

UNITED STATES DEPARTMENT OF DEFENSE

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JUDICIAL PROCEEDINGS PANEL

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JUDICIAL PROCEEDINGS SUBCOMMITTEE

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MEETING

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THURSDAY
MAY 7, 2015

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

PRESENT

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

WITNESSES

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

STAFF:

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

TABLE OF CONTENTS

	PAGE
Comments from Chair.	4
Article 120 from a Training Perspective.	4
Trial Counsel Perspectives on	
Issues 1-11.	104
Defense Counsel Perspectives on	
Issues 1-11.	218
Appellate Counsel Perspectives on	
Issues 1-11.	313
Civilian Counsel Perspectives on	
Issues 1-11.	378

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1 went off the record at 12:42 p.m. and resumed at
2 1:24 p.m.)

3 CHAIR JONES: All right, we're going
4 to continue now with the Defense Counsel
5 Perspectives.

6 We're going to finish all of the
7 presentations today, so don't be concerned that
8 there was some intent on us speaking to
9 ourselves. We've decided speaking to you is more
10 important.

11 So, with that, let's begin with
12 Colonel Zimmermann.

13 COL ZIMMERMANN: Thank you. Good
14 afternoon, ladies and gentlemen. Can you hear me
15 okay?

16 CHAIR JONES: Yes.

17 COL ZIMMERMANN: I tend to speak
18 quickly and too much, so please feel free to let
19 me know if I am.

20 CHAIR JONES: So, if I raise my hand
21 like this, you'll know?

22 COL ZIMMERMANN: That would be very

1 helpful. Thank you, ma'am.

2 CHAIR JONES: Okay, sure.

3 COL ZIMMERMANN: I'm really delighted
4 to be here today on behalf of the Marine Corps
5 Defense Services Organization.

6 I'm standing in for Colonel Stephen
7 Newman who is the Active Duty Chief Defense
8 Counsel in the Marine Corps. I am his Reserve
9 counterpart. So, that's why they have my job to
10 fill in for him when he's not available.

11 And, just for your information, I have
12 been a Marine Corps judge advocate since 1993 and
13 I've been both a prosecutor and an appellate
14 military judge and a defense counsel litigating
15 these cases, these sexual assault cases.

16 And in my civilian practice, where I
17 do exclusively criminal defense, my personal
18 docket is almost, I would say, about 75 percent
19 military.

20 So, this is what I do day in and day
21 out, both as a civilian and as a Marine Corps
22 Reserve lawyer.

1 And I do both trials and appeals, by
2 the way. So, I can't decide what I like to do, I
3 just do a little of everything.

4 So, with that background, I have just
5 a couple of introductory thoughts and then
6 there's not time for me to go through all 11
7 questions that the Subcommittee asked and we will
8 submit something in writing with our answers to
9 those later.

10 But, I think the first three questions
11 are probably the ones that are getting most
12 attention.

13 But before I get to that, I noticed
14 that the previous panel mentioned the preamble,
15 which I think is really important.

16 What is the purpose of the military
17 justice system? And one of those purposes is to
18 achieve justice.

19 And what is the purpose of any
20 criminal justice system in our country? It's to
21 punish people who intentionally or with some
22 culpable mental state take an action that we, as

1 a society, deem as inappropriate and unlawful.

2 It's not to punish people who do
3 things, for the most part, by accident or
4 mistake. I understand there are some things that
5 require strict liability.

6 But, for the most part, our criminal
7 justice system is intended to identify people who
8 break the law, punish them and deter other people
9 from committing the same type of conduct.

10 And so, I think it's really important
11 to keep that in mind when we're talking about
12 whether we tweak a statute, whether we rewrite a
13 statute, what is the purpose of the statute?
14 What kind of due process concerns do we have?
15 What kind of notice concerns do we have?

16 All of those factors, in my opinion,
17 militate towards completely rewriting the
18 statute. I know I'm contradicting the prior
19 panel, but my view is, and the defense counsel
20 view from the Marine Corps is that whatever this
21 Subcommittee recommends, no matter what the
22 result, there's going to be some change

1 recommended.

2 This statute is a mess. It is just
3 unworkable. It's too complicated. It's unwieldy
4 and it's not fair.

5 So, there is going to be some change,
6 I think, that will come from there proceedings.
7 And so, people in the field are going to have to
8 adjust to some change.

9 In my view, it's appropriate for us to
10 rewrite it and get it correct, as correct as we
11 can get it. Nothing's ever going to be perfect,
12 I know that. But I think we ought to start from
13 scratch and get it right and then people can
14 adjust to that.

15 I'm not too concerned about people
16 saying, well, there are going to be four statutes
17 in effect. Well, there's going to be four
18 statutes in effect no matter what change is
19 enacted.

20 So, as opposed to tweaking, my
21 recommendation is that we start from scratch.

22 So, the issue of consent is really the

1 pivotal issue. Most cases involve a factual
2 determination of whether consent was involved in
3 a particular transaction. Right?

4 If the two parties agree that the
5 behavior was consensual, then there's no case
6 unless it's something like an adultery or
7 fraternization case which are uniquely military
8 offenses. You don't see those in the civilian
9 world.

10 But in the military, even completely
11 consensual behavior between adults can still be
12 illegal, but it's not a sexual assault that's
13 going to require a lifetime of sex offender
14 registration.

15 So, if the parties agree it's
16 consensual, then it doesn't go forward. And if
17 the parties agree that it's not consensual and
18 accused is willing to admit that, then the case
19 is going to be resolved with a guilty plea. So,
20 most cases are resolved one way or the other,
21 those two options.

22 But cases that are causing us the

1 heartburn and why we're here today are those
2 middle-of-the-road cases where there's not an
3 agreement between the parties and consent is the
4 issue.

5 And so, let me turn to the definition,
6 that first question is, is the current definition
7 of consent unclear or ambiguous? And I think
8 it's very clear from all of the presenters today
9 that, yes, it's totally unclear, totally
10 ambiguous.

11 And my proposition is that the very
12 first sentence, what is freely given -- that
13 consent is freely given agreement by a competent
14 person, that part's okay. What the problem is,
15 is each subcomponent concept contained in that
16 sentence, that's where the ambiguity is. That's
17 where the unclear language is.

18 In other words, a freely given
19 agreement by a competent person, well, what is an
20 agreement? And we've talked already a little bit
21 today about whether we expect an affirmative
22 expression of consent.

1 And I know there are some
2 jurisdictions that require that and I would
3 respectfully submit that that's not what we want
4 to go to in military.

5 Agreements can be expressed or
6 implied. They can be verbal. They can be
7 nonverbal. And it needs to be more clearly
8 defined.

9 And as the professor so aptly noted,
10 the consent definition in the UCMJ seems to
11 combine and make ambiguous four different
12 components of consent definitions from other
13 jurisdictions and it's a complete mess.

14 So, how does the fact finder determine
15 whether there's been a meeting of the minds if
16 it's not set out in the statute?

17 Now, the next component, freely given,
18 how does one freely give anything or an
19 agreement? And I guess that's related to the
20 issue of force, physical force, other force.

21 How does one give an agreement?

22 Again, express or implied? The nonverbal cues,

1 the nodding of the head, the touching, the
2 dancing, the words that are said. There's so
3 many different ways that one could give agreement
4 or express a lack of consent.

5 And, again, the purpose of the statute
6 is to set out what is the law. So that not only
7 potential people who might be charged with the
8 crime know what conduct is prohibited and know
9 what's not prohibited.

10 But, I didn't even think, honestly,
11 about the investigators who are investigating
12 these crimes. What a great point that was made
13 earlier today that, you know, we can't expect
14 non-lawyers or baby lawyers or military Service
15 members to be well-versed in the case law and
16 have copies of the Military Judges' Benchbook
17 handy to delve through to see how the President
18 has decided something's going to be decided.

19 The statute needs to say, this is what
20 you can and can't do. And so, all of these
21 terms, agreement, freely given, how does one
22 give, all those are things that need to be

1 defined so that people know what they can and
2 can't do and so that investigators can
3 investigate and lawyers can prosecute, defend and
4 judges can fairly and justly rule on these cases.

5 Now, I have a question: what is the
6 relationship of the term "by a competent person"?
7 To the part of the definition that the person
8 cannot consent if sleeping and unconscious or
9 incompetent under subsection B.

10 I mean if "competent" or "incompetent"
11 isn't defined, again, we're back to not really
12 knowing what the standards are.

13 And then I want to talk about strict
14 liability later because I'm on a time constraint.

15 But the bottom line is that the
16 current definition of consent leaves all of these
17 questions unanswered.

18 So, moving on to question number two
19 which is, whether the statute should define
20 defenses relying on victims' consent or accused's
21 mistake of fact as to consent and sexual assault
22 cases?

1 The answer, I think, I loved Ms.
2 Kepros' -- I don't know if I pronounced your name
3 correctly -- I love your proposition. In fact,
4 my proposition is written on my paper that I
5 wrote yesterday says, the elements of the statute
6 ought to include a lack of consent.

7 And here, I think the statute can be
8 very simply written, not in these exact words but
9 with this concept that if someone commits a
10 sexual assault, if you have a -- if you touch
11 somebody intentionally either in a place that we
12 traditionally think of as sexual-like, you know,
13 the genitals or the breasts or buttocks, those
14 sort of things, or you touch some other part of
15 the body with a sexual intent and to arouse their
16 sexual desires. And the person who's touched
17 doesn't consent to that.

18 Because if you do one of those
19 touchings and it's consensual, then it shouldn't
20 be illegal and we all agree on that.

21 But that's a very simple way to define
22 the statute is that you touch somebody in a way

1 that you shouldn't touch them and they don't
2 consent to it.

3 And then, I agree with the proposition
4 and discussion earlier that aggravating
5 circumstances can then be added on to that. You
6 know, if it's a full-on rape, that's obviously a
7 much more significant serious crime than a
8 touching of the breast over clothing. And that
9 can be dealt with by having a graduated series of
10 penalties for the conduct. But the basic
11 baseline conduct ought to be unwanted,
12 nonconsensual touching.

13 And this is not an onerous burden to
14 put on the Government to require the Government
15 to prove a lack of consent. All they have to do
16 is call the complainant and ask the complainant
17 to testify, did you give your consent verbal or
18 otherwise, express or implied? Did you consent
19 to this behavior? And the answer, I assume,
20 would be no.

21 And then that would be for the fact
22 finder to consider all the evidence presented by

1 the prosecution and the defense and determine who
2 to believe and whether the fact finders think
3 that the government proved lack of consent.

4 And in a case of an incapacitation,
5 the government can put on that evidence that,
6 well, other witnesses saw the witness passed out,
7 sleeping, throwing up, whatever the case may be.

8 But asking the government to prove a
9 lack of consent is not an overly onerous burden
10 and they should have to do that, in our view.
11 And that should be in the statute that consent is
12 a complete defense as is mistake of fact as to
13 consent.

14 I realize that RCM 916 incorporates
15 that defense and so, we, as lawyers, know that we
16 can still use that but if we're going to rewrite
17 the statute, let's get it right. Let's have it
18 as complete and thorough as possible while being
19 simple and unambiguous.

20 And so, one sentence in there about
21 when mistake of fact applies and when it doesn't,
22 I think, would be helpful to everyone.

1 With respect to the third question
2 about whether the statute should define
3 "incapable of consenting," I think the answer is,
4 yes, it should. Again, we need to put people on
5 notice of what they need -- how they need to
6 conform their conduct.

7 And I would note that I practice in
8 Houston, Texas and I think I would win a contest
9 for making the understatement of the year if I
10 said Texas is a prosecution-friendly
11 jurisdiction.

12 But even -- I just, for curiosity
13 sake, pulled the Texas statute on sexual assault
14 and I would make that recommendation, too, by the
15 way. I note that some of the other folks have
16 made reference to the federal statute, and while
17 there is one that has a knowingly mental state,
18 by the way, most sexual assaults of the kind that
19 we see in the military are not prosecuted by the
20 federal government.

21 They're mostly your run-of-the-mill sexual
22 assaults and rapes that are prosecuted day in and

1 day out by state authorities, the District
2 Attorney's offices and the local jurisdictions.

3 And I would recommend that the
4 Subcommittee maybe do a collection of -- let's
5 not reinvent the wheel necessarily by ourselves.
6 Let's get input from other legislatures that have
7 considered the issue and see how the states have
8 defined their sexual assault statutes. It
9 doesn't have to be controlling, but it can be
10 informative as to how we might craft our statute
11 for the military.

12 But even the Texas statute, being a
13 very prosecution-friendly jurisdiction requires
14 intentional or knowing conduct and it has to be
15 nonconsensual.

16 And the way they defined the lack of
17 consent, they kind of incorporate the
18 incapacitation and we could do a similar thing
19 where it says, they have a whole laundry list of
20 circumstances under which a sexual assault is
21 without consent.

22 And some of them include things like

1 if the other person is unconscious or physically
2 unable to resist due to mental defect or disease,
3 the other person was at the time incapable of
4 appraising the nature of the act or resisting and
5 so forth.

6 So, I don't know if we need a separate
7 definition or if we want to incorporate the
8 definition into our definition of consent, but
9 one way or the other, I think the statute needs
10 to clearly set out, what does the government have
11 to prove and what are the factors that go into
12 that proof?

13 I think I'm going to cede the balance
14 of my time to my colleagues from the other
15 Services unless there's any questions for me now.

16 CHAIR JONES: Yes, Ms. Kepros?

17 MS. KEPROS: Can I have the citation
18 for that Texas statute?

19 COL ZIMMERMANN: Yes, ma'am. It's
20 Section 22.011 of the Texas Penal Code.

21 CHAIR JONES: Great. And now we'll
22 hear from you, Colonel, is that Pitvorec?

1 LT COL PITVOREC: Yes, ma'am, it is.

2 Good afternoon, Chairman Jones and
3 distinguished members of the panel. I'm truly
4 honored to have this opportunity to speak with
5 the Subcommittee on the recommendation regarding
6 Article 120 set forth in the preliminary report.

7 As a brief reintroduction, I am
8 Lieutenant Colonel Julie Pitvorec. I am
9 currently the Chief Senior Defense Counsel for
10 the East Coast, Europe and the AOR and have been
11 a military defense attorney seven of the 16 years
12 that I have been an Air Force JAG.

13 I have also served as a trial counsel
14 for a number of years and I was also the Deputy
15 Staff Judge Advocate a few years back as well as
16 an Air Force Fellow.

17 And today, I'm privileged to represent
18 the 187 members of the Air Force Trial Defense
19 Division who are charged with providing zealous,
20 ethical and professional defense services to Air
21 Force members worldwide.

22 My comments today are my own and do

1 not reflect the opinions of the JAG Corps, The
2 Judge Advocate General or the United States Air
3 Force.

4 And while as a lawyer, I tend to have
5 very distinct opinions about many of the
6 recommendations and that might be just another
7 major understatement, I have tried to limit my
8 substantive comments.

9 In my opinion, it is the first three
10 recommendations that go to the heart of what is
11 trying to be accomplished for this review.

12 And probably an interesting comment to
13 a congressionally mandated panel, but one I feel
14 I need to make initially, is that I truly believe
15 we have a tendency to over-legislate matters.
16 And a common issue that we have is doing
17 piecemeal legislative fixes which is something
18 that I think has hurt us in the past.

19 And for an issue like sexual assault,
20 it is so complex. When we do piecemeal fixes, we
21 tend to break some things that we're trying to
22 fix.

1 And sometimes, taking a holistic look
2 at Article 120 and, in this case, what this panel
3 is trying to do, taking a look at Article 120 in
4 its entirety is important and should be required
5 so that we're not limiting our focus but are
6 looking at how the elements fit together to
7 achieve justice.

8 It is more important to get this right
9 than it is to make simple tweaks which we'll,
10 just in turn, be forced to rework in another few
11 years.

12 As an aside, I will also propose that
13 simplicity is an important aspect when rewriting
14 a code on this very complex issue.

15 And what I mean by that is as we tend
16 to add everything into the statute, we add all of
17 these definitions and add all these things into
18 the statute itself, that it tends to be -- we
19 tend to look at the statute as if it's not in
20 there, then they must not have meant to
21 criminalize it which I don't think that's at all
22 what we intend to do.

1 I understand that gone are the days of
2 "by force, without consent" which is the statute
3 under which I began my military career trying and
4 defending cases.

5 And understandably, the force aspect
6 of this equation is no longer required. But in
7 order to get this right, we need to simplify the
8 elements so that they address exactly the conduct
9 that we believe should be criminalized.

10 Going to the issues that you have laid
11 out in the -- that you've asked us to comment on,
12 and I'll start with the beginning, that is the
13 current definition of consent unclear or
14 ambiguous?

15 I think Colonel Zimmermann really
16 spent a lot of time talking about this. I think
17 one of the issues that I have, yes, that it -- in
18 short, yes. It is somewhat ambiguous. And I
19 think it's somewhat internally inconsistent.

20 But one of the things that I struggle
21 with with this definition is that it is a prime
22 example of adding so much to the content of the

1 statute that then we look to, well, what's
2 missing? If it's not there then it must not have
3 been -- that must not be prescribed.

4 And I don't think when we're talking
5 about some of the other things, given the
6 totality of the circumstances, do we really
7 believe that an MTI case, an MTI who sexually
8 assaults someone, you know, in their -- in basic
9 training, should that be prescribed? Of course
10 it should be prescribed.

11 We recognize that it needs to be
12 prescribed. It doesn't necessarily have to be a
13 strict liability offense for us to understand
14 that that conduct is wrong and that is something
15 that we can try in a trial by court-martial.

16 And I do take issue with the
17 affirmative consent portion of the definition of
18 consent as it's currently written. And the
19 reason I do that is because it's just not our
20 social norms.

21 There are very few people who ask, you
22 know, would you like to have sexual intercourse

1 with me and actually get an assent, affirmative
2 yes, I would.

3 And so, recognizing that that is not
4 how this normally transpires, there has to be a
5 look at across the board, every part of that
6 behavior that comes into being. I think that's
7 written into the statute, but I think that's
8 something that's important.

9 We keep saying this affirmative
10 consent, affirmative consent. In fact, that's
11 not -- my issue with it is that there are so many
12 cases that it's up to the prosecutor to decide,
13 their discretion to say, well, in this case, she
14 didn't say yes but she didn't say no. And then
15 this case, she didn't say yes and we don't know
16 if she said no. And so, one case goes forward
17 and the other one doesn't.

18 Many cases do not go forward when
19 they're just as no/yes because the consent is
20 implied because of the surrounding circumstances.
21 So, to require an affirmative yes, I think it may
22 be taking a step beyond where we're comfortable

1 with our own social norms.

2 The second issue, Issue #2, should the
3 statute define defenses relying on the victim's
4 consent of the accused's mistake of fact as to
5 the victim's consent?

6 I'm not sure that needs to be included
7 in the statute as clearly RCM 916 allows us to
8 include both of those defenses. However, I agree
9 with a number of previous presenters that the
10 historic availability of these defenses is
11 important and should continue.

12 And just to briefly talk about a
13 previous presenter back when I was here in
14 September or in D.C. in September, a previous
15 presenter talked about the California model where
16 they introduced the opportunity for either
17 consent or mistake of fact as to consent as a
18 defense but not both.

19 And I would argue that that could lead
20 to inconsistencies and I could envision certainly
21 as inconsistency in application.

22 In short, the defense of consent and

1 mistake of fact as to consent are likely to be
2 substantially similar, evidentiary speaking in
3 many cases.

4 And the same facts could illustrate an
5 objective manifestation of consent on the part of
6 the victim and could also demonstrate how the
7 accused could have misinterpreted those facts at
8 a time when the victim had testified that she did
9 not consent or that her behavior did not
10 constitute.

11 So, I would just say that those --
12 having both of those defenses available, I think,
13 is important and to adopt the California model
14 which allows one, but not the other in different
15 circumstances or allows the defense to choose one
16 but not the other I think may be a bridge too
17 far.

18 And I would add that, in the
19 traditional sense, that I would still argue that
20 the consent on the part of a legally competent
21 victim should negate any criminality on the part
22 of the accused. And again, when I mean legally

1 competent, again, I think we're using -- now I'm
2 using more terms that are ill-defined.

3 But I think we mean someone who is
4 capable of consenting and that kind of segues
5 very nicely into the next element here, issue
6 number three.

7 And should the statute define
8 "incapable of consenting"? And I believe,
9 obviously, wholeheartedly yes. The ambiguity in
10 the laws that currently stand leads to
11 misapplication of the law and, therefore,
12 injustice.

13 I find it really interesting that the
14 panel of prosecutors sat and talked about how
15 difficult it is to prove "incapable of
16 consenting" without a definition or --

17 I have seen in a number of cases where
18 young prosecutors are arguing, not how difficult
19 it is, but that the standard for "incapable of
20 consenting" is actually like the legal drinking
21 limit, you know, the driving limit.

22 And to say that at 0.08 or 0.10 that

1 I am "incapable of consenting," I think it belies
2 logic.

3 But, if you convince a military judge
4 that that's the standard to use, then I think we
5 had a misapplication of the law without a better
6 definition that's included across the board.

7 The other thing I find interesting and
8 I am somewhat troubled by, this is that the
9 prosecutors all discussed how they charged one
10 theory but yet, intended to prove elements of
11 another theory.

12 And the way our notice charging and
13 the way we do things, I find that very difficult
14 that they are giving notice that they're going to
15 charge based on this force when there really
16 isn't force and intend, instead, to prove up and
17 proposed definitions of "incapable of consent"
18 that do not comport with the law.

19 And I'm not saying that they're doing
20 it on purpose, but I think they are looking for
21 ways to actually get prescribed behavior before
22 the jury but they're arguing both sides and I

1 think that's -- if you're not charging both ways,
2 then I think it's very difficult for the defense
3 to be put on notice that, in fact, you are
4 arguing under both theories.

5 So, I find myself actually agreeing
6 with Colonel Grammel who is the military judge
7 who put forth a very good paper. I agree with
8 his definition of "incapable of consenting." And
9 he defined it as meaning "unable to appraise the
10 nature of the sexual conduct at issue, physically
11 decline participation or physically communicate
12 unwillingness to engage in the sexual act at
13 issue."

14 I was, in all of my reading throughout
15 this, I really was swayed by that definition and
16 I felt like that that actually encapsulates
17 exactly the conduct that should prescribed.

18 And one, since I share my colleague's
19 concern that legislative changes could prove
20 unworkable or add confusion to the issue, the
21 argument is the fixes, if you will, that make
22 changes through the Military Judges' Benchbook

1 through more detailed instructions or definitions
2 or through executive order.

3 But, again, the problem becomes that
4 the normal airman, the normal soldier, the normal
5 marine, the normal sailor has no idea what
6 conduct is prescribed unless we do it in statute.

7 Thank you for the opportunity to
8 discuss with you and I look forward to your
9 questions.

10 CHAIR JONES: Thank you very much.

11 Pardon me, Major Kostik?

12 MAJ KOSTIK: Ma'am, members of the
13 panel, thank you for inviting me back. In
14 September, I testified in front of the Joint,
15 Judicial Proceedings Panel in Ballston and I've
16 actually followed the testimony and watched many
17 of the presentations given over the last several
18 months because I've taken a personal interest in
19 the proceedings.

20 As you know, I'm the Senior Defense
21 Counsel at Fort Leavenworth, Kansas and for much
22 of the last year was the Senior Defense Counsel

1 at Fort Leonard Wood, Missouri.

2 I have been a trial counsel, I've been
3 a defense counsel, I've been a brigade judge
4 advocate advising commanders both in garrison and
5 deployed. I've also been an appellate attorney
6 and I received my degree at The Judge Advocate
7 General's School with a focus in military
8 justice.

9 In addition, I've also been an
10 administrative law attorney advising our officers
11 charged with doing our Article 32 formal
12 investigations, now hearings. And so I feel like
13 I have a fairly good grasp from an operator
14 level, not from the supervisory level and, let me
15 clarify what I mean, I try half the number of
16 cases that counsel carry.

17 So, if my counsel were carrying 15
18 cases, I'm carrying around eight or nine, if
19 they're carrying, you know, ten, I'm carrying
20 five. And then I also supervise all those
21 counsel and their cases.

22 As I sat down to prepare to address

1 the mandate of this Subcommittee and look at
2 those 11 issues, I tried to address each one of
3 them from the perspective of the defense counsel,
4 but also from out of the judge advocate who's
5 going to switch sides.

6 And as I've listened to many of the
7 presenters, I'm kind of struck with the idea that
8 I don't see many of the problems and certainly as
9 someone brings up a unique issue, for example,
10 this morning, throwing of the dodgeball, hitting
11 the genitalia of another pilot, I've never seen
12 that happen.

13 Well, I guess you could find that to
14 be a sexual contact, but I haven't seen that
15 happen. And we're not facing the problem in the
16 field and I do trust that in the large majority
17 of the cases, the prosecutorial discretion first
18 held by the judge advocate was advising the
19 commander, as was pointed out earlier, is going
20 to temper that.

21 And so, first and foremost, I do not
22 believe that we need a total rewrite of the

1 statute.

2 If I can pick a presenter whose
3 opinions I most follow, it would be Colonel
4 Grammel and I practiced in front of Colonel
5 Grammel when he was a judge. And, of course,
6 retired Colonel Grammel, he is a subject matter
7 expert for our Defense Counsel Assistance Program
8 and is charged with training all of us, of
9 course, in charge of training the junior counsel.

10 And so, with that said, I will
11 address, I think, Issue 2, 3 and 9 to start, but
12 I do have specific comments for each of the
13 issues and have prepared to at least provide my
14 opinion on each of the other issues.

15 So, with Issue #2, should the statute
16 define offenses relying on the victim's consent,
17 of the accused's mistake of fact as to consent
18 and consent?

19 I think sure, absolutely. First and
20 foremost, let's just face it, it's a statutory
21 curiosity to have the defenses outlined in the
22 statute.

1 I mean if we look at Article 128,
2 assault, you don't see the defense of self-
3 defense articulated in the statute or in the
4 Code. But, to the extent that practitioners are
5 -- in the field are confused and judges are
6 confused on whether those defenses apply because
7 Congress specifically removed them out of the
8 2007 draft, then let's put them in there and
9 remove ambiguity.

10 I don't think it makes one difference
11 whether they're in there in or not. Every single
12 case that we try in which consent or mistake of
13 fact with consent is an issue, we're getting the
14 instruction, we're able to argue with cross-exam
15 and on those theories.

16 And so, it's not causing problems, at
17 least at Fort Leavenworth or at Fort Leonard
18 Wood. But if there is some confusion and there's
19 a risk that a judge in the future may come in and
20 say, well, it's not in the statute, it's not part
21 of the statutory scheme, then we shouldn't put it
22 in there or it shouldn't be instructed on, then I

1 say we should make it clear and put it in.

2 The next issue is whether "incapable
3 of consenting" should be defined. As I said at
4 the JPP in September, I think it does need to be
5 defined. And the reasoning is fairly simple.

6 When looking at "incapable of consent"
7 and you combine it with the word "impairment" in
8 120(b)(3)(A), a real issue evolves when you
9 combine it with the training.

10 And we've talked some about the
11 training here this morning and my concern is that
12 when judges and practitioners are left to their
13 own devices, their own knowledge of the ways of
14 the world and how things work. In Torres, a
15 Marine Corps case, the Navy-Marine Court said we
16 should use the definition when trying to figure
17 out what capable of consent is.

18 I think there's a real risk that some
19 people or some Service members who should not be
20 convicted are convicted because we don't know
21 what "incapable of consent" means.

22 And, frankly, adding a definition, is

1 a laser-like fix, as the term was thrown around
2 in the last hearing. And I would recommend
3 adopting Colonel Grammel's definition.

4 I listened to the definition from this
5 morning. Those all sound interesting to me, but
6 you know, we are used to the definition that
7 Colonel Grammel used because it's from the 2007
8 statute. We shouldn't make it any harder.

9 Lieutenant Colonel Pickands'
10 definition also sounded to me as a reasonable
11 definition to consider.

12 But those are two variations of the
13 definition that I think would be workable within
14 the statute.

15 And then the last point that I'll
16 cover in my initial comments is Issue 9 which is
17 are the definitions of sex act and sexual contact
18 too narrow or are they overly broad?

19 I do think the definition of sex act
20 is too broad and, as I said in September, I
21 believe that the definition of sex act could be
22 made consistent with that of the Federal Code.

1 Having read Colonel Grammel's
2 submission to the panel and his marked-up
3 recommendation of the statute, I believe this
4 solution is just as workable, and perhaps, maybe
5 even better.

6 As far as sexual contact is concerned,
7 I did not -- I had not considered that definition
8 prior but Colonel Grammel's markup of sexual
9 contact that includes "or any object" at the end,
10 "touching may be accomplished by any part of the
11 body or any object" is a workable solution.

12 Only I would add to that "when the
13 object is used to arouse or gratify the sexual
14 desire of any person" to make sure -- to avoid
15 the dodgeball scenario.

16 So, those are the three issues, I
17 think if I only had three to change, I would
18 change those three. If you ask me to choose
19 between a rewrite or no changes, so a rewrite or
20 no changes, I would say no changes. We are able
21 to defend these cases. The defense is able to
22 win these cases. The Government prosecutes these

1 cases and, by God, they win a lot.

2 So, it seems to me, that the statute's
3 working, we could make corrections, but in the
4 field, the government gets their convictions, we
5 get our acquittals and the fact finder decides
6 the hard issues in the case that commanders send
7 them to the panels for, to decide those hard
8 issues.

9 And so, I'd be happy to answer any
10 questions about the other issues. But I'll pass
11 the mic.

12 CHAIR JONES: All right, thank you
13 very much, Major Kostik.

14 Commander Federico?

15 LCDR FEDERICO: Good afternoon, Madam
16 Chairman, this distinguished committee, I'm
17 thrilled to be here. This is my first time
18 attending the Judicial Proceedings Panel or the
19 Subcommittee. If I was a radio call-in, I would
20 say I'm first time, long time.

