UNITED STATES DEPARTMENT OF DEFENSE

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JUDICIAL PROCEEDINGS SINCE FISCAL YEAR 2012
AMENDMENTS PANEL

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PUBLIC MEETING

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FRIDAY
SEPTEMBER 19, 2014

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The Panel met in the Glebe and Fairfax Rooms, Holiday Inn Arlington at Ballston, 4601 Fairfax Drive, Arlington, Virginia, at 8:51 a.m., Hon. Elizabeth Holtzman, Chair, presiding.

PRESENT

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

WITNESSES

CAPT STEVEN ANDERSON, U.S. Coast Guard, Commanding Officer, Legal Services Command
Col JOHN BAKER, U.S. Marine Corps, Deputy Director, Judge Advocate Division, Military Justice & Community Development
CAPT ROBERT CROW, U.S. Navy, Director, Criminal Law Division (OJAG Code 20)
HON. LOIS FRANKEL, U.S. House of Representatives
PROF. VICTOR HANSEN, New England Law Boston*
CDR JASON JONES, U.S. Navy, Defense Service Office, Bremerton, WA
Col POLLY KENNY, U.S. Air Force, Staff Judge Advocate, Headquarters Air Education Training Command, Joint Base San Antonio, Randolph, TX
LTC JOHN KIEL, U.S. Army, Criminal Law Division, Office of The Judge Advocate General
MAJ FRANK KOSTIK, U.S. Army, Senior Defense Counsel
Col MIKE LEWIS, U.S. Air Force, Chief, Military Justice Division
Maj MELANIE MANN, U.S. Marine Corps, Military Justice Officer, MCAS Miramar, CA
CAPT (Ret) STEPHEN McCLEARY, U.S. Coast Guard, former Chