just a little bit about AEquitas, our mission is to improve the quality of justice in gender-based violence cases by refining prosecution practices that increase victim safety and offender accountability.
AEquitas' staff is comprised of former prosecutors with over 100 years of collective experience prosecuting such cases. We conduct legal research, we provide 24/7 case consultation, serve as mentors and instructors at training events. We publish resources that focus on strategies to approach and go after violence against women crimes, multiple resources that we have.

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

I am here this afternoon to offer testimony on behalf of our organization, which we did this project with the Women's Law Project, assessing rape and sexual assault laws across the 50 states, five territories, and the District of Columbia, as well as the federal and military systems.
In addition, I am relying upon my own experience and my office's collective experience in training military and civilian prosecutors and allied professionals practicing in these jurisdictions.

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

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

Upon review of the laws, it is important to remember that terminology may differ, and that common understandings of certain terms cannot be relied upon. It is
important to review the statute's definitions and the case law that interprets those definitions to figure out exactly what these things mean.

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

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

Penetration is a category of crimes that is covered in all of the 50
states. It includes penetration of the vagina, anus, mouth, by the penis or other bodily part, or penetration of the vagina and anus by an object. Only slight penetration is typically required and should be required.

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

All of the states criminalize each of the penetrations, with few exceptions. Different states have different gradations of crime based on the activity that has occurred. Historically, non-penile vagina penetration is the highest level of grade of crime. Other kinds of penetration historically have been minimized or have a lower level of gradation.
Digital penetration or penetration with an inanimate object sometimes is a lower graded crime in some of the states.

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

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

Most expansive definitions of force are starting to include coercion, going beyond the overt physical force, codifying coercion as a fundamental element of the
crime, so that we are no longer required
simply to have some sort of physical brute
force at play.

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

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

Consent is another area that is
addressed by most of the states. Did the
victim have capacity to consent? Age is an
issue when you talk about capacity to consent.
Is there a minimum age beyond which it is per-
se criminal to engage in sexual intercourse
with an individual because that individual
lacks the capacity to consent? Is there a
disability at play in an individual that it
might render their ability to consent not
being present? And those are tricky cases,
but most states have statutes that address
that situation.

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

Intoxication is the one where it
starts to get tricky. Most every state has a
statute that addresses intoxication. Not all
of them direct -- address voluntary
intoxication directly. There is -- everybody
has involuntary intoxication covered, and most
every state through case law, not specifically
through the statutes, has a way to go after voluntary intoxication, which we find tend to be some of the toughest cases, because you have a built-in credibility issue, you have judgment against victims who are voluntarily intoxicated by juries, and that becomes a tough uphill battle, not so much because of the statutes but because of juror attitudes and perhaps prosecutor skill in addressing those issues.

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

Forty states use the term "intoxication" that require a victim to be
involuntarily intoxicated, but they still have ways to go after the voluntary intoxication cases, even though when we talk about intoxication it's referring to involuntary intoxication. 

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

Was consent freely given?

Eighteen states criminalize penetration without consent and without force, and this is another trend that is going on. The definitions differ across jurisdictions, sometimes including force in the very definition.
Conveying permission, positive cooperation in the act, or attitude consistent with freewill and with knowledge of the nature of the act, is sometimes used to determine consent. Lack of consent, if it's induced by fraud or compulsion, compulsion to submit due to the use of force or coercion, there would be no consent in those situations. That would be lack of consent.

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

Affirmative consent is a minority position of a few jurisdictions, meaning that there has to be evidence that there was affirmatively consent given to engage in sex. Whether it's through verbal consent or through
acts that demonstrate that there was consent
to a sexual act.

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

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

Some states have the sexual
arousal, gratification, degradation,
humiliation, or abuse prong to their statute.
And it -- the circumstances are generally how
we are going to figure out whether that has
happened or whether we are able to prove that
prong or not. And when we are talking about
penetration crimes, it is not really necessary
that is what the crime is about and the
circumstances certainly reveal that. That is
sometimes an additional uphill battle and is
something that needs to be looked at carefully
for other crimes.

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

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

Multiple perpetrators -- some
states are looking at laws that cover multiple
perpetrators. Typically, we would go after
them under a conspiracy theory or an accessory
theory in the law.

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

The more people understand the
law, but also the dynamics -- and Carol talked
about some of those dynamics -- and how they
are perpetrated, how these crimes are
perpetrated, how perpetrators use the myths
and misconceptions to not only accomplish the
crime but to cover their tracks afterwards,
because they know that people are going to have trouble believing a woman who got voluntarily intoxicated is telling the truth about a sexual assault, that she may not remember. People are very willing to believe these things.

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

Understanding and addressing victim behavior is one of the keys. Why victims might delay reporting, why victims might not fight back and resist, are very important. When you say -- tell a juror or a jury panel that they are going to hear a rape case, the image that appears in their head instantly of course is the stranger rapist who uses force, drags someone into the bushes, and uses brutal force or a weapon to commit the rape. That is not the majority of our cases.
They are non-stranger cases, and those are the ones that we have to address, and that victim behavior is the key. We don't want people to fall into the trap of making false credibility assessments because they don't understand how victims behave.

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

Also, we want to provide as many resources and support to victims when they have suffered the trauma of a sexual assault
as we can, including health care, but also
advocacy and counseling when it is necessary.
That is what's going to also help us win the
day when it comes to trying these cases in
court, because a stronger victim makes a
stronger witness for me.

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

And when we look and investigate
with an offender focus, we find more evidence,
that there is planning, that there are
schemes, that there is targeting of
individuals, things that I can argue to a jury
to demonstrate that this didn't just happen.
This wasn't bad judgment. This wasn't a
drunken night. This was an intentional,
perpetrated crime.

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

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

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

CHAIR HOLTZMAN: Thank you very
Our next -- Ms. Whitman, are you making a comment? Okay.

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

LT COL GREEN: Mr. Schulhofer is by phone.

CHAIR HOLTZMAN: Yes, is by phone.

Professor Schulhofer. Professor, welcome to our panel, even by remote. You may proceed. Can you hear us?

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

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

PROF. SCHULHOFER: I was asked to discuss the American Law Institute's project to revise the sexual assault provisions of the
Model Penal Code. And as you know, the MPC is not formally enacted as law anywhere in the United States, but it has been a model for state legislation and the courts often refer to its text and commentary as sources of authority.

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

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

However, those are kind of the obvious flaws. The more fundamental problem
is that the whole structure of Article 213 is based on the traditional notion that rape is a crime involving physical force or threats of violence. And to some extent, this continues to be the law in many American states. But it is now very widely recognized that this approach is far too narrow. So it's widely recognized that the sexual offenses should include all forms of sexual penetration without genuine consent.

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

The ALI approved this revision project in the spring of 2012, and they appointed me as reporter, which means only that I lead the research and the drafting, I lead the consultation with different ALI advisory committees, but the ultimate
decisions will be made by the American Law
Institute membership as a whole.

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

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

In fact, in many significant ways,
I suspect that we will probably endorse what
would currently be a minority view that seems
to us one that can be perhaps an emerging
trend or one that ought to be followed, even
if it hasn't yet been widely recognized.

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

But the largest, I would say the
most basic set of issues, is in the area of
substantive crime definition, because the
shift from physical force and resistance to a
consent-based defense requires us to confront
a wide range of different kinds of impediments
to genuine consent. So we have to decide which impediments should or should not trigger criminal liability.

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

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

As we work through these issues,
we seem to be headed towards having five distinct types of sexual offenses -- rape, intercourse by coercion, or imposition, or exploitation, and, lastly, intercourse without affirmative consent. I would like to say more about those in a minute, but those are the five penetration offenses. And we will also have parallel provisions for contact offenses short of penetration.

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

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

As Mr. Wilkinson just said a
minute ago, the area of intoxication is extremely important because it involves a large number of situations, and also one where it is very important to have -- we think if the law is going to work effectively, it is important to have a comprehensible line that makes clear how much intoxication is too much, and how much isn't, because it is also that realm of perfectly consensual sexual activity when people have something to drink.

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

The fourth one, exploitation, involves abuse of professional trust as well
as certain specific forms of deception -- relatively few, but well identified forms of deception. And, again, those would apply even if the victim ostensibly expressed some form of consent.

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

    It's not the prevailing view that this conduct should be punished simply because there is no affirmative expression of consent, but these situations where a victim may be passive because of fright or inability to speak coherently because of intoxication, those situations would be covered even when the victim didn't expressly resist or say no. So they didn't expressly give affirmative consent either, and the judgment,
then, would be that to proceed under those circumstances was abusive.

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

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

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

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

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

Thank you.

CHAIR HOLTZMAN: Thank you very much, Professor.

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

JUDGE JONES: Have any of you --
perhaps you have, Professor, I don't know --
taken a look at our task, which is to look at
the current version of Article 120 and think
about it in the context of improvements?

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

JUDGE JONES: Yes, it was.

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

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

PROF. SCHULHOFER: I took a look
at the UCMJ, and I can see what you're dealing
with. To my case, I think there is -- I saw
many issues, but I haven't sat down to
consider what I would do with it. In many
respects, I think it might not be that much different from what we would consider appropriate with respect to state law offenses, although in certain respects the military context clearly would be different.

JUDGE JONES: Off the top of your head, do you see -- and I'm really speaking very generally -- do you see any value to taking the penetrative offenses and separating out the non-penetrative offenses? Is there something that you see as a value to that?

I'm trying to figure out what value that might have, and it is something that we -- you know, has been suggested.

PROF. SCHULHOFER: Yes.

Incidentally, could you tell me, please, which panel member was speaking?

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

PROF. SCHULHOFER: Oh, Judge Jones. Thank you very much. So, in general, it has been traditional to separate. And I
think the principal value of doing that is to be very clear about grading questions, because the penetrative offenses typically are considered much more serious.

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

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

It is much harder to see that in the context of touching that might be a kiss on the cheek or a brush against the backside
or something of that kind. So, yes, I think our judgment would be that there is -- that it would be very important to try to keep those offenses separate.

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

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

JUDGE JONES: I guess that's what I'm talking about. I mean, to give you some context, there were points where the -- our Response Panel did have some concern that some
conduct that was being captured, at least in
the work gender-relations survey, was not
actually criminal. It was contact but may not
have been criminal. It might have been
harassment, and there was a -- we were
concerned there might have been a fuzzy line
there. And maybe that's just a problem with
the survey instrument and not -- not the Penal
Code or the -- in your case or the Uniform
Code of Military Justice in ours.

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

PROF. SCHULHOFER: Yes, actually,
quite a bit. I think you've put your finger
on a very serious problem. It's certainly a
problem in terms of surveys because people
don't often understand what is meant, that
even if you ask, "Have you been raped?" and
one of the notorious problems in surveys has
been that people who clearly -- who describe
conduct that clearly involved forcible, non-
consensual penetration, did not think that
they had been raped because they were
operating under -- for example, if they were
on a date, they might think, well, then,
automatically it couldn't have been rape.

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

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

And that is a subject that we had
quite a bit of discussion about and quite a bit of discussion about how to draw that line, because there are very clear dangers of abuse in these situations of asymmetric power. And I would think especially so in the military. But, on the other hand, we wanted to be sensitive to not overextending the criminal law, not to get too far ahead of social norms, and also to respect people's right and need for relationships that really are mutually consensual.

MS. WHITMAN: Hi. This --

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

MS. WHITMAN: Yes. Thank you. I just wanted to address your question in context of what we looked at. When we first started doing this research on rape and sexual assault across the country, we sat down with our staff who John mentioned have extensive experience in violence against women crimes. We sat down with Women's Law Project and other
professionals to really look at what they saw when they were investigating and prosecuting cases.

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

And even though on their faces the statutes might not appear as flexible, we have seen the application to be more comprehensive in some states. And so it really goes down to how the statutes are implemented, how the prosecutors go forward with their cases, the investigation. So just in considering how much conduct is covered, simple language can
cover a lot of conduct. It just depends on
how it's implemented. But that's something we
have looked at and considered. So just wanted
to add that point in.

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

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

PROF. SCHULHOFER: Yes,
Schulhofer. Thank you.

JUDGE JONES: I think that's just
what you were talking about, the inequality in
-- well, here we have -- in the military rank
or a leader versus a new recruit, shall we
say. Where are you at with respect to that
analysis, if anywhere?

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

JUDGE JONES: We'll take it,
though.

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

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

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

In the civilian context, I don't think it's likely that we would say a relationship between an employee and an employment supervisor would be impermissible per se, but we would have a criminal offense that would apply -- what we would call sexual intercourse by coercion -- if an employment supervisor, anyone acting in an official capacity, implied that there were either job-related sanctions or benefits tied to sexual
consent. That would be -- we would treat that as criminal coercion per se.

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

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

PROF. SCHULHOFER: Precisely.

Yes.
JUDGE JONES: Okay. And where would you put --

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

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

JUDGE JONES: Well, that will be something that we will definitely be talking about. I don't have any other questions, except --
MS. WHITMAN: I just wanted to make another addition to complement what Professor Schulhofer was saying. And related to coercion, Carol mentioned that coercion is being included more and more, and it's something that we're seeing. And right now we're doing some research on coercion in sexual assault cases, which it's in the middle, but we're happy to share it with you.

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

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

Just wanted to add that.

JUDGE JONES: Maybe I misheard
you. Did you say there were cases out there involving this in state courts?

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

JUDGE JONES: Thank you.

CHAIR HOLTZMAN: Thank you.

Admiral?

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

CHAIR HOLTZMAN: Mr. Stone?

MR. STONE: Yes. This is Victor Stone. I guess, Professor, the first question that occurs to me is you had said it depends on the social norms involved. And we are dealing with a situation here, it seems to me, that is very different from civilian society's social norms.
When we are in a combat zone, and people may think they are lucky that they are living today and didn't get blown away earlier in the day, and their life expectancy is very questionable by the end of the week, it seems to me that is a very different set of social norms. The easiest case is the one you mentioned when it's a superior officer, but I'm much more concerned with the case when it's two officers of the same rank or it's not clear that the victim isn't the superior officer.

And I guess I'm wondering whether you have any materials that you can share with us that look at people in these incredibly stressed situations and whether or not there are different exceptions or defenses or definitions of consent which are a little broader and help us address, a) the fact that they're in an ongoing relationship, b) the fact that their ongoing relationship may be a co-dependent team to keep them all safe, and
c) it's not something that they can easily decline sometimes. That relationship is not going away.

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

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

PROF. SCHULHOFER: Well, perhaps I should start, although I think you also wanted the other panel members to comment on that. We have -- we do look at that in a number of ways. Yes, we do.
Whether stress -- I'm not sure if I'm reading correctly between the lines of your comment, but there might be an implication that being in a stressful situation somehow operates to mitigate or excuse what might otherwise seem to be sexual overreaching.

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

On the other hand, it might be appropriate to say that precisely because situations are stressful there might be more of an institutional obligation to establish clear boundaries and to take on board from the beginning, ex ante, the nature of that kind of a dynamic, and to set boundaries so that that
doesn't lead to abuse.

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

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

            There are cases all over the map
on that. And in my view, it becomes self-
destructive to have a definition that is so
broad that at least literally it applies to 90
percent of the mutually desired sexual
activity that occurs between people who have
been drinking.

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

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

But having said that, we are -- we
are loosely guided by the wisdom that's out
there, and also very sensitive to the fact
that a lot of legislation gets through without
very thoughtful consideration of what it really means. So ultimately we are trying to make our own judgment about what works best in terms of victim protection as well as fairness to the accused.

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

But also it's important to come back here, and I think this ties very directly into your question, we think that an important function of the law is to communicate norms in situations where what might be generally accepted social behavior doesn't adequately take into account risks to people who are in vulnerable situations. And often a norm is taken for granted by men as well as by women, without -- and a general public that really
doesn't appreciate how risky certain kinds of behavior can be, and to what extent the potential harm gravely outweighs the potential benefit.

So we want to -- we think the law has an important role. And not being a military person myself, I would think that the UCMJ has a very, very important role in looking at norms and saying, "Gee, this seems to be the norm. But you know what? Boy, that is really dangerous and unjustifiably so."

And we should -- very abstractly, but, you know, I think it would be, in my view, appropriate for your panel to look at prevailing practices and say, "Well, there are some areas where something that everybody accepts should not be accepted," and to adopt a provision that would try to communicate very clearly a better standard of behavior.

MS. TRACY: I would just like to add to that. It seems to me when we are talking about the history and evolution of the
law of rape, within the context of the 
military of course there is a history of rape 
being the spoil of war, that the conqueror 
conquered. One of the victories of war was 
being able to rape the female population, to 
despoil the population. It was seen as an 
anguish of male defeat more than female harm. 

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

CHAIR HOLTZMAN: Mr. Wilkinson?

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

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

But I don't know that it -- you can list every single situation and codify the answer that will address this this way or that way. If something is happening repeatedly,
though, it probably does need to be addressed in some fashion. And whether you narrowly specifically tailor it to -- I know you were just giving one example, but these things happen.

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

PROF. SCHULHOFER: If I can add a competing, maybe contrasting perspective on that point, which is that this will be an
academic as opposed to an experienced practitioner's perspective. And, in principle, the experienced practitioner is right every time.

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

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

PROF. SCHULHOFER: Yes. I mean, I really -- you are absolutely right in what you say. At the same time, I think looking at it from an academic -- somewhat academic perspective, one of the things we find coming back to the question of social norms, is that when the law is not absolutely clear, when it seems to be flexible, it doesn't communicate a sufficiently clear message.
And particularly when you are pushing back against social norms that tend to be insufficiently protective, in the area where there is vagueness or room for interpretation, it's the narrow interpretation that usually wins out, either at trial or even in prosecutors deciding whether to go forward.

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

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

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

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

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

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

So I think there's --
CHAIR HOLTZMAN: Professor?

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

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

Mr. Taylor.

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

If I understood your comments earlier about trends that you are noticing with rape shield and similar laws, I think I understood you to say that prior sexual activity is generally considered inadmissible
with some exceptions. Two of the items that
this panel has been asked to address are
instances in which prior sexual conduct of the
alleged victim was considered in a preliminary
hearing, and then, secondly, instances in
which similar evidence was presented in a
court-martial and what impact that had on the
case.

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

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

We have given your staff a copy of
our current draft, which has about 30 or 40
pages addressing the question of exception.

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

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

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

CHAIR HOLTZMAN: If I could just
take the liberty of the Chair, since Mr.
Taylor doesn't have another question, do you
want to amplify your answer? You've got a few
minutes to do that.
PROF. SCHULHOFER: Oh. You're speaking to me?

CHAIR HOLTZMAN: Yes, sir.

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

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

For example, in a case where -- there are cases where a victim picked up a young man on the highway, a complete stranger, and had sex with him, and then the allegation was that he forced himself on her. And her testimony was that she would never do such a thing voluntarily. And the defense offered to
prove that in fact she had done that --  
something like that voluntarily on a previous  
oclassification. So evidence to -- that a witness  
made a specific statement which -- about her  
prior behavior, that's another instance in  
which prior inconsistency has to be admitted.  

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

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

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

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

MR. WILKINSON: Thank you. Yes, that is a tricky situation. And when you’re talking about rape shield, it's in place for a reason. And the more exceptions you give in some of those sort of remind me of how things were before we had rape shield, and it would let in all sorts of evidence that could be characterized under numerous exceptions that really have nothing to do with the case, except trashing the victim, which is exactly what the practice was.
So of course where you have physical evidence that needs to be explained, that absolutely could be an exception. Where you have a prior sexual relationship between the parties, that is a common exception, that you would want to be able to go into that to explain that that may be where the issue of consent came in or was confusing, things like that.

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

Additionally, you mentioned preliminary hearing and the use of prior sexual conduct or rape shield implications there. Preliminary hearings, typically credibility is not an issue there. It is simply a fact-finding hearing to determine whether there is enough evidence to go forward 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
5 If it was to explain away
6 scientific evidence or physical evidence that
7 was introduced in a preliminary hearing, then
8 that might be one exception. And any time the
9 prosecution opens the door where a victim
10 makes a statement, affirmative statement, then
11 you could have a hearing to ask the judge,
12 well, now, this is relevant, this needs to
13 come in -- the incident of the individual who
14 was picking up folks along the highway, or
15 whatever, that the judge would be able to look
16 at that.
17
18 And the other catch-all exception
19 is if it's going to impose a burden on a
20 defendant's constitutional rights, which is
21 sort of a catch-all one. And if it's going to
22 affect his ability to receive a fair trial,
23 then you have that kind of catch-all to let it
24 in.
But I worry about lots of exceptions to rape shield and how we treat victims and our history with it, which explains why we have rape shield to begin with.

CHAIR HOLTZMAN: Okay. Thank you.

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

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

I don't know if you've had a chance to review that or haven't, but if you wouldn't mind taking a look at it and giving us your comments about where you think it could be strengthened, what is missing. Bear
in mind that the statute has been changed now
several times in the past few years, so we
don't want to drive prosecutors and defense
counsel crazy, totally crazy. But if we are
going to try to get it right, what do we need
to do?

And similarly, Professor, and I
say that with all compliment, you mentioned at
the outset in your remarks that you identified
a number of issues in Section 120. Would you
mind telling us what those issues are?
Obviously, I don't know that we have time for
you to go into all of them at the moment, but
perhaps you can identify some of the major
concerns you have, at least for us now, and we
would love to have the opportunity to explore
your views on this later. So, anybody who
wants to proceed first.

PROF. SCHULHOFER: Well, I would --

CHAIR HOLTZMAN: Okay. Professor,
yes.

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

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

So any non-consensual act is, by
definition, bodily harm, and then that
definition -- so the concept of non-consent is smuggled into -- I don't say that -- well, I guess I do say it pejoratively. I don't quarrel with the outcome, but I don't think it's -- I think it's very confusing to bury the crime in the definition of bodily harm the way that the UCMJ currently does.

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

CHAIR HOLTZMAN: Mr. Wilkinson?

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

So that -- I would want something more clear in that situation. I think it's good that the code covers that activity,
though, and covers it with some language.

That just wouldn't be the preferred language in my mind, just the term "bodily harm."

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

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

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

MR. STONE: Yes. I have a quick
question, which I'd just preface by saying
that I agree with the Professor that we have
to get rid of -- it would help tremendously to
get rid of ambiguity. That's part of the
reason we're hearing this panel, and Congress
is doing what it's doing.

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

And so I would invite you, and I
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.

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

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

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

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

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

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

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

So if we go back to the origin of the UCMJ in 1950, originally Article 120 was a 110-word statute that covered both rape and carnal knowledge. And once like those antiquated statutes that Ms. Tracy described in her testimony, rape was defined as, quote, an act of sexual intercourse with a female, not the person's wife, by force and without her consent. And death was an authorized sentence for rape.
Now, there were other UCMJ provisions that covered other sex offenses other than what we just described. So, for example, Article 125 was a prohibition against sodomy, including forcible sodomy, and the term sodomy was construed much more broadly than at common law, to also include not only anal intercourse, but also fellatio and cunnilingus. And then sometimes sexual assaults would also be charged under Article 128, which covers assault and battery, and then also would be charged as attempts.

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

Now, since that time, Article 120 has been amended six times, and we'll look at each of those amendments. So in 1956, Congress codified the UCMJ into Title 10.

There were then certain non-substantive changes in the wording as part of that revision.

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

As I mentioned, the original Article 120 covered carnal knowledge, which is the military offense of statutory rape. In 1996, Congress made certain amendments to
Article 120, but they were limited to that
carnal knowledge portion of the statute. And
then in 2006, Congress substantially rewrote
Article 120, entirely rewrote it. In 2011,
Congress did so again. And then in 2013, they
corrected a typo, literally deleted a period,
an extraneous period. So I'm going to ignore
the 2013 change for the rest of my remarks and
focus on the other ones.

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

So let's start by looking at the
2006 amendment. So in the National Defense
Authorization Act for Fiscal Year 2005, Congress required the Secretary of Defense to review both the UCMJ and the Manual for Courts-Martial provisions regarding sexual assault. And then a Joint Service Committee subcommittee of which Colonel Jackson was a member produced an 809 page report that presented Congress with six options. At first, DoD said, don't change it, don't change it, but if you do change it we recommend option five, which was a modified version of the 18 U.S.C. statutes that were in place at the time.

And then in the National Defense Authorization Act for Fiscal Year 2006, Congress did amend Article 120, and the amendment was almost identical to option five. There were certain differences. Particularly, Congress chose not to enact certain provisions that dealt with people under the control, having sexual intercourse with somebody who exercised control over them. But with minor
exceptions, Congress enacted what was option five. And at that point, Article 120 became a 2,830-word article that addressed 14 different sexual offenses, only one of which retained a consent element. There's a listing of the 14 offenses.

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

So use of force against the victim, causing grievous bodily injury to any person. So you can cause a rape to someone by causing grievous bodily injury to someone else. So, you know, I might assault someone's child as a means of making them having sex with me. That would fall within the definition. Threatening or placing the victim
in fear that any person, again not limited to
the victim, but any person would be subjected
to death, grievous bodily harm, or kidnapping.
Rendering another person unconscious,
administering them, basically, a date rape
drug without that person's knowledge or
consent.

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

Now, soon after the 2006 amendment
was adopted, several trial judges declared
portions of it to be unconstitutional. And
one Air Force judge, Colonel Don Christensen,
who went on to become the chief prosecutor of
the Air Force and, in effect, was the
prosecutor, he personally prosecuted the
Lieutenant Colonel Wilkerson case, when he was
a trial judge, he said Article 120 on its face
is almost incomprehensible and is probably the
most poorly-drafted and poorly-enacted article
in the UCMJ probably in the history of the
UCMJ.

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

However, it was still recognized
as an affirmative defense if the defense could
establish that there was consent. So it was
no longer did the government have to prove
lack of consent, but the defense could raise
the defense of lack of consent. And if they
raised sufficient evidence, then the burden
would shift back to the government to disprove
consent beyond a reasonable doubt. So you had
what was called at the time a double burden
shift.
And so the argument in Neal was that double burden shift was unconstitutional in a forced context, and CAAF said no. They said no 3-2. But one thing is interesting. Note the statute took effect in 2007. It wasn't until 2010 that we got that no. In the meantime, a number of prosecutions were placed on hold because of these trial judges' rulings, and there was considerable delay throughout the system to get to that no.

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

And then in 2011, the Court of
Appeals for the Armed Forces did hold a portion of the statute unconstitutional. In the case of the United States v. Prather, CAAF held that the burden shift was an impermissible, the consent burden shift was an unconstitutional burden shift in a substantial incapacity case.

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

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

But in the Valentin case, the court said that had been extinguished by the plain wording. Now, I don't think anyone thinks that Congress meant to extinguish it. It's just they didn't include that within the recognized theories. And so it's inclusio est exclusio alterius concept, you know, when you mention the one you don't mention the other, you've excluded the other. So, again, a cautionary tale in rewriting the statute that not all of the common law gloss is brought in
with the statute. Sometimes you lose part of
that, as was demonstrated by the Valentin
case.

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

So the revised Article 120 covers
rape, sexual assault, aggravated sexual
assault, and abusive sexual contact. The new
Article 120(b) covers rape of a child, sexual assault of a child, and sexual abuse of a child. And the new Article 120 covers voyeurism, video voyeurism, forcible pandering, and indecent exposure. It eliminated the burden shift. And, as I mentioned, it used to be the case that rape was a death penalty offense. It eliminated death as a punishment for either rape, or rape of a child.

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

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

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

So rape is defined as the penetration of the vulva, anus, or mouth. And then we have a dichotomy, either by the penis, in which case there is no further specific intent element. It's official without any state of mind to satisfy that element, just a penetration of the vulva, anus, or mouth, although you still have to prove the means. So that's one way that you can have the conduct, or penetration of the vulva, anus, or
mouth by any part of another person's body or any object. So, essentially, anything other than the penis, with either the intent to abuse, humiliate, harass, or degrade any person, or to arouse or gratify the sexual desire of any person, and then accomplished through one of five means.

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

Okay. So sexual assault then is defined as the penetration of the vulva, anus,
or mouth by penis, or penetration of the
vulva, anus, or mouth by any part of the
person's body accomplished through one of
seven theories of liabilities.

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

All right. And then there are two
sexual contact offenses: aggravated sexual
contact and abusive sexual contact. So that
depends upon both sexual contact of the non-
penetrative nature, plus one of the forbidden means of perpetration. So the more serious means of perpetration, the one that aligns with rape is the aggravated sexual contact, and the less serious that which aligns with sexual assault is abusive sexual contact.

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

The president, as we mentioned
this morning, it's the president who
prescribes the maximum punishments for
offenses. And in 2013, the president
prescribed the maximum offenses for the new
Articles 120, 120(b) and 120 by executive
order. And so the maximum punishment for rape
is dishonorable discharge, forfeiture of all
pay and allowances, and confinement for life
without eligibility for parole; for sexual
assault, confinement for 30 years; for
aggravated sexual contact, confinement for 20
years; and for abusive sexual contact,
confinement for seven years.

Now, in addition to that, Congress
also has created a mandatory minimum of
dishonorable discharge for offenses that occur
on or after June 24th, 2014. So for a
penetrative sexual offense, including not only
those that we've just examined, but also
forcible sodomy, or an attempt to commit any
of those, if the accused is found guilty, the
sentence for an enlisted member must include
a dishonorable discharge, the sentence for an officer must include a dismissal. While it's possible, in some instances, for the convening authority to reduce a dishonorable discharge to a bad conduct discharge, the convening authority does not have the unilateral discretion to reduce an officer's sentence to a dismissal.

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

And, finally, one of the things that's included in the Manual for Courts-Martial for the various offenses are model specifications, definitions, elements of the offense. The Joint Service Committee has recommended those for the new Article 120 and 120(b) and 120. Those have been published in the Federal Register, but the president has not yet promulgated those by executive order.
So that's everything I have. I'll be happy to take any questions.

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

CAPT REISMEIER: Yes, ma'am.

Thank you, Madam Chair and panel members. Just briefly, by way of background, I'm currently the Chief Judge of the Navy, so I supervise both the trial judges and the appellate judges. I say that because, to some extent, even though I'm not a sitting judge, I'm still in the judiciary, so some of my comments and perhaps recommendations are somewhat constrained by the judicial canons. But with that said, a couple of opening remarks here. I've spent my entire career in the world of criminal litigation and military justice. So I came in as a trial lawyer, and pretty much never left it. I've never been a staff judge advocate. All of my time has been spent simply doing criminal work.
The overwhelming majority of my experience is with the pre-2006 version of Article 120, because I left the trial bench in 2006. So by the time the versions that have come out that have proven to be a bit more problematic, I was dealing with them at the appellate level or in the criminal policy realm in one of my jobs.

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

As Mr. Sullivan indicated, the
case law that has developed created a judicial
gloss that permitted prosecutors to reach any
misconduct that had been alleged, permitted
defense counsel to defend, with notice that
had been developed through decades of common
law, any charge that was alleged, and it also
permitted judges to thoughtfully instruct
based on that same history of case law
development. The case law provided
incremental change that kept pace with the
evolution of practice and criminal theories.

A lot has changed over the last
eight years. The first major changes in 2006
created incredible uncertainty, years of
appellate litigation, unconstitutional
applications, and cases that were salvaged
only by trial judges who did not follow the
language of the statute.

The second major changes in 2011
addressed many of the legal problems that
arose from the 2006 amendments, but the
landscape remains complicated and unsettled,
with overlapping theories in some instances,
gaps in some applications, and, from the
perspective of some trial practitioners,
applications that are, in some instances, both
more broad and less broad that may be required
or anticipated.

Compounding the changes in the
substantive criminal law or the changes in the
way that the appellate courts have addressed
lesser included offenses, that is offenses
which are included within the offense charged
but not specifically listed on the charge
sheet, those changes may have made it
impossible to return to the charging schemes
that existed prior to 2006 under Article 120,
because what were once lesser included
offenses may not be lesser included offenses
under the existing interpretations by the
appellate courts.

But even if turning the clock back
is not possible, one thing was clear under the
old charging regime: everyone knew what the
theory of liability was, and charging was
clear and uncomplicated. As this review moves
forward, it would be useful to know why the
older version of Article 120 worked, how
exactly the case law provided a workable
series of criminal theories under which cases
to be tried, what changes would have to have
occurred to the statute because of the
developing case law addressing notice pleading
and lesser included offenses.

And then consider how that older
version, as modified, would compare with
today's statute, not just in terms of the
wording of the statute, but in terms of how
the practitioners and juries actually function
relative to the statute.

These changes to Article 120 and
the evolution of the appellate case law and
addressing the relationship between offenses
has created something that is an anathema of
criminal law: uncertainty. The uncertainty
arises first in the charging decisions as
prosecutors struggle to determine what is and what is not a lesser included offense in the charged offense.

They struggle to determine which statutory period of liability most closely matches their assumed facts. That forces prosecutors to charge various theories of liabilities for the same criminal misconduct to reach a sustainable conviction. That, in turn, forces defense counsel to face charge sheets that appear to allege more crime than allegedly occurred.

Trial judges are forced to determine whether and how the charges can be combined, how to instruct the juries, and what to do when juries return verdicts on charges that are clearly related or potentially contradictory. Ultimately, years later, an appellate court is forced to determine whether the conviction can stand. And only then, once a case is decided on appeal, the result in applications have to be translated back via
common law to practitioners who have to
determine if their facts match those that gave
rise to the emerging landscape.

Cases that in years past would
have been fairly simple to resolve are now
science projects for everyone involved,
consuming vast resources and considerable
time. Criminal practitioners benefit from
predictability. They need to know that what
they are doing today will be sustainable under
case law that will be created tomorrow.

While the law naturally evolves
and naturally creates new rules and
requirements, layers of statutory changes
inserted into a body of law that is still
developing in trial and appellate courts is,
as one person put it to me, akin to building
a plane while flying it.

Now, I'm not advocating change or
stasis. I'm merely noting that when change
occurs in substantive criminal law, those
changes necessarily give rise to changes in
processes and applications. And when the substantive criminal law continues to change while appellate courts are still creating a body of law to address the last changes, the system will naturally be unpredictable. Some change is good. Some may be required. But before changes are offered, it may be worth considering if it's truly needed, or if the change is being driven by a short-term problem, or an aberrant result that could just have easily been resolved by the evolution of jury instructions, case law, and practice.

Speaking with trial practitioners, at least within the Navy, there's a sense from prosecutors that they would prefer some relative stability and the ability to work through the existing statute to find applications that work without, again, altering the fundamentals of the statute. Defense counsel would generally prefer some greater clarity in some of the definitions and perhaps some narrowing of the scope of some of
the provisions that they believe reach conduct
that may be better considered as hazing or
battery. Judges would prefer to practice in
a stable system and be able to develop
instructions based on case law that find
logical, legal, and sound applications
grounded in common law.

Appellate judges will continue to
work through the cases as they find them, but
they note that the existing landscape has
created a need to resolve more legal issues
that existed before any of the changes were
enacted, and they struggle to find touchstones
and precedent that has been uprooted from the
cases that guided us prior to 2006.

As decision-makers work through
this project, it would be useful to consider
the best source for change. Change is brought
about by the evolution of common law as slow,
steady, and predictable. Changes brought
about by statute or rule are instantaneous and
create a demand for more common law to develop
the gloss of judicial precedent that informs trial practitioners. The task may be to determine what truly requires statutory change because it's the only way to fix the problem, determine what requires time for the system to reach a new equilibrium that will naturally solve the problem, or, ultimately, establish that there is no problem to fix in the first place. With that, I look forward to talking with you today.

CHAIR HOLTZMAN: Thank you very much, Captain. Mr. Cassara?

MR. CASSARA: Good morning, Congressman Holtzman, Judge Jones. It's a pleasure to see both of you again. Madam Chair, as you were making your comments, you talked about the very distinguished panel, and then there's me. I've actually tried cases in front of all three of these gentlemen at one time in my history.

Let me just tell you a little bit about myself so you will know what my
perspective is. My name is William, or Bill, Cassara. I am a civilian attorney in Augusta, Georgia with a law practice dedicated to representing service members in court-martials, appeals of court-martials, and other military-related matters.

I served six years in the United States Army as Judge Advocate General Corps on active duty, 16 years in the JAG Corps Reserve, retiring about four years ago. And I got to meet both of these distinguished women when I was on the response systems panel for approximately one year.

I say this with no inhibition when I tell you that I'm an unabashed defense hack. So I want you to know that that is what my perspective is. My job is to represent service members who are accused of crimes or who have been convicted of crimes. Therefore, you will hear me use the terms "alleged victim" and "alleged perpetrator," and I mean no disrespect by that. But, respectfully, I
am the person who gets a call from a family member after they believe that one of their loved ones has been wrongly convicted of a sexual crime, and has been sentenced to confinement in Fort Leavenworth. It is my job to try and get them out of that confinement.

My perspective is exactly that. I don't come with stats, statistics, charts. I have empirical data from the service members that I have represented over the years. I'm not here to argue the history of Article 120 and where we are, although I will say that I agree firmly with Captain Reismeier's conclusion that we operated very well until six years ago. But that's gone.

My concern is simply that the pendulum has now swung too far, that we are putting people on a sex offender registry and convicting people in cases that we never would have done years ago. To date, I have seen two changes in the Uniform Code of Military Justice that cause me great concern. And,
again, I'm not here to argue history, but I
would like to do this just to sort of give you
a framework of where I'm looking at this.

One is in the evolution of Article
32 investigations. I have had two cases in
the last year in which prosecutors came to me
and said, quote, we want to kill this case at
the Article 32. These were sexual assault
allegations, one of which involved four people
-- you can use your imagination as to what
happened -- three of whom said that the sexual
contact between my client and the alleged
victim was completely consensual.

One of those people was the
alleged victim's husband. My client was still
charged with a crime of sexual assault and
faced an uncertain future until the case was,
quote, killed, unquote, at the Article 32
hearing.

I did another case in which a
first sergeant was alleged to have sexually
assaulted one of his soldiers. I'm not here
to defend a first sergeant having sex with one of his troops. It should not happen, and he should have been punished. But there were two eyewitnesses to the sexual act between the two of them who testified at the Article 32 hearing that the sexual contact was completely consensual. Again, the prosecutor's desire was to, quote, kill that case at the Article 32 investigation. Under the new Article 32, I do not believe that will happen.

My other concern is with the mandatory minimums that have passed. I have great concern about this in two areas. One is I think it discourages plea bargains. It's hard enough to get a service member to plead guilty when they know they're going to be placed on a sex offender registry. It is even harder when they know that they will face a mandatory dismissal or dishonorable discharge.

Two, I am very concerned, as I deal with a lot of service members who come back from war with severe traumatic brain
injuries and post-traumatic stress disorder
that might not arise to the level of a legal
defense at court-martial, but would be taken
into consideration as a matter of mitigation.
I am now concerned that their families will be
deprived of their retirement, because they
will be faced with a mandatory dismissal or
dishonorable discharge.

I'm not so naive as to think that
none of my clients are guilty, although they
will all say so. I'm also not so naive as to
think that all of my clients are guilty. So
I'd like to point out to you some of my
concerns about the new Article 120 and its
one-size-fits-all approach.

My biggest concern is with the sex
offender registration requirements. I am
seeing clients go to court-martial where, if
convicted, they will be placed on the sex
offender registry, in cases that I do not
believe anybody envisioned would be the end
result. And I will give you a couple of quick
examples. I represented a soldier this week who one of the charges against him was that he took a video of himself -- you can use your imaginations as to what that video consisted of -- and jokingly showed it to a couple of his fellow soldiers in a supply area. Had my client been convicted, he would have been placed on the sex offender registry. Fortunately, he was acquitted.

I have had cases in which a drunken slap on the backside of a female has been charged as an aggravated or as a sexual assault, an aggravated sexual assault, in using the language that Mr. Sullivan just pointed out, under the touching any body part of a person with the intent to arouse or gratify the sexual desires. Respectfully, I don't know what Congress's full intent was, or what the state's intent is with regards to sex offender registrations. I don't think it is to put that individual on the sex offender registry. And I have seen one case recently
in which my client was charged with a sexual assault for kissing a woman against her will to gratify his lust and sexual desires. That is my biggest concern with the new Article 120. It's not my only concern.

We talked earlier, I heard some of the panel members discussing the issue of intoxication as it relates to sexual assault allegations. Intoxication plays a role in probably 80 to 90 percent of the sexual assault cases that I do. It has become literally a rush to the police, whether it be a male and a female, two males, or two females, as to who can get to the CID, OSI, or NIS office first and file the complaint of sexual assault after a night of drinking and a lack of memory. It is not victim blaming to point these issues out.

In the case that I did last week, another one of my clients was also charged with a sexual assault. Again, he was acquitted, but he was charged three different
ways under three alternate theories as to the
sexual assault allegation. That has created
mass confusion amongst panels, and even
amongst military judges.

One other comment about the new
Article 120 that was discussed earlier, the
issue of supervisor-subordinate relationships.
And I just wanted to clarify one thing for the
panel. I think the most common scenarios that
we are talking about that in a military
environment are in drill sergeant or drill
instructors and trainees, and commanders and
their soldiers.

This consensual activity between a
commander and his or her soldier and between
a drill sergeant and his or her trainee is a
crime in the military. It is already punished
under the Uniform Code of Military Justice.
I do not believe that we should criminalize
consensual sexual conduct between drill
sergeants and trainees or between commanders
and their soldiers.
I can tell you from -- I live very close to Fort Jackson, South Carolina, which is an Army training base. I have handled numerous cases in which drill sergeants have had sex with their trainees, one of which involved several trainees rolling dice to see who would be the first one to sleep with the drill sergeant. I'm not saying that that drill sergeant should not be prosecuted for having sex with a trainee. I am saying he should not be prosecuted under Article 120 of the UCMJ.

I believe that any discussion of the revisions to the Uniform Code of Military Justice and Article 120 need to also consider the pressure that military panels and, to some smaller degree, military judges feel in this area. I think it would be completely naive to think that panel members do not feel an increased pressure to, quote, support the command and render convictions in these cases.

Years ago, at least in my practice
and I think most defense practitioners would tell you the same thing, if you had an Article 120 case, it was an automatic panel case. It has almost become the opposite way. I had a military judge tell me recently, a former military judge, that military judges are the last bastion against the pressure that many in the military feel in this area.

Respectfully, I believe it would be folly to think that, as a result of the recent actions by Congress, all well intended, but I think it would be folly to think that no service member has been wrongfully convicted under Article 120. My practice tells me differently. As you focus on the changes to the Manual for Courts-Martial, I urge you to consider the rights of the accused and their service to our great nation.

So I'm often asked, Bill, if you were king for a today -- and I don't get to do this, certainly not at home -- but if I were king for a day, what would I do? I would ask
you to consider two changes to the UCMJ. One
is -- and they're very closely related, as
they both relate to Article 25 of the Uniform
Code of Military Justice, as it relates to the
selection of panel members for courts-martial.
I would ask you to consider recommending the
enactment of mandatory -- excuse me -- random
panel selection for panel members. As you all
know, right now the panel is appointed by the
convening authority. This creates the
perception, not the reality, that they are
there to do the command's work.

Secondly, I would ask that you
recommend that, in general courts-martial and
specifically in sexual assault and Article 120
cases, that there be a minimum panel size of
12 members, as there is in the civilian world,
for a general court-martial, and six members
for a special court-martial, as there is in
the civilian world. I believe it is an
anathema to fundamental fairness to not afford
the same protections to our warriors, to those
who protect us, as are afforded to the
citizens in the private sector.

And the other thing I'm asked is,
well, what can be done? Madam Chair, you and
I spoke about this many times. In my opinion,
prevention is the best cure. It is not
blaming the victim to admit the reality that
it's just a really bad idea to have alcohol-
fueled parties in the barracks with 21- and
20- and 22-year-old kids.

I have a 23-year-old son. I know
this will be reported on the record, and he'll
probably shoot me for this. But it's a really
bad idea to give my son, or any other 23-year-
old kid an alcohol-fueled party with members
of the opposite sex. If anything, pointing
this out is protecting the victims, not
demonizing them.

Telling someone not to leave the
keys in their car in downtown D.C. is not,
quote, blaming the victim of an auto theft.
It is facing the reality that leaving the keys
in your car and the top down on your
convertible is just not a really good idea.
Having drunken alcohol-fueled parties in the
barracks is not a really good idea, and
commands are still doing that.

So, again, as you consider these
changes, please keep in mind the rights and
the protections of those who are serving our
country. Thank you, Madam Chair.

CHAIR HOLTZMAN: Thank you very
much, Mr. Cassara. Colonel Timothy Grammel.

COL GRAMMEL: Madam Chair and
members of the panel, good afternoon and thank
you for letting me speak today. I'm going to
keep my comments short, because I prefer to
answer the questions you have, rather than
answering the questions I think you might
have.

I've been a trial judge for the
last ten years presiding over courts-martial.
I've prepared some notes for my initial
comments, but someone would think I Xeroxed
Captain Reismeier's notes and, for fear being charged with plagiarism, I'm going to change. I'm just going to comment on some things other people have said, and erase and delete most of what I had prepared.

The main concern for trial judges is to properly instruct the jurors on the law. And it's a challenge to take the language that Congress has given us and then to articulate it in ways that the court members will understand so that they can implement the law.

As Captain Reismeier said, the pre-2007 statute was workable. As a trial judge, I call it, you know, 2007 - 2012, because the special date for us is when does the new one take effect, because we always have to check that with charge sheets, to know which statute we're going to use during a particular trial or which statutes in a particular trial.

Codifying the statute was good. It was good because it notifies the popular
support is or is not criminal. However, the
advantage of the old statute was the
flexibility they gave the prosecutor. As
someone already mentioned, the courts had
interpreted that very concise statute in a way
that encompassed a lot more, including
constructive force. So it included parental
compulsion. It included abuse of authority by
military authorities. So something that the
panel is already looking at was already
included within the pre-2007 statute.

It gave the advantage to the
prosecutor, because the defense was on notice
that they needed to prepare for every theory
of liability under Article 120. The
specification merely said that the accused did
rape, and sometimes during trial evidence
comes out different than a prosecutor might
think it will come out, and there were cases
where it was supposed to be all about, perhaps
intoxication and, as it turns out, there was
enough evidence there for a reasonable fact-
finder to determine actually there was force used. So the panel could have been instructed on multiple theories of liability, even under the one specification.

I've seen that with the new statute where prosecutors chose their theory of liability, gone into trial, and they don't get an instruction on any theory of liability, because the defense was put on notice only of the one theory.

The codification of the rape statute in the 2007 statute was problematic. Several people have already mentioned the issue with burden shifting and the problems that caused. The biggest challenge for the trial judges was how to articulate to the court members the issue of consent and also the affirmative defense of mistake of fact as to consent, how that played in. The structure was extremely cumbersome under Article 120, and it made it very difficult for the trial counsel and the defense counsel and,
therefore, for the trial judges to sort out what exactly was in the statute and what was at issue in each case.

The current statute is an improvement. There have been a lot of improvements. Obviously, there could be more improvements. It's less cumbersome the way it's structured right now. Certain language was taken out. There was some language in there that served no purpose, but it was confusing to people, and that was deleted.

The trial judges have diligently debated how to properly instruct members under the new statute. The biggest challenge is still the issue of evidence of consent and also the affirmative defense of mistake of fact as to consent, and how that plays.

The way that many trial judges right now instruct is included in the Military Judges' Benchbook. I think the most current version of that is from late February 2014, and the panel members have that available to
you in your materials.

Professor Schulhofer mentioned something that is true, and I just want to reiterate that. There is something hidden within the statute that sometimes, because it's hidden, is a detriment to the trial counsel. He was talking about non-consensual sexual intercourse being tried, because of the way bodily harm is defined. It says any sexual act or sexual contact without consent would be bodily harm. So all you need there is you need a sexual act, and then no consent, and it's an offense.

There was recently a case that I was presiding over. It was a rape case, and it was contentious. It was an extremely close case, and it was charged as rape by force. And I was prepared to give instruction on the lesser included offense, because I thought the trial counsel would want that under that theory. If they could show the sexual act, you know, and circumstances where there wasn't
consent, but they didn't meet the definition of force, then that would have been permissible. But the trial counsel didn't ask for that. I think the reason the trial counsel didn't ask for it, because they couldn't find it because it was buried within the statute and the definition for bodily harm.

Defense counsel didn't want it, so it wasn't given. It's the judge's discretion. But, usually, if neither side wants an instruction of lesser included offense, we won't give it.

One observation I want to share is that there are great challenges created when a criminal statute has several iterations in a close period of time, especially a criminal statute for which periods of time are alleged within the specification, such as sexual misconduct. Oftentimes, there may be a case where the alleged victim says it happened -- there's been real examples of this -- it happened in the middle of the summer of 2012,
sometime in June or July of 2012. As I mentioned earlier, there are certain dates stuck in my mind because of when these different statutes took effect. June 28, 2012 is the magical date.

So you can imagine the challenge for the prosecutor in that case because one statute was in effect up to 27 June, 2012, and the other came into effect after that. And it actually has to be in effect for somebody to be convicted under it. So the judge can create an instruction to present to the members, but it was a great challenge for the prosecutor in that case.

As Representative Holtzman mentioned in the last segment, it can drive a prosecutor crazy when you keep changing the criminal statute. I'll say if there are changes that are necessary that need to be made, then they need to be made. But just realize the consequences for the trial practitioners, and minimize the number of
changes, if possible.

I also echo what the panel had said earlier today about the recommendation that the defense side get their fair share of resources. Fairness is an important component of a healthy military environment, and unfairness, or the perception of unfairness can have a negative impact on good order and discipline. As mentioned earlier, I want to keep the comments brief so, subject to your questions, I'll stop.

CHAIR HOLTZMAN: Thank you very much, Colonel. Colonel Gary Jackson.

COL JACKSON: Thank you, Ma'am.

Thank you all for the opportunity to appear before your panel. I guess I should just start out by saying that these comments are mine and solely mine, and do not reflect the comments of the United States Air Force or the Air Force Judge Advocate General Corps.

By way of background, I've been in the Air Force for a little over 30 years,
years as an enlisted aircraft mechanic, 24
years or so as a judge advocate, and I've
served in just about every military justice
capacity one can serve in the Air Force. I've
been a prosecutor. I've been a defense
counsel on two occasions. I've been a
military trial judge. I've been an appellate
military judge in the Air Force Court of
Criminal Appeals. I've served as a staff
judge advocate on five occasions, two of which
as a deployed staff judge advocate, once at
wing level and once at numbered Air Force
level, and currently the staff judge advocate
at Air Force Global Strike Command, advising
the commander who has the responsibility for
two-thirds of the nuclear triad.

I've also had the privilege of
serving in the Air Force Military Justice
Division, where I was a member of the Joint
Service Committee. As you all may be aware,
the Joint Service Committee is composed of
representatives from all of the services among
the DoD, GC, and their charter is to look at 
UCMJ and the Manual for Court-Martial to 
examine those, to determine whether or not to 
make recommendations to the president to make 
it more effective and more efficient.

During that time frame, 2003 to 
2005 time frame, I was a member of, a working 
group member of the Joint Service Committee, 
and I was also a member of a special 
subcommittee that the JSC created to look at 
Article 120, and to make recommendations as to 
whether or not it should be changed.

I agree with most of what my 
colleagues have said about the old Article 
120. I think it did work perfectly. I'll 
tell you that my experience with the old 
Article 120 and the pre-2007 change was as 
either as a prosecutor, a defense counsel, and 
as a trial judge. I've had limited experience 
with the, I guess, second version of Article 
120, which would be the 1 October, 2007 and 27 
June, 2012, and that was as an appellate judge
in the Air Force Court of Criminal Appeals.

I agree with my colleagues that any time that you make changes to a statute, you are creating a learning curve for the practitioners. I also agree with my colleagues, and I think it may have been, Mr. Sullivan that at least touched on this, that we're operating under three versions of Article 120. And it's real difficult for the practitioners, it's real difficult for the judges, and it's real difficult for me, as a staff judge advocate, to advise the general court-martial convening authority that we are actually prescribing what we should be prescribing because, if you get it wrong and jeopardy attaches, then perhaps an accused walks away free.

And I will tell you that I've had cases even now, as a general court-martial convening authority, SJA, where the practitioners in the field, they are still getting it right. They are still charging
what should be charged, for example, under the first version of Article 120. They're charging either under the second version or the third version. So it gets more -- it just creates more complexity.

So how did we get to the 2006 change? As you all are probably aware, the NDAA of 20 O-4 requires SECDEF to examine Article 120 and the way that we prescribe sexual assault in the military and, to the extent possible, to bring it more align with 18 U.S.C.

And so we took about a year -- this is the subcommittee. We took about a year to examine Article 120. We looked at all of the state laws, and some state laws or, rather, some states are better are prescribing sexual assault than others. We looked at the Model Penal Code. We looked at 18 U.S.C. We looked at Congresswoman Sanchez's bill, which I think was option three. And we came to the conclusion as a panel that everything that
needed to be prescribed we could reach under
the old Article 120.

We also realized that there was
congressional pressure. And if we did not put
forth a recommendation to change the then old
Article 120, that it was still going to be
changed. In essence, Congressman Sanchez's
bill was going to pass. And so, as a
committee, we opted to go with option five,
which is a more beefed-up version of
Congresswoman Sanchez's bill.

So with that, I'll throw it back
to you, and I look forward to your questions.

CHAIR HOLTZMAN: Members of the
panel, thank you very, very much for your
guidance, for your testimony, and for your
help. I'll start with Judge Jones.

JUDGE JONES: I find everything
that you're telling us really interesting, and
what I think I would love to have is the
opportunity to hear about specific cases that
would explain or exemplify exactly what you're
talking about in terms of the difficulties, particularly in charging and the lesser offense problem. And maybe what could be done is you could simply cite some to us where we can read the case law because I think I understand what you're talking about, but it's always great to have some case studies to look at.

And I don't know that I have any specific questions. Maybe some will come to mind.

VADM TRACEY: I think that most of you have indicated that where we are is not very satisfactory from either trial counsel or the trial judge perspective and that every time you change a statute you generate some potential for the kind of conundrum you find yourselves in with people needing to establish case law and the learning curve for all the participants. But we are where we are.

What would you suggest is the step that would clean up the current status? If
you don't believe that further changes are needed, how do you suggest that the panel would recommend that we move on in order to clarify the situation for the participants or to overcome the challenges that you all are seeing? Is this a matter of training and experience, or are there fixes that you individually or collectively would like to see in Article 120?

CAPT REISMEIER: Admiral, I have to answer somewhat carefully again because of my position. But I think I would say this: the least best option is probably having a fourth version of the statute somehow in operation. The reality is that there may be some adjustments that need to be made, but my suggestion would be that the best way to approach that is to figure out what the least disruptive method of that adjustment would be before coming in with a statutory fix.

In other words something that could be fixed through case law should be
fixed through case law. Something that can be
fixed -- I'm using the word fixed, not
intending to suggest a value judgment on it,
but something that could be, I'll say
addressed through case law should be addressed
through case law. Something that could be
addressed through jury instructions should be
addressed through jury instructions.
Something that could be addressed through
presidential action or drafters' analysis
should be done that way.

The statutory change is the one
that's likely to be the most disruptive and
the most difficult to undo if it doesn't work
out quite the way that one would hope. And I
know that's not a very specific answer to your
question, but, again, I go back to something
Colonel Grammel mentioned. The beauty of the
old statute was that you had certain language
that was fixed. You know, it was by force and
without consent. The theory of liability was
something that left great flexibility, so
people could walk in with the specification and look the same, yet have two vastly different cases that were presented. And then members were able to sort through the various theories and come to a conclusion as to guilt or innocence, sometimes based on differing theories, as long as they all got to an answer.

Those days are gone. What I think would be useful, again, go back and look at what existed in the case law at the time and then look at what doesn't exist under the statute at this time, one of which is constructive force.

You know, we talked and this sort of goes back to the question that Judge Jones posed, which is, you know, when you look at the potential conflicting theories, the problem with the way it's laid out right now is that the battery theory, which arguably is simply penetration without force, just consensual, when prosecutors put that on a
charge sheet along with force and the members come back and acquit of the battery version, somebody has to figure out whether they have impeached the verdict as to the force one. There are just plain problems on the face of the statute that anybody actually attempting to use it is going to recognize.

So at the end of the day, it goes back to my comment that the solution is not to come up and figure out, as a bunch of lawyers, what do we think the best way in a vacuum would be because of the problems with the statute. It's to look at how this actually works at the jury level and at the level of instructions from the judges before attempting to make any more modifications. I'm just not sure that we're there yet. Maybe in 2017 we'll be there, but I'm not sure that's something we'll get to today.

VADM TRACEY: Because of a lack of cases to --

CAPT REISMEIER: Yes, yes, ma'am.
VADM TRACEY: Thank you.

MR. CASSARA: Ma'am, I'd like to sort of expound on something that Colonel Grammel said. One of my biggest concerns is with the lack of training being afforded to defense counsel and, to some degree, also to trial counsel. But from the defense counsel perspective, in all of the services we now have special victims prosecutors, we have special victims counsel, and we have defense attorneys. There are no special defense attorneys. There are no -- you know, there's a lot of training that goes in.

But the reality of it is that, while there many, many fine lawyers in the United States Army, Air Force, and Marine Corps defense services and I'm honored to try cases with many of them, they are also generally very inexperienced and do not have anywhere near the resources that the prosecution team has. A prosecution team will fly in a special victim prosecutor who has
probably tried dozens of sexual assault cases in the last year, the defense attorney may have tried one or two.

But I also think that additional training for the prosecution would be helpful, and I point to really two different areas. One is in charging decisions as to whether cases should be charged or referred in the first place. And secondly is in the way that cases are charged, and I would go back to what Captain Reismeier just said. In a case that I was just telling you about where my client was charged with having sexually assaulted another individual in three different ways all within a 30-minute time frame, touching him X, Y, Z, doing X, Y, Z, and the prosecutor charged it under the three different possible theories of liability. So you now have a nine-specification charge sheet in what was one act. I mean, according to everybody who was involved in the case, it was one act.