21 You know, in a lot of ways, I'll be
22 singing to the same tune as this chorus but

1 probably going off in a few solos.

2 By way of introduction, like a lot of
3 my colleagues in the previous panels and on this
4 panel, I've been both a trial counsel and a
5 defense counsel. I did two tours as a prosecutor
6 including the Senior Trial Counsel in Europe and
7 currently serve as the Officer in Charge in
8 Jacksonville, Florida where I run two offices
9 throughout the Southeast in the docket there.

10 It's where the inverse of the previous
11 Navy officer on the panel, Lieutenant Colonel
12 Stuart Kirkby, an officer I have great respect
13 for, he and I have been trying cases against each
14 other for a number of years, so we seem to always
15 be on the opposite sides of the aisle.

16 As I start to think about comments
17 today and listening to the discussion and reading
18 transcripts, I notice that the tension,
19 particularly this was pointed out in the page
20 four of the Executive Summary, the February
21 report of the Judicial Proceedings Panel, that
22 many have said don't change the statute.

1 A fourth change now in less than ten
2 years would prove to be really impractical when
3 prosecuting cases that may fall under different
4 statutes. But frankly, it's just hard for us to
5 really grasp and implement.

6 And I thought to myself as I was
7 sitting here this morning, I don't speak German,
8 but there's this word in German that I won't try
9 to pronounce but a direct translation is "to make
10 something worse by improving it." And as I
11 thought about this debate that word came to mind.

12 My view is that there have to be
13 changes no matter how hard it is for us to
14 implement. Although I think some of these
15 changes could be done with the scalpel and not
16 the axe.

17 And so, one of the concerns also I
18 wanted to mention that I heard this morning was
19 that, you know, the common law can take care of
20 this. Common law by virtue of what it is, is an
21 incremental process between the trial judges
22 crafting instructions, the appellate courts

1 breathing life into the statute by creating
2 factors, pulling them from thin air for
3 definitions, that it will work itself out.

4 But I thought to myself that, while
5 that process and that incrementalism is going on,
6 there are sailors potentially serving sentences
7 for offenses that may not have been an offense
8 under the law.

9 And so, to me, in my mind, the risk is
10 enormously large to not do something when I think
11 there are just enormous gaps in the law and in
12 the statute.

13 Another argument I heard was that the
14 instructions get really confusing the more
15 definitions you add.

16 In my experience -- and I should also
17 say, given the caveat at the beginning, I'm
18 speaking only for myself -- I'm confident a lot
19 of members, fellow members of the defense bar in
20 the Navy share my views, but I'm not here to
21 speak on behalf of the Navy.

22 But going back to the idea that the

1 instructions and adding definitions proves to be
2 unworkable to the members, in my experience, the
3 issues that members have looking at sexual
4 assault instructions is almost always the
5 interplay between the defenses and the
6 government's burden of proof of the elements.

7 In other words, the who has to prove
8 what and finger pointing both ways. That seems
9 to be -- you can even see the expression on
10 members' faces, confusion when those instructions
11 are read.

12 But rarely have I had or experienced
13 members being confused by definitions. And, in
14 contrast, in our system, and I heard someone say
15 our members are smart and I agree, we're talking
16 about aviators, people who drive ships, people
17 who do all kinds of things, you know, with
18 advanced degrees throughout the military, we have
19 smart panel members. They want information.
20 They want the law to define for them what is
21 prohibited.

22 And so, when they get to come back

1 from the deliberation room and ask questions to
2 the military judge, in my experience in sexual
3 assault cases, they're always one of two things,
4 either procedure about how to actually do their
5 jobs back in the deliberation room or they want
6 definitions. They want clarity on what some of
7 these terms mean. And I think we owe it to them
8 in the statute to give it to them.

9 So, as I think about, again, whether
10 or not there should be changes, again, I know
11 there are 11 issues before this Subcommittee, I'm
12 going to pick really two and here's where I'm
13 going to sing on key a little bit.

14 First, and by far, to me, the most
15 important is Issue #3, should the statute define
16 "incapable of consenting"?

17 My respectful suggestion is that it
18 absolutely has to. This is, in my experience,
19 the most wide gap there is.

20 The reason for that, and I don't have
21 metrics or data, but just anecdotal evidence that
22 I'm confident a lot of my colleagues would agree

1 with, is the vast majority of cases that are
2 coming before our courts martial system have
3 alcohol involved.

4 Whether or not the charge is incapable
5 to consent due to impairment by alcohol, which is
6 a very common charge, or even by force, in some
7 way, alcohol is involved in the case.

8 And so, when you think about then how
9 those cases begin to be investigated and how the
10 evidence presents in court, there is lack of
11 memory and ability to recall. The case turns
12 into, a lot of times, you'll see a lot of expert
13 toxicologists using what's called the Widmark
14 equation to try to extrapolate what BACs were at
15 that point in time, when, of course, a BAC wasn't
16 actually usually taken.

17 You see psychologists coming in to
18 talk about memory, the difference between a
19 blackout and a pass out. That's what these cases
20 often involve.

21 But the question as to what is
22 impairment or "incapable of consent" is the one

1 that I've seen baffle members. And I know this,
2 and I'll give a case example.

3 In September 2013, I tried a case at
4 Naval Station Mayport, Florida. It was a general
5 court-martial where the client was charged with
6 having committing a sexual act against a civilian
7 who was "incapable of consenting" due to
8 impairment by alcohol.

9 During voir dire, the members were
10 asked this question, how many of you believe that
11 if a person has one drink of alcohol, they cannot
12 legally consent to any sexual activity? Out of
13 the 12 panel members, nine raised their hand in
14 the affirmative.

15 In other words, then they thought one
16 drink, one sip, because as we individually voir
17 dired them, that's what they were told when they
18 were given sexual assault prevention and response
19 training.

20 I have heard Major Bateman say this
21 this morning, that a lot of the trainers go out,
22 and the prevention part of this is key for the

1 Department of Defense, everyone up here, if
2 you're a defense counsel, it doesn't matter what
3 you do, believes wholeheartedly in prevention.
4 So this is not, in any way, a comment upon that.

5 But the people going out to do the
6 training are often, it's either materials that
7 are given or in an effort to be aggressive and
8 get to the left of the problem, are making
9 comments such as if you have a drink, they can't
10 consent. And you've heard that.

11 I've heard of judge advocates being in
12 the back of the room in those trainings and
13 hearing that and having to raise their hand and
14 say, well, I'm not sure that's really what the
15 law is.

16 But when the members said that at that
17 general court-martial and were individually voir
18 direed on that question, they said, well, this is
19 what we were trained.

20 And this was really the key on that.
21 The judge couldn't tell them they were wrong.
22 The trial judge didn't have an instruction or

1 statute that he could look to to say that that's
2 wrong.

3 And so, what happened in closing
4 arguments was the counsel had to stand up and
5 spend an enormous amount of time trying to
6 convince the members that what they had heard in
7 training wasn't true without the benefit of the
8 instruction of the military judge.

9 And so that case, as I watched that in
10 the courtroom really, in my mind, solidified
11 where this gap was between what it means to be
12 "incapable of consent" as it relates to
13 impairment.

14 I echo, and here I'm really going to
15 sing on tune, that Colonel Grammel suggested a
16 fix to the statute and adding that definition. I
17 think it's very workable. But we have to give
18 the members something to help them to decide.
19 And, again, from my experience, they want some
20 more clarity and I think that having it as a
21 statutory change is the only way to do it.

22 I will agree with Major Rosenow who

1 was on the previous panel in saying that even
2 investigators or legal offices, no one's really
3 looking at the Military Judges' Benchbook unless
4 you're a counsel on the case.

5 But the Manual for Courts-Martial is
6 everywhere. Lieutenant Commander Kirkby talked
7 about one specific article in which it requires
8 there to be training of Service members.

9 So, having it there in the statute, I
10 think, is really the way, the only way, to fix
11 issue number three.

12 The other -- and I'll also note that
13 actually on Issue #3 that, and Major Kostik just
14 mentioned the Torres case from the Navy-Marine
15 Corps Court of Criminal Appeals, that case was an
16 as-applied challenge to the constitutionality or
17 argument that it was unconstitutionally vague,
18 that term. The court held that it was not.

19 Well, up and coming potentially at the
20 CAAF, the Petition is pending in a case that was
21 tried in my office, United States v. Corcoran in
22 which it was a facial challenge to the

1 constitutionality of whether or not, excuse me,
2 that term is unconstitutionally vague.

3 In reading both Torres and Corcoran
4 from the CAAF, I thought to myself, I think our
5 standards should be a little higher than, well,
6 at least it's not unconstitutionally vague.

7 So again, I've probably beat this drum
8 loud enough. On Issue #3, that would be the
9 suggestion I would respectfully submit to this
10 committee that some definition should be in the
11 statute as to what that means.

12 The second issue I'll take on, and
13 Major Kostik just spoke about Issue #9. I agree
14 with Colonel Grammel in terms of sexual act
15 deleting the word mouth and there's been a lot of
16 discussion about the object.

17 But really, what I want to talk about
18 is the definition of sexual contact in subpart B,
19 the discussion about "any body parts" and with
20 the specific intent hook at the end.

21 Colonel Grammel suggested edits to the
22 statute or amendments to the statute. Basically

1 just struck all of subsection B and then took the
2 specific intent element and put it into subpart
3 A, and I would agree with that.

4 And there has been the hypothetical
5 that keeps coming up about the dodgeball, but in
6 my experience, I can see how this has come up in
7 practice in a different way.

8 You know, there has also been
9 discussion about prosecutors selecting theories
10 of liability in which to charge. As a former
11 prosecutor and now as a defense counsel, I can
12 tell you prosecutors often pick all theories of
13 liability to charge and charge in the
14 alternative. And frankly, it's strategically a
15 very sound way to go.

16 And so, in one case I was involved
17 with what began as really a harassment complaint.
18 A civilian working at the Marine Corps Exchange
19 at Parris Island, there was a hospital -- Navy
20 sailor who was in charge of going around and
21 doing basically sanitary inspections, but he came
22 around a little too often and just made sort

1 flirtatious -- one-way flirtatious comments.

2 And one day when she was stocking the
3 refrigerator, he came up to her again, was making
4 such comments and then he poked her a couple of
5 times. He poked her in the neck, he poked her in
6 the arm, he poked her in the leg and then she
7 finally issued a formal complaint. She didn't
8 want him around anymore.

9 When that case and that investigation
10 went to the prosecution office when charges were
11 preferred, there was the sexual harassment
12 change. There were three specifications of
13 battery and there was a charge of a violation of
14 Article 120, subsection B because of the "any
15 body part" with the assumption that it was with
16 the intent to gratify his sexual desire based
17 upon his flirtatious behavior.

18 I think that, to me, encapsulates the
19 risk that really you're taking what, objectively,
20 is at most flirtatious behavior and capturing it
21 in really what are serious sexual charges. And
22 we know they're serious because the Department of

1 Defense has said in a recently updated
2 instruction that if convicted, that the offender
3 shall report themselves as a sex offender
4 registrant.

5 That issue, I can tell you with
6 clients, always comes up as extremely important
7 in your analysis as to whether or not to take a
8 plea deal or how to go forward. When you look at
9 the risk involved in going forward with that type
10 of charge in the charge sheet compared with
11 seeking some type of resolution for harassment-
12 type, the client facing sex offender registration
13 is always going to avoid that risk of what the
14 court's called a collateral consequence. And my
15 experience, in some cases, it's the whole
16 ballgame.

17 Now some people may look at that case
18 and say, well, that's a great outcome. It
19 reached a pretrial agreement at a special court-
20 martial for sexual harassment and the batteries
21 and he was convicted of that, and maybe properly
22 so in -- pursuant to his provident pleas.

1 But I think that charging that theory
2 of liability really was such a game changer that
3 to me -- to answer the question number nine. I
4 think the subsection B to sexual conduct or
5 contact ---- excuse me, has the potential and has
6 in fact ensnared conduct that, again,
7 objectively, is at best flirtatious but not
8 really what I think the statute is meant to
9 actually prescribe.

10 So with that and those two points and
11 recommendations, at this point, I guess I will
12 either cede the microphone back to Colonel
13 Zimmermann or to Madam Chairman for questions.
14 Thank you for your time.

15 CHAIR JONES: Thank you, Commander
16 Federico.

17 Questions? Would anyone like to
18 begin? Yes, Colonel?

19 COL (R) SCHINASI: In conversations
20 with your clients, is there ever an issue that
21 they didn't understand what rape was or what
22 Article 20 covered and they are surprised that

1 they're charged with a crime?

2 COL ZIMMERMANN: Well, let me start
3 because I'm the oldest one here.

4 It's not like, well, I looked in the
5 Manual for Courts-Martial and I didn't see that
6 element in there. But what they're surprised
7 about -- I mean, not to be disrespectful, but I
8 mean really, I would say the majority of the
9 sexual assault cases that are litigated are what
10 we call colloquially, drunk sex.

11 Where both parties are intoxicated and
12 they get frisky and one thing leads to another
13 and then the next day, for whatever reason,
14 either it truly was unwanted or there's some
15 other reason why Monday morning quarterbacking
16 makes it unwanted. A sexual assault complaint is
17 filed.

18 And once that ball starts rolling with
19 today's climate, we have cases that are at
20 general courts-martial where the 120 allegation
21 is not even referred to trial, but there are
22 other charges that came up during investigation

1 are now this guy's facing a felony conviction.

2 So to answer your question, no, they
3 don't say, well, I didn't understand the
4 elements, but they say, you know, I was drinking,
5 she was drinking, she was kissing me, she grabbed
6 ---- I have a case on appeal right now where the
7 guy says she -- we were dancing together. She
8 grabbed my penis while I was on the dance floor
9 with her. I don't remember touching her breasts,
10 but if I did it was because that's how we were
11 dancing and that guy has a conviction, a felony
12 conviction now, for sexual assault.

13 COL (R) SCHINASI: But that's not a
14 problem with respect to the Rule 120, that's --
15 excuse me -- that's the vicissitudes of proof.
16 But is there anything in the statute itself
17 that's a surprise? The fact that this crime is
18 prohibited? Is that ever a surprise to your
19 clients?

20 COL ZIMMERMANN: It's a surprise to my
21 clients when they feel like who assaulted whom?
22 I mean we were both drunk, we both touched each

1 other, why is that a crime?

2 That is a surprise then, so that's why
3 the definition of incapacitated and impairment is
4 so important and I mean truly, it's been
5 described ---- when I've complained about this or
6 talked with my colleagues in the field about why
7 is it -- when it's truly both parties are
8 intoxicated, why is it only usually the man or
9 always the man who's charged?

10 Because he's got the equipment and I'm
11 a woman and I don't think that's fair. I mean I
12 have clients that tell me, well, I want a SARC.
13 I want a UVA, because you know what? She
14 assaulted me.

15 I have a client right now ---- again,
16 not a Marine client, but a client right now who
17 was solicited for sex. He said no, I've taken
18 some medication that makes me go to sleep, so
19 please don't come over, and the woman came over
20 anyway and had sex with him. In my opinion, she
21 committed a sexual -- you flip the genders, she's
22 committed a sexual assault, but guess who's on

1 trial? My client because he had sex with her.

2 So it's not a fair way of doing
3 business, and so while they don't say, well, I
4 looked at Article 120 before I went to that party
5 and I made sure that I conformed to it, they are
6 surprised by the fact that someone's accusing
7 them of a crime for doing what kids do, which is
8 get drunk and have sex.

9 COL (R) SCHINASI: Is that something
10 that we could clean up in 120 or is that
11 resolution someplace else?

12 COL ZIMMERMANN: I think both. I
13 think that the statute needs to be clarified to
14 say, what is the government's burden of proof?
15 If we're going to take someone's liberty away
16 from him, put him in jail and label him a sex
17 offender for the rest of his life, what does the
18 government have to prove in order to achieve that
19 result?

20 And they have to prove a lack of
21 consent, I think. And then I think there are
22 other measures we have to ---- you know, the

1 training. The one and you're done, that's what
2 we call in the Marine Corps, one and you're done.

3 I have seen with my own eyes marines
4 confess to rape after being told by the NCIS
5 agent, well, were you aware that she had a beer
6 earlier that night? Oh God, now that you mention
7 it, yes, I knew she was drinking. I guess she
8 couldn't consent. I guess I did rape her. I've
9 seen that with my own eyes. So it's got to be a
10 combination of clarifying the statute and
11 improving the education.

12 And I agree that some of these
13 commanders mean well. If the standard for
14 incapacitation is here, they don't want their
15 troops getting anywhere close to it. They're
16 going to tell them, hey, when you go out
17 drinking, keep your hands to yourself. I'm a
18 mother, I tell my kids, be careful. I mean we
19 want them to err on the side of caution.

20 So, I think we need to clean up the
21 statute and we also need to improve the
22 communication about what's legal and what's not

1 legal when we educate our troops about the law.

2 LT COL PITVOREC: I would agree. I
3 think really the education piece is huge on this.
4 Again, is it the text of the statute or is it
5 really educating the people about it?

6 Really, it's the education and I think
7 that's one of the common misconceptions is that
8 everyone is training this and we're all on -- you
9 know, if you look at the Services, that we're all
10 together on this. All the Services are training
11 the same way. They're absolutely not.

12 I don't even think that internally in
13 the Air Force we're training this the same way.
14 I'm not sure if any two bases are training this
15 the same way. And I think that's the biggest
16 piece is that, again, a lot of Monday morning
17 quarterbacking.

18 You know, girl talks to her friend and
19 said, oh, so-and-so just left and blah, blah,
20 blah. Yes, I guess we had sex and then the next
21 thing's, she's like, well, you were drinking last
22 night, you couldn't consent, you were raped.

1 That's the next thing.

2 And the thing is -- and this is the
3 biggest problem, is that someone who honestly and
4 reasonably believes they were raped, whether they
5 were told by a friend or they were told by
6 somebody else, they are going to act the exact
7 same way as someone who was actually the victim
8 of rape.

9 And that's the problem is that we are
10 letting ---- you know, that this girl now
11 believes it. And so, it's not -- and I don't
12 feel like I don't think she felt victimized the
13 night before, but now she feels victimized.

14 Now some people do feel victimized the
15 night before. Some people really are raped, but
16 I think because we've watered down this alcohol
17 component that there are real victims of sexual
18 assault, real people who are really victimized,
19 who then are now afraid to report or don't report
20 or -- I see it all the time. I see it all the
21 time.

22 MAJ KOSTIK: Sir, I don't think my

1 clients are confused by what the law is. I think
2 they're confused by what they did meets the
3 element. And so ---- and maybe that's putting
4 too fine of a tip on it.

5 But they're not sure what "incapable
6 of consent" is. I think that's clear, they're
7 not sure how to assess that in the real world.
8 And then when they get called in to CID and
9 they're told what they're charged with when they
10 have their rights read, they're confused.
11 They're like, no, that wasn't the case that
12 night. That isn't what happened.

13 And the same way with the definition
14 of sex act. It's, "well, I did slap, you know,
15 Private Female on the rear end right after PT,
16 but I didn't intend to satisfy my sexual desire,
17 sir." That's weird, we were -- you know, I was -
18 --- everyone was high-fiving as we're walking off
19 the PT field, that's not what I meant.

20 So I think they're confused by the
21 factual predicate in saying I didn't do that.
22 They're not confused about what the law is, at

1 least in my experience. And again mine is
2 narrower than these folks who have lots of
3 counsel they supervise and try their own cases.

4 LCDR FEDERICO: Colonel, to answer
5 your question directly, I would say the vast
6 majority if not all of my clients are surprised
7 they've been accused of rape and I can't think of
8 a single time a client ever asked me about the
9 statutory language.

10 But more broadly, my response would be
11 similar to my colleagues. In another example, I
12 had an officer client who, when the incidents
13 were first reported, he was assigned a SVC. In
14 the Navy we call them a Victims' Legal Counsel,
15 but I think a Special Victims' Counsel in the
16 Coast Guard. So he was treated as a victim. And
17 six months later was charged himself with
18 forcible sodomy.