Again, the case was not tried by a
panel, but had it been I can't imagine the
difficulty of the military judge in drafting
instructions for that panel. I can't imagine
the difficulty of a panel of even
understanding what happens in a case like
that.

And I think you run into two fears from both sides of the fence. One is does the
panel just say we don't have a clue,
therefore, we're not going to convict him of
anything; or does the panel say we don't have
a clue, but he obviously did something wrong
so we have to tag him for something? And I
really think that, at its root, is a lack of
training on both sides of the fence.

Again, just because of my personal
bias I fully admit to, I am very concerned
about the lack of resources for defense
counsel in these fairly complex sexual assault
cases.

COL JACKSON: Hopefully, this is
something more than just happy to glad, but I
think it would help if we were to bifurcate the penetrating offenses away from the non-penetrating offenses. I don't know whether or not you all have looked at the Manual for Court-Martial and how Article 120 is laid out, but it has, essentially, all the offenses, all the sexual offenses. And this is what practitioners, this is what trial counsel is looking at when they're deciding how best to charge a particular offense.

You know, you have one article that talks about rape and sexual assault that involves obviously a sexual act. But then you have the same article talking about abusive sexual conduct, which involves sexual conduct as opposed to a sexual act. And you have to keep running back and forth, back and forth to the particular definitions of sexual act and sexual conduct, trying to apply it to the alleged facts to make a determination whether or not you can prescribe it.

I think it would help, personally
I think it would help practitioners if you
were to bifurcate the non-penetrating offenses
out of Article 120 and put it under some other
article. That way, I think folks will be more
attuned to know that if they're talking about
rape as rape is traditionally looked upon, a
penetrating offense, they're going to go to
that particular article, as opposed to trying
to somehow squeeze it into some other type of
theory, I guess.

COL GRAMMEL: One recommendation
for the panel. It sounds like, from hearing
your earlier discussions, the process is going
to be a longer process anyhow. So this will
contribute to this is to let the statute play
out the way it is now and see whether Congress
agrees with the way the military has
interpreted that statute.

I think it was clear earlier is
prosecutor, defense counsel, and the judge,
under the pre-2007 statute, that worked well
because it was flexible and covered the areas
that needed to be covered. However, as Admiral Tracey said, we're not there anymore, so we're somewhere else.

The current statute is better than the last statute. It is better than the 2007 to 2012 statute. So there have been improvements made. So we are now where we're at. The judges worked hard and tried to come up with instructions. If you want to know, you know, how does this play out in trial, you can look at the instructions. You know, not every judge does that. Judges have discretion on how they instruct the members. But that's going to give you a very good feeling for what's happening inside the courtrooms.

And Congress can look and say, "You know what? That's not what we meant. The judges interpreted our statute wrong," and Congress can correct that by changing the statute and that's clear.

The same with the appellate courts. The appellate courts can start to
issue opinions in this area, and, if the appellate courts interpret the statute that Congress gave differently than the way Congress wants it, then they can go back and congressionally repeal the case law.

So let it play out. Obviously, there are going to be some tweaks. It's clear there are some, whether it's adding another theory of liability or tightening up what some of the other witnesses had talked about. I think there are tweaks that can be made without a comprehensive change to the whole scheme. I don't think the scheme is so broken right now that we need to throw it all out and come up with something totally different and really drive all the trial practitioners crazy. I think you can tweak it without doing that.

JUDGE JONES: Any suggestions for tweaking would be greatly appreciated.

MR. STONE: I've been listening, and I have a background that involves being
involved in a wholesale change which did not come about, although it was volumes and volumes to Title 18, civilian criminal statutes, and there were several attempts, as you may know, over the years to completely rewrite the statutes. And they met with many of the same objections you're raising that we'd be in deep trouble because all of a sudden we just threw out all the case law and we're all starting over.

But, nonetheless, pieces and bits were changed, and I had something to do with those legislative changes to fill gaps and holes. So I appreciate what you're saying, and I recognize you have a difficult job because the statute keeps getting changed on you.

I basically have heard two things, one from the judges, as I'm listening, and one from the defense practitioner, and I'd like to repeat them back and have you correct me if I'm wrong. The first thing I heard, I think,
is that, almost uniformly, while the current statute is not optimal, substantively you'd like us to leave it alone and not start changing elements and definitions and theories.

But procedurally you've outlined at least, I wrote down six things, and the defense counsel related some too, that we could change without touching the elements of the offense. And they included things like penalties. Defense counsel mentioned these forfeitures automatically of salary. Number of members on a panel, again, doesn't affect the elements. Maybe having a special verdict form that showed whether or not, in some of these battery and force offenses, what the jury was saying so that it didn't seem contradictory. Lawyers experience, more training, again, doesn't affect the elements. Charging process. Maybe we should recommend that prosecutors with less than five years experience as a bright line have to have
somebody above them with more than five years experience sign off on their work so that we know they charged it the right way.

Bifurcating the way the jury has to look at what's been submitted to them. Again, none of those require changing theories of the offense, I don't think, or substantively where we are, which would raise all kinds of problems.

So I thought I heard, if I'm getting it right, that, given where we are, maybe we should, your preference is that we leave it alone. I don't have a lot of confidence that Congress will figure out how to change this in 2017 because I don't think most congressman have military legal experience that they would need, and their staffs typically don't either. It's really the exception, rather than the rule. And I think they know that, which is why this panel is here because they're trying to have us get the expertise necessary to help you.
But I think, as a group, I hear you saying you can live with the 2012 substantive stuff if we clean up some of the procedural issues. And if I'm wrong, I hope you will respond and tell me I'm wrong.

The only other thing that I heard, and I, frankly, would like defense counsel or any of the others who think you've got an answer to throw to us because -- problems we know. I want to hear solutions. Defense counsel, and I appreciate your role and your unique problems, has noted that these alcohol-fueled parties in the barracks lead to a lot of problems. And I'm sitting here thinking are you hoping that we're going to have lemonade-fueled parties, or are you hoping we're going to have alcohol-fueled parties not in the barracks, as happened in the Naval Academy problem, or are you hoping that we're going to have same-sex parties only? Are they supposed to play checkers? What do you propose fills that gap among people who've had
a really maybe hard or stressful time, whether it's in a combat zone or basic training, and they want to let off some steam? Where do you see us proposing something to address that?

MR. CASSARA: I'll be happy to take your question, sir. I live in Augusta, Georgia. There's a very busy road, Washington Road, that is littered with very cheap hotels that's about ten minutes from base. On Sunday morning on my way to church, I can pick out the people who are likely to have gotten into trouble the night before. There are literally gaggles of soldiers walking across the street. And you're right, sir. We are never going to completely eliminate that. But I do believe that there are some common sense changes that we can make, and Congresswoman Holtzman and I discussed some of this at the RSP.

A case that I recently got involved in was a Super Bowl party sanctioned by the command, a keg party, with nobody, the rule was nobody over the rank of E5 was
allowed. I'm not the smartest person in the world. Heck, I'm not even the smartest person at this table, and I know that's a very bad idea. To have an alcohol-fueled party in which you do not allow anybody over the rank of E5 to attend, to me, is fraught with peril. And in that case, it generated at least one allegation of sexual assault that I was aware of.

There are limitations, I believe, that can be placed on, you know, basic training soldiers, AIT soldiers, or I forget what the Air Force calls them, AIT, but, you know, tech school, in terms of their liberty, in terms of -- there are, I think, common sense limitations which don't lead the service members to think, well, we're just being treated like babies but which also can protect potential victims of a sexual assault.

One of the other things that we had discussed at the RSP was perhaps changing the way that the Class VI stores operate.
Class VI stores, I'm not sure if you're aware, but that is the military's liquor store. On many bases, the Class VI store is open 24 hours a day. I'm not naive, again, enough to think that a soldier member might just not go off base to get alcohol if the Class VI is closed, but I'm also realistic enough to think that having an alcohol store open at three in the morning on a military base may not be a very good idea.

MR. STONE: Well, for the purposes of this panel, I don't know that the JPP panel has a mandate to fix some of those --

MR. CASSARA: Oh, I thought that was your question, sir.

MR. STONE: Well, it was, it was. But I guess what I hope is if you have some ideas that fit with our mandate, you'll throw them back at us because I think my concern is not that you may not have some good ideas but I'm not sure we're able to reach those. So I'd appreciate --
MR. CASSARA: Yes, sir.

CHAIR HOLTZMAN: Mr. Taylor?

MR. TAYLOR: Thank you. I will note that I think I read in publication sometime in the last couple of months that the Secretary of Defense has asked the services to assess the impact of alcohol as part of the culture, so I think this is something that people are taking seriously because they recognize it's part of a larger problem.

Captain Reismeier, one of the things that I thought was really interesting about your comments, and I thought the whole panel did a great job of highlighting their particular interests, was something I think I heard you say which is there's no predictability in the current situation. And what I understood was that the prosecution would prefer some time to gain experience, the defense counsel would like better definitions, and the judges need to resolve some of the issues.
So I guess I'm wondering how would those three lead to predictability?

CAPT REISMEIER: Again, I go back to -- not because I think we can actually turn back to the clock, but, if you look at what existed prior to the change, there was stability because everyone knew what the law meant. You know, I can remember in law school asking the question why some of the language still exists in some of the property exchange documents, and the answer from the professor was because nobody wants to change it. It's been that way since Merrie Olde England, and everybody is afraid that if you change it the document may no longer be valid.

There is some value to not changing things because it does allow you to predict with pretty good certainty what's going to happen based on what happened yesterday. The problem is that, whether you go back to, you know, the 2007 version or you look at the current version, such a small
amount of case law exists on which people can make good judgments as to how to move forward that it just takes time. So we're literally having discussion about whether to change something where the offenses are really just now beginning to get into the criminal pipeline, and we're already saying, well, okay, so how should we change it? I think it's very difficult to say this is how we ought to change it without first seeing what it is that we're changing and then also figure out is that the best way to actually change it.