19 That led to some confusion as to how
20 he could flip roles so quickly as the
21 investigation continued when really, the
22 difference in the facts as to what was initially

1 reported were very small.

2 But usually the questions around the
3 issues that I see is Issue 2 and Issue #9. We're
4 talking about the issues of consent and whether
5 or not, you know, how -- well, not that the
6 knowledge as to consent is an element. And so
7 phrased very differently than the statutory
8 language, those are the types of questions I'm
9 fielding from clients.

10 COL(R) SCHINASI: If you think about
11 Article 120 with respect to your practice in
12 general, has Article 120 caused convictions where
13 they shouldn't be? Caused acquittals where there
14 shouldn't be? Or has it had a neutral effect on
15 your practice?

16 COL ZIMMERMANN: You mean the
17 statutory language and the changes over the
18 years?

19 COL(R) SCHINASI: If you look at it as
20 it is now, has it caused convictions where it
21 shouldn't? Caused acquittals where it shouldn't
22 or had it has a neutral effect?

1 LCDR FEDERICO: Do you want me to
2 start, ma'am? Okay.

3 I would say it's been an interesting
4 -- even since the current statute took effect in
5 June of 2012, colleagues and I -- even in fact,
6 this morning, Major Kostik and I were discussing
7 this. Coming out of the gate with this statute,
8 we saw a higher conviction rate and I would say
9 substantially to the point that the old standby
10 in the defense bar is always go members changed
11 dramatically to always go military judge alone.
12 We were afraid of the SAPR training.

13 Since then I've almost seen the
14 pendulum swing dramatically the other way. And
15 again, this is completely anecdotal, but my
16 belief is -- in a lot of ways I've heard this
17 said that the folks out on the deck plate are
18 kind of tired of being told so much about sexual
19 assault that they now believe cases are over-
20 prosecuted.

21 Again, whether or not that's a
22 reasonable belief, I don't have any data to

1 support that. I would think though, back to --
2 not the old 120, but the old, old 120. When I
3 first started as a prosecutor, the cases that
4 were leading to convictions there were almost
5 always guilty pleas.

6 We did not always expect to get
7 convictions on cases that were purely sort of by
8 force and without consent prosecutions, much
9 harder to obtain under that statute.

10 MAJ KOSTIK: Sir, I can say that's a
11 really hard question to answer. I can only think
12 of a few cases in which we really believed that
13 an acquittal hinged on the language of the
14 statute.

15 In a case tried at Fort Leavenworth
16 several months ago, we think we won the case on
17 the lack of a definition of "incapable of
18 consent" and "impairment." So we filed a lot of
19 motions asking for a definition to be -- it was a
20 military judge alone case, so this means that we
21 were asking in advance for the military judge
22 alone to tell us what he was going to apply as

1 "incapable of consent." And that was going to
2 drive the guilty plea. And so, I supervised this
3 case.

4 But that -- if his answer was bad for
5 us, it likely would have driven a guilty plea,
6 but he came back with this answer is, I will
7 apply the law as -- I know the law and I will
8 apply it correctly, which is the standard the
9 appellate courts use pretty much --- military
10 judge knows the law and applies it correctly.

11 Ultimately, before he deliberated we
12 asked him to come back with special findings.
13 Meaning if he ---- of course, if he convicts our
14 client, we want him to tell us what facts he used
15 to convict our client for the consumption of
16 alcohol, and ---- because this case it was a
17 question of whether the victim was asleep or she
18 was drunk.

19 And he came back with mistake of fact
20 sexual assault conviction on 128, which is a win,
21 okay, for the defense. But I'm not sure that the
22 -- I'm don't want to imply any bad intents on the

1 Judge, but I'm not sure that that case would not
2 have gone different if we had a clear definition
3 of "incapable of consent."

4 I think that was an easy way for the
5 judge to convict on 128, max him out on the
6 offense and avoid the appellate issue because the
7 client still got the maximum punishment under the
8 128 and still got a bad-conduct discharge. So it
9 was a way to avoid the appellate issue.

10 So to answer your question, I mean, I
11 think it's possible. I don't see it a lot, that
12 cases are hinging on the statutory language. I
13 think in most cases, you know, the defense is
14 getting the consent instructions or we're getting
15 the mistake of fact as consent instructions,
16 we're able to cross-examine the victim. So lots
17 of these issues that we're talking about aren't
18 really playing out, at least in the Fort
19 Leavenworth and Fort Leonard Wood courtrooms.

20 LT COL PITVOREC: I just have one, and
21 it's still actually really hard for me to talk
22 about because I feel like it's the one that got

1 away.

2 And we were convinced he was not
3 guilty. I had talked to my client extensively.
4 And they came back with a guilty and I think my
5 client's legs buckled underneath him. We had to
6 pick him up.

7 Most of the people -- it was a members
8 case, I think it turned on incapable ----
9 incapacity to consent.

10 The thing that gets me the most about
11 this one is that when the members came back with
12 the sentence, they read a statement that said, we
13 believe that drunk sex occurred and because of
14 that we believe this is the appropriate sentence
15 and he received six months, a reduction of one
16 grade and no discharge. So this was before the
17 mandatory discharge.

18 But that was a capacity to consent
19 issue on a person who -- it was charged as a by
20 force and without consent. So she actually
21 testified to a ton of force that nobody believed,
22 but it hinged on how much alcohol they had had

1 and that really is the crux of it.

2 And I call that the case that got away
3 because it still makes me a little bit sick
4 because of it. Because there were a lot of
5 issues about inconsistencies and outright lies in
6 that case but it came down to alcohol.

7 COL ZIMMERMANN: Truthfully, I can't
8 offer you anything more helpful than what these
9 guys have said.

10 When I try a case, I, you know, really
11 focus on the facts and the law obviously is
12 important as well. But all I can say is if this
13 room full of lawyers and experienced non-lawyers
14 who are -- I mean people who are experienced in
15 military affairs. If we can spend all day
16 talking about how confused we all are about this
17 then we should fix it.

18 CHAIR JONES: Any further questions?
19 Yes, Ms. Kepros?

20 MS. KEPROS: I'm curious given that
21 the defenses of consent and mistake of fact are
22 not explicitly discussed in the statute -- I

1 understand they are in 916. Is that something
2 that the accused are advised of either when
3 they're initially charged or at the time of any
4 kind of guilty plea? The availability of those
5 defenses, that is, or potential availability?

6 MAJ KOSTIK: I can speak from
7 experience, yes. So a couple of things.

8 When I prepare a client for a guilty
9 plea, one of the things we have to do is we have
10 to prepare them to deal with --- tell the
11 military judge why what they did violates the
12 law, and part of that is for me to go over each
13 of the defenses.

14 And I go over those defenses and I say
15 things like, well, you know, if she said yes at
16 any point in time, we might have a defense and
17 then we assess the credibility of that defense.
18 The same thing with mistake of fact as to consent
19 because the story invariably has some elements
20 of, well, she did this or she did that. It made
21 me think this, but then later she said no and so
22 I knew a hundred percent that I wasn't permitted

1 to have sex at that point.

2 And so we talk about how we could use
3 those things as a defense and how they probably
4 wouldn't carry the day, but then during the
5 providency hearing or the Care inquiry ---- in
6 the United States v. Care, the military judge
7 also talks about some of the defenses that are
8 either raised by the stipulation of facts in the
9 case or that just are raised by the accused's own
10 words that explain why he violated each element.

11 And even if there's a defense that
12 nobody thought of that sort of just kind of pops
13 up in the courtroom, or comes up on sentencing.
14 So the judge has already accepted the plea and
15 now we're in sentencing. If a defense comes up
16 during a sentencing witness, the judge will say,
17 at this time, we're going to reopen the
18 providency hearing, you stated X. X could be a
19 defense in the case, though I'm not telling you
20 that X would carry the day.

21 And at the end of all of that, he
22 explains it and he says, do you still want to

1 plead guilty? Now, before you answer, take a
2 moment, discuss that defense with your defense
3 counsel. If you'd like a recess, we'll give it
4 to you. I mean, they're very paternalistic when
5 it comes to making sure they understand a plea.

6 The harder case -- I think you hit the
7 nail on the head earlier, is in a contested
8 court-martial, you know, are we as careful? I
9 train my counsel to be. I train my counsel to
10 open that Judges' Benchbook and to go through the
11 elements and the defenses. That's their starting
12 point for a case because we build the case
13 backwards from what the judge is going to have to
14 decide backwards.

15 And so that's where I train my counsel
16 and I know the defense counsel across our region
17 generally start their cases that way. So I don't
18 think it's as big a concern, but again, my small
19 slice of the world.

20 CHAIR JONES: Anything further? Yes,
21 Dean Anderson?

22 DEAN ANDERSON: First, I just want to

1 apologize to the panel, I had a phone call I had
2 to take for work. I'm very interested and also
3 very compelled by the experience on this panel
4 and really want to thank you for coming here to
5 testify.

6 I'm still interested in this issue I
7 keep bringing up to each panel and that is the
8 disparity between some of the education --
9 preventative education and training that folks
10 get and how that ends up impacting, if at all,
11 actual justice as it's meted out.

12 Lieutenant Colonel Pitvorec, you have
13 the one that got away and it imprints on your
14 mind in part because it's so exceptional it seems
15 to me, where the jury was chagrined to have to
16 bring forward a moment of a conviction and
17 clearly gave a sentence that was minor or mild
18 compared to what was possible, I guess.

19 And I'm wondering with -- I'll ask you
20 all what I asked the prosecutors earlier and that
21 is, with all of the discretion -- it seems to me,
22 right? There -- it sounds like there's a

1 disparity between the messages that are received
2 by those who go through SAPR training and the
3 specificity of the law and what it requires.

4 If there are discretionary moments of
5 time when that something's not prosecuted.
6 Someone is thinking, oh, maybe I was raped, but
7 then she comes forward or he comes forward and
8 the prosecutor says, no, actually, that's not
9 what's going on. Those solve a lot of potential
10 injustice problems.

11 I guess my question is, is there
12 anything in the law or the definition of Article
13 120 that would address that concern that many
14 people raise anecdotally. And it sounds like in
15 one particular case, you, Colonel, have
16 experienced an injustice. What you consider to
17 be an injustice. Is there anything in the law
18 that you would change to address that disparity?

19 COL ZIMMERMANN: I think one thing, as
20 we've just spent a lot of time talking about is a
21 clearer definition of what substantial
22 incapacitation is because I think ---- you know,

1 with respect to the SAPR and the SHARP training
2 that the Services do, it's having an effect in a
3 lot of ways on the system. It's not just the
4 members.

5 I mean we had lots of members struck
6 because they say, I can't be fair. But usually
7 the military judge can rehabilitate by saying,
8 okay, well, you know that one and done is not the
9 law. If I tell you that that's not the law, can
10 you follow it? And, of course, they say yes.

11 But it affects more subtle things like
12 the witness's perception of what's happening. If
13 they see their friends drinking at a party and
14 then they find out the next day that there was
15 some sexual activity, it affects their perception
16 and how they're going to testify as a witness.

17 It affects the complaining witness and
18 their decision to report an offense or to go
19 forward, make it a restricted report or an
20 unrestricted report and all those sorts of
21 things, whether to submit to a medical exam.

22 So the training piece, I think,

1 affects all levels of the investigation and
2 prosecution and defense of the crime, not just
3 the actual trial itself. So I think if there
4 were more clarity in what the law is, we could
5 improve the training and we might have more fair
6 trials.

7 DEAN ANDERSON: Well it's interesting,
8 both sides want us to clarify, if anything, that
9 one thing about what "incapable of consent" or
10 "incapacity" means. Both sides sounds like that
11 would be key.

12 COL ZIMMERMANN: And I think if there
13 were more guidance on what is consent, okay? If
14 we made it clear that what -- your consent can be
15 oral, you know, verbal, or nonverbal. It can be
16 expressed or implied, you know, by your behavior.

17 If the troops were educated better on
18 that, then perhaps there wouldn't be so many of
19 what we might call misunderstandings, you know?
20 Where she says, well, yes, I put my arm around
21 him but I didn't mean for him to think I wanted
22 him to have sex with me.

1 And if they -- maybe they were
2 educated better on what -- you need to pay
3 attention to what you say and what you do and
4 then to the other side, just you need to be
5 careful of how you evaluate the signals you're
6 getting and don't jump to conclusions and make
7 assumptions.

8 But if people were on the same page
9 with what is consent and what is not consent, I
10 think that would avoid a lot of the
11 misunderstandings that result in criminal charges
12 these days.

13 CHAIR JONES: Anything further from
14 the panel? Professor?

15 PROF. SCHULHOFER: I have one
16 relatively simple question. I think each of you
17 has said that consent is a defense, but it would
18 be helpful to make it clear.

19 As I understand it as of now, the
20 prosecutor has to prove beyond a reasonable doubt
21 the absence of consent. One way or another, it
22 comes in through one word or another in this

1 statute.

2 If there's an amendment that says
3 consent is a defense, would that then shift the
4 burden to the defendant to prove consent or would
5 it still be true that the prosecutor has to
6 negate it?

7 MAJ KOSTIK: Sir, this is the problem
8 under United States v. Neal. Right? This is
9 what we had in the 2007 statute.

10 Lots of folks say that that case got
11 it wrong because it was an affirmative -- I mean
12 it's an affirmative defense. If it's offered as
13 an affirmative defense ---- if that affirmative
14 defense is unconstitutional, then why aren't all
15 the other affirmative defenses that operate in
16 the exact same way also unconstitutional?

17 I mean so the real issue is, is it
18 just under the peculiarities of the 2007 version
19 of the statute in the way that case sort of
20 percolated up to -- you know, up to CAAF that
21 created that unconstitutional burden shift? I
22 think the answer to that is yes.

1 I think if we create a formal
2 statutory scheme of affirmative defenses, we're
3 not going to have that same unconstitutional
4 burden shift that you had under the 2007 version.
5 Otherwise our courts would be overturning every
6 case that ever upheld an affirmative defense.

7 PROF. SCHULHOFER: I'm just reflecting
8 my civilian perspective. Under UCMJ, is it
9 typically the case that the prosecution has to
10 negate every affirmative defense that's raised by
11 the evidence?

12 LCDR FEDERICO: Yes, sir.

13 PROF. SCHULHOFER: Okay, so then -- so
14 it wouldn't involve any burden shift?

15 LCDR FEDERICO: That's right, sir.

16 PROF. SCHULHOFER: Okay, thank you.
17 One other question which is maybe a little bit
18 more complicated. I think we all heard somewhat
19 -- we heard two concerns I think very saliently
20 from all of you.

21 One was the misunderstandings that can
22 so easily arise in these very, very common

1 situations. And the other was that an
2 affirmative consent standard is really several
3 steps ahead of current norms or maybe a bridge
4 too far, I think was the term you used, Colonel.

5 And I see some tension between the two
6 of those because one of the concerns that we hear
7 so often from both the victim advocates and
8 defense advocates is that existing social norms
9 by themselves are what create all this ambiguity
10 and failure of communication.

11 And that one of the ways to resolve
12 it, which is so often proposed, is to move a
13 little bit ahead of existing social norms in the
14 interest of making clear -- both in the statute
15 and perhaps then the next step in education,
16 making clear a conception of consent that would
17 avoid some of that misunderstanding.

18 So, do any of you have any thoughts
19 that would help us kind of bridge that
20 difficulty?

21 COL ZIMMERMANN: I certainly do,
22 surprise, surprise.

1 On the affirmative. First of all, I
2 would note that there are very few jurisdictions
3 in the civilian world that require that
4 affirmative consent, and I think subjecting our
5 service members who have signed a line to go get
6 shot at to protect the rest of us deserve as much
7 protection as their civilian counterparts. And I
8 think it would be terribly unfair to make them
9 have to comply with a much, much higher -- and
10 with all due respect, I think an unreasonable
11 burden in order to avoid criminal liability.

12 We have to remember that -- while I
13 agree with you that it's a good educational goal
14 and we should maybe work on educating our Service
15 members about, hey, look, before you engage in
16 this behavior, you need to make sure that the
17 person that you're doing it with is consenting.
18 I don't have any problem with educational efforts
19 to that effect.

20 But when we're talking about labeling
21 someone a sex offender, taking away his liberty,
22 depriving people of retirements and other

1 benefits, I just don't -- I'm not ready to go
2 there. I don't think that's fair.

3 And if I might just take a second to
4 answer your first question about consent as an
5 affirmative defense. My proposal would be to
6 make lack of consent an element of the offense.
7 Make the government prove a lack of consent, and
8 we don't have to get into that discussion about
9 shifting burdens and back and forth.

10 The Government needs to prove the
11 touching -- whatever the touching is and that it
12 was without consent and that would avoid that
13 problem.

14 PROF. SCHULHOFER: Thank you.

15 LCDR FEDERICO: Yes, sir. I mentioned
16 in my opening remarks how, in my experience, the
17 ---- what is almost a visible confusion on behalf
18 of members oftentimes is when they're being
19 instructed regarding the elements the Government
20 must prove. And then when you start raising
21 affirmative defenses of consent and mistake of
22 fact as to lack of consent.

1 What's been interesting, I think for
2 me and my colleagues as we are thinking about how
3 to present our case, and for example, whether or
4 not to advise the client to testify in his or her
5 own defense, often hinges upon our belief as to
6 whether or not the members are going to
7 understand those instructions properly. Or in
8 another analysis, whether or not we can raise
9 some evidence -- the standard of merit, for
10 example, a mistake of fact instruction.

11 But the reality is, if we're doing
12 that analysis ---- I heard Major Bateman say
13 something this morning that I agree with, which
14 is consent has always been found to be relevant.

15 So when we are trying to think about
16 ----- you know, in looking at elements compared to
17 whether we raised some evidence, the reality is,
18 whether or not there has been sort of a doctrinal
19 shift from a focus on the victim's behavior
20 compared to the focus on the offender.

21 The cases don't look very different in
22 the courtroom in terms of how the evidence is

1 being presented and at the end of the day, with
2 some of these gaps that we've discussed as we're
3 preparing our clients and our cases, part of the
4 analysis comes with, well, do we trust that even
5 with these gaps, is it going to work in our favor
6 from the factual standpoint to go down the road
7 even sometimes when the law doesn't necessarily
8 support it, if that makes sense.

9 PROF. SCHULHOFER: Thank you.

10 CHAIR JONES: Yes, Liz?

11 HON. HOLTZMAN: First of all, let me
12 thank you all for your very thoughtful testimony
13 and for taking the time to come. I really
14 appreciate it.

15 In terms of consent and the burden of
16 proof, it seems to me -- and maybe I'm misreading
17 the statute, but bodily harm requires -- that's
18 an element of the crime, and an element of bodily
19 harm is that there be nonconsensual sex.

20 So, nonconsent has to be proven ----
21 as I read the statute, please correct me if I'm
22 wrong, by the Government if you're prosecuting

1 under the bodily harm section. Is that correct
2 and how does it work in practice?

3 LCDR FEDERICO: The theory of
4 liability -- I'm sorry if I jumped in -- on this
5 charge that I have seen is -- and this came up
6 earlier and in Colonel Grammel's remarks, is the
7 statute seems to require both that the bodily
8 harm is sort of what causes then the sexual
9 contact.

10 But in reality, in the specifications
11 I've seen, it is always one in the same. In
12 other words, the sexual contact is the bodily
13 harm and basically merges those two.

14 But I would agree, as it is written
15 and as I would read it, that the having to prove
16 the lack of consent is part of what the
17 government must prove.

18 HON. HOLTZMAN: Well, how does it
19 work? Does the government then prove lack of
20 consent in practice? And what are the charges?

21 LCDR FEDERICO: On this one I'll fall
22 neutral in that I would say ---- although I've

1 seen a number of these charges of bodily harm, I
2 can't come to mind one way or the other in saying
3 that I believe that either convictions were
4 obtained or not obtained because of that
5 particular charge falling one way or the other.