I understand why the defense would like more clarity in some of the issues. In part, it well defines the territory on which the offense stands. And to the extent that it's not well defined, there is lack of predictability for them. They don't necessarily know whether their conduct falls into what's alleged in the statute.

Now, the prosecutors, again, they're figuring out how to deal with this
They're figuring out how to charge things in a way -- at least they think they are. We'll find out as the appellate courts chew into this. But they think they're figuring out ways to be able to charge this so that they get to a result that they think is going to be sustainable. The judges just would like the chance to work through all this.

I'm not sure if that's a direct, I'm not sure if that's an answer to the question. But stability is what criminal law is -- if you don't have stability, then you never really know whether your criminal law is effective. So I guess I just start from the point of view that I think we want stability.

CHAIR HOLTZMAN: I have a few questions. First, Colonel Jackson, you suggested that it was important to separate out the penetrative and non-penetrative crimes or charges into two separate statutes.

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
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
sexual assault but it also has the abusive
sexual conduct, which is the non-penetrative
type of offense. And if you notice, when
we're defining rape and sexual assault, we're
looking at whether or not a sexual act had
occurred or has occurred, whereas --

CHAIR HOLTZMAN: I'm not following
you yet because I don't have -- do I have that
on this statute? I have aggravated sexual
conduct. Is that what you're talking about --

COL JACKSON: No, ma'am. I'm just
looking at the general articles, Article 120.
It says rape and sexual assault generally.

CHAIR HOLTZMAN: I know. That's
what I have --

JUDGE JONES: Subheading C and D,
aggravated sexual contact and abusive sexual
--

CHAIR HOLTZMAN: Okay, fine.
That's where you're at. Okay.

COL JACKSON: Right. And so when
you look at the definition of rape and sexual
assault, it starts out with a sexual act
having been occurred or having occurred. When
you look at abusive sexual conduct, you're
talking about sexual conduct.

I've seen, and I believe what's
happening out in the field, especially when
you're dealing with junior counsel, is that
when they receive a report of investigation
talking about alleged misconduct and they're
looking at trying to charge an offense either
as rape, sexual assault, or abusive sexual
conduct, they're going back and forth between

VADM TRACEY: Conduct or contact?
COL JACKSON: Contact. I'm sorry.
I stand corrected. They're going back and
forth and trying to determine what they're
looking at. I think it becomes much more
confusing if everything is contained under one
particular article, as opposed to breaking it
out and perhaps even creating an Article
120(d), for example. So that way, the
practitioners know that when they're dealing with a penetrating type offense, they're going to go to one particular article. And then when they're dealing with a non-penetrative type of offense, they're going to go to an Article 120(d), for example. I think it's less confusing.

CHAIR HOLTZMAN: How do the other members of the panel feel about that? Mr. Sullivan?

MR. SULLIVAN: I would caution against any statutory change that isn't absolutely necessary. And so, you know, we can figure out the 120 -- it's difficult as it is because there's a 120 and there's also a 120(a), which is stalking, and there's a 120(b) -- but I think we can figure out the difference between a 120(a), 120(b), versus a 120 and a 120(d).

But Colonel Grammel identified a very important point previously, and that is let's hypothesize that Congress were to change
it to create a new 120(d). Then you're going
to be in a situation again where it's
necessary for the prosecution to prove beyond
a reasonable doubt, in that scenario, for a
120(d) prosecution that the act occurred on or
after the date of enactment of 120(d) versus
occurring, versus it being a 120 or a 120(d)
under the previous statute.

So you're just creating
opportunities for reasonable doubt to creep in
and result in an acquittal in an instance
where if the statute had just been left alone
there would have been a conviction, like we
saw in the Valentin case. Again, we've seen
this before, so we're not even talking about
hypotheticals here. We've seen it play out.

So, again, I would caution against
any statutory change that isn't viewed as
absolutely necessary, and I would say that a
reorganization of the statute isn't necessary.
That's something we can deal with through
training.
CAPT REISMEIER: I would agree with Mr. Sullivan. I mean, in a perfect world, it might be nice to cabin these some so that people don't have to sift through so much language to find out which one is theirs. But at the end of the day, they're going to have to read it all whether it's separated out or not because they still have to figure out which version it is. And while it might be nice to separate it, you know, the reality of having offenses that span -- you know, every one of us have probably seen that. It typically comes up with child victims who remember, okay, that one lived in the blue house Fairy Street. We can tell when that was, but the child doesn't know, and it may span a significant amount of time having to figure out which version or how many versions the statute applies.

I would agree with Mr. Sullivan.

That's, again, the least best option.

COL GRAMMEL: Yes, I would advise
against separating it out, unless it had some kind of significant impact. If we're looking at conduct that we didn't think should be reported to be registered in a sex offender registration or something like that, we got to pull it out that had some impact besides what label we put on it, then that would be fine. But I don't think we're looking at that.

The 2007 was overly cumbersome. And the way things played out, taking out the child offenses out of our 120 like we did, that made it look much easier for all the trial practitioners. What we're left with now is workable. It is a little bit of a challenge, but I don't think the benefit of pulling it out outweighs the danger of confusing everyone.

So I would recommend, I guess -- if there is a tinkering with the aggravated sexual contact and abusive sexual contact, when we look at the definition for sexual contact, someone made mention, I think it was
Mr. Cassara who mentioned a case where someone was charged with abusive sexual contact for kissing someone. We have to all wonder do we really think that deserves to be prosecuted under Article 120? Should that really be a sex offense that someone has to register for the rest of their life? And if not, then we might say, well, tightening up that definition -- because the danger is when we have a criminal statute that's too broad, what happens is we're putting a lot of discretion in the hands of the commanders down there. So what happens is, the way it happens for most people, the commanders, you know, do something else. But if that commander doesn't like that person, then that person who is not liked is going to be prosecuted. It's indiscriminate. And if there's no one, if we think, well, no one is going to be charged with that, then we should tighten up the definition so it just doesn't happen at all.

But I think when any trial
practitioners read the definition that says,
you know, touching any body part with an
intent to gratify your sexual desires, I mean,
we can think of hypotheticals where it's
absurd. But if the absurdity can be removed
from the definition then I think it adds
respect to the law.

MR. CASSARA: I would agree with
Colonel Grammel. I would also add that there
may be another way to do that without changing
Article 120. Currently, when a service member
is convicted in a court-martial, there is a
list of qualifying sex offender registration
defenses. It's not all of Article 120, but
it's pretty doggone close to it. And perhaps
the panel would want to look at whether we
want to change that methodology of reporting
to exclude the kiss, the drunken slap.
Obviously, we can't understand or predict
every possible scenario, but I would echo what
Colonel Grammel said, which is I think all of
us would agree that somebody who kisses
somebody against their will may be a cad, but
I don't know that we need to know that they
moved into my neighborhood to protect my
children and I don't think they need to be on
the sex offender registry.

CHAIR HOLTZMAN: Let me just ask
you one other question which has occurred to
me looking at these statutes. We have a
separate sodomy statute. Is there a reason
for it still? I mean, I know there was one,
but why do we need it today?

MR. SULLIVAN: There was a
suggestion to repeal it. In fact, the Senate,
I believe, voted to repeal it. But the
bestiality is included within it, and so a
concern was raised when it was in the House
that if 125 were repealed that would legalize
bestiality within the military.

And so I will say that the Joint
Service Committee has proposed a change to
Article 134 to include a comprehensive animal
abuse provision within 134 that would cover
bestiality. If the president approves that suggestion, then there would no longer be a necessity for 125 to fill any gap.

CHAIR HOLTZMAN: Any disagreement with that?

COL GRAMMEL: No. And absolutely, I think it absolutely needs to be done just to remove sodomy, except for bestiality, from 125 and keep bestiality one way or another, whether it's as 125 or under 134, because an added problem that we run into here is a lot of the case law for Article 125 is similar to our old 120 rape statute. So that whole constructive force and all that case law, a lot of that applies to sodomy. So you could charge sodomy under 120 or 125 and the law on consent and the said factors says in constructive force and things like that, it differs which way you charge it, and it's really probably too much. It's unnecessary. With the forcible sodomy being covered under Article 120, forcible sodomy under 125 is just
unnecessary.

CHAIR HOLTZMAN: Doesn't it create a double standard in a way as to how it's being prosecuted, whether you want to prosecute it under the old case law or under the new case law? And why should that be available?

LT COL GREEN: Right. I would absolutely, as a trial counsel, I would look, and it may differ on the case and see what the evidence is, I would pick out which statute I could prosecute better, 125 or 120, and I'd go under that statute. It's unnecessary because I think it's covered by Congress under Article 120.

CAPT REISMEIER: If I may, one thing I think that we have to look at would be the effective dates to make sure that you don't end up with a gap in coverage because the effective date of Article 120 is set. If Article 125 goes away, you know, depending on when the misconduct occurred, you just got to
make sure you don't create a void in the
criminal law, assuming you want to reach it.

CHAIR HOLTZMAN: Okay. I don't
think I have any other questions. Anybody
else on the panel? Thank you very much. And
if you have any further thoughts on the
tinkering side, let us know. Thank you very
much. Let's take a five-minute break.

(Whereupon, the above-entitled
matter went off the record at 4:15
p.m. and resumed at 4:21 p.m.)

CHAIR HOLTZMAN: I think, unless
anybody has got some extraordinarily important
remarks to make, we can adjourn. And our next
meeting is on September the 19th.

MR. STONE: Do we have the 15
minutes public comment, or has no one --

CHAIR HOLTZMAN: No one -- there
is no public comment. So we are adjourned.
Thank you very much to all the panel members.

(Whereupon, the above-entitled
matter went off the record at 4:21 p.m.)
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In the matter of: Judicial Proceedings Panel on Military Sexual Assault

Before: DOD

Date: 08-07-14

Place: Washington, DC

was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate record of the proceedings.

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