6 CHAIR JONES: Do you remember what
7 charge was given to the members on a bodily harm
8 case?

9 HON. HOLTZMAN: That's my question,
10 not the outcome, but what the charge is?

11 LTCOL PITVOREC: If I may, what I have
12 seen routinely on a bodily harm is that they
13 charge the theory of bodily harm really with, by
14 being a proponent of the theory of this
15 substantial incapacitation.

16 And so the bodily harm ends up being
17 the sexual intercourse or sexual act itself
18 that's sufficient to establish the bodily harm
19 element, and then argue under the substantial
20 incapacitation or a capacity to consent issue.

21 And so they really do conflate them
22 together, which is one of the issues that I have

1 with that is that it's because they seem to be
2 arguing two different theories, but pushing them
3 together and then throwing it at the jury, which
4 I think does add more confusion. I'm sorry, if
5 that's not helpful.

6 HON. HOLTZMAN: Any other comment?

7 MAJ KOSTIK: Ma'am, so the Benchbook
8 instruction does instruct -- it says, so the
9 government has alleged that the accused committed
10 a sex act, to wit ---- in respect to the act ----
11 upon the victim and that the same physical acts
12 also constituted the bodily harm required to
13 charge sexual assault.

14 Under these circumstances, the
15 government also has the burden of proof beyond a
16 reasonable doubt that the victim did not consent
17 to the physical act.

18 So, that is the charge.

19 CHAIR JONES: So in that particular
20 section of 120, consent has to be proven because
21 it's an element?

22 MAJ KOSTIK: Yes, ma'am.

1 HON. HOLTZMAN: And what percentage of
2 the prosecutions are on a theory of bodily harm?
3 Most? Many? Some?

4 MAJ KOSTIK: I would say that when
5 they're not alcohol-related, it's falling into
6 the bodily harm -- the charges are falling into
7 the bodily harm.

8 And I would say, at least in our
9 jurisdiction, it's a 50/50 split on whether or
10 not the bodily harm is something else or it's the
11 sex act.

12 CHAIR JONES: But I think from my past
13 readings, most ---- and maybe what you've said,
14 most of these cases do involve alcohol. So are
15 you telling us that you get both charges for the
16 most part? Bodily harm and then the
17 incapacitation?

18 MAJ KOSTIK: I have seen that. We
19 have a very senior SJA in our jurisdiction who's
20 been an SJA multiple times and a Chief of Justice
21 who has also been Chief of Justice, usually picks
22 this theory and does different theories on the

1 charge --

2 CHAIR JONES: And what does he pick,
3 for the most part, in alcohol cases?

4 MAJ KOSTIK: I'm sorry, I didn't hear
5 the question?

6 CHAIR JONES: Which charge would he
7 choose in -- which charge is most often chosen in
8 cases involving alcohol?

9 MAJ KOSTIK: "Incapable of consent."

10 CHAIR JONES: Incapacity, okay.

11 HON. HOLTZMAN: Can I just ask one
12 other question? I'm very troubled about this
13 bodily harm statute, because to me, I don't
14 really understand it at all.

15 I mean if you look at the -- B itself.
16 "Any person subject to this chapter who, causing
17 bodily harm to" another person. Causing means
18 generally causing. Cause-effect, you are an
19 actor. Okay, then if you go to definition of
20 bodily harm, it says "bodily harm means any
21 offensive touching of another."

22 Well, how can you cause if you are --

1 I think Professor Schulhofer and I have been
2 through this before, but how can you cause bodily
3 harm if all that you've engaged in is offensive
4 touching? It seems to me that there's a problem
5 in the language itself. Am I wrong? Am I
6 confused?

7 COL ZIMMERMANN: It's very confusing
8 and you're very educated and -- as are we and it
9 doesn't make any sense. It's circular, saying
10 you caused -- you did a nonconsensual --
11 offensive touching that was bodily harm which is
12 defined as offensive touching. I mean, it's
13 silly.

14 HON. HOLTZMAN: Yes, well you caused
15 something but you're not causing something ----
16 there is an offensive touching.

17 COL ZIMMERMANN: To me, it's
18 irrelevant. I mean if you're charging someone
19 with, let's say, penetrating the vulva with the
20 penis. Well, then charge -- that's the act that
21 you did.

22 And if there's some bodily harm above

1 and beyond that like you punched her first,
2 that's a matter of aggravation. That's not an
3 element of the offense. The element of the
4 offense is that you put your penis in her vulva
5 without her consent. And if there was some other
6 bodily harm above and beyond that, that's a
7 matter of aggravation that should increase the
8 sentence.

9 MAJ KOSTIK: And, ma'am, if I can add
10 on to that. I think what will clean it up is to
11 get rid of the second part of the definition of
12 bodily harm.

13 So the "bodily harms means any offense
14 of touching another, however slight, and
15 including any nonconsensual sexual act or sexual
16 contact." If you strike that language, and you
17 think about what we're trying to do with that
18 sexual assault provision, what we're trying to do
19 is we're trying to say it's something more than
20 the placing of the penis in the vulva.

21 It is, they held down the victim by
22 placing hands around the neck, putting hands on

1 the shoulder, and so it's that bodily harm that
2 they're capturing. So that bodily harm plus the
3 sex act that they're trying to capture.

4 And I think it gets very confusing
5 when you allow those two acts to be the same
6 thing. I caused this sexual assault by
7 committing the sexual assault. It's extremely
8 confusing.

9 HON. HOLTZMAN: Do you think that
10 there's a chance that whole thing would be thrown
11 out on just due process claim that this is an
12 incoherent provision in the law?

13 MAJ KOSTIK: I hadn't thought of that
14 yet, but I'm going to try it next.

15 CHAIR JONES: Yes, go ahead Professor.

16 PROF. SCHULHOFER: My apologies,
17 because I know I asked a question already, but
18 this is on a different subject really.

19 Virtually every witness that we have
20 heard -- not all, but virtually everyone has
21 agreed that this statute is a mess. Where the
22 witnesses differ is on whether to allow the

1 process to keep slowly, incrementally clarifying
2 it, to allow people to stay with what they are
3 familiar with, that the best is the enemy of the
4 good and so on, on the one hand. And those who
5 think that we should clean it up. And the latter
6 seems to be a stronger view from this panel.

7 Some of us up here, and I include
8 myself in this category, have given a lot of
9 thought to what an ideal statute should look
10 like. But again, speaking for myself, I have no
11 idea how to think about the transition problem
12 and the costs of trying to take something that's
13 imperfect and make it less imperfect.

14 My personal experience in the civilian
15 sector has been -- one part of it has been with
16 the U.S. Sentencing Guidelines. Some of you may
17 be familiar with that, which now has, I think,
18 over 400 amendments with timing and transition
19 and retroactivity problems with respect to every
20 single one of them.

21 So four different statutes doesn't
22 impress me, but I hear what people are saying.

1 And so, I wonder if you could give us some help
2 on how to think about that and whether, if we do
3 prefer to recommend a new statute or a clean
4 start, is there some way to think about easing
5 that transition so that it would not cause so
6 many headaches for people as you move from one to
7 the other?

8 MAJ KOSTIK: I don't think it causes
9 headaches, I think it causes acquittals.

10 CHAIR JONES: Causes what?

11 MAJ KOSTIK: I don't think it causes
12 headaches, I think it causes acquittals. And we
13 have a -- I'm speaking for myself and not as a
14 defense counsel, but as a judge advocate who's
15 going to go back to the other side -- in 30 days,
16 I'm going back to the other side.

17 So the concern for me is that what may
18 be good for the Army in the long term is going to
19 be very bad for a sexual assault problem in the
20 near term. And I believe that we can make these
21 laser-like changes in the near term and have
22 very fair trials where accused's rights are

1 recognized and acquittals will occur, but
2 convictions will also occur.

3 And so again, I fear that after a
4 change, for the next year or more, as counsel
5 sort of starts to figure out how to thread that
6 needle of the perfect balance to get a
7 conviction, the defense counsel are going to get
8 a lot of acquittals and that's going to damage
9 our Service and that's concerning to me.

10 LCDR FEDERICO: Sir, if I might just
11 also add. I think it's because of the way the
12 military justice system takes the statute and
13 then implements it further through the
14 presidential authority in Article 36 and the
15 Joint Service Committee, it just can't happen
16 quickly.

17 So in that way, it's hard to think of
18 ways to really mitigate sort of on the timing
19 aspect as you may have heard with the new statute
20 and sort of the executive orders yet to come to
21 still further implement.

22 So the process is inherently slow when

1 the two branches of governments and the
2 Department of Defense are coming together to try
3 to implement what --- the language that Congress
4 has passed.

5 But again, you know, just because it's
6 hard, I think that really ---- at least to me in
7 my mind, as I said in the beginning, it's not
8 whether or not there should be changes. You
9 know, Colonel Zimmermann has said ---- and a lot
10 of which I think very thoughtfully that, you
11 know, maybe it's time to build the house from the
12 foundation up.

13 But I think at this point, reasonable
14 minds can differ. It's going to be hard either
15 way, even if you're doing definitions but I do
16 think from sitting through all the panels with
17 maybe one exception, I think everybody thinks
18 there has to be some changes and when you
19 acknowledge that there's going to be some change,
20 it's going to take time to implement and shift
21 the way business is done a little bit, and then
22 you just look at the overall utility as to

1 whether or not to, again, build that house from
2 the foundation up.

3 COL ZIMMERMANN: I agree. I just think
4 we ought to do it right. I think our Service
5 members are entitled to have a good, fair,
6 constitutional statute that gives them notice and
7 allows them to have a trial that comports with
8 due process.

9 And the fact that it might be
10 inconvenient for the lawyers to adjust, I'm just
11 not very sympathetic to that. I'm worried about
12 the guy sitting in my office tomorrow. I'm not
13 worried about these lawyers having to learn a new
14 rule because they're going to have to learn some
15 new rule anyway.

16 PROF. SCHULHOFER: Thank you.

17 CHAIR JONES: All right, thank you
18 very, very much. Again, this has been
19 extraordinarily helpful to us and I thank you for
20 your candor.

21 All right, we're next going to hear
22 from the appellate counsel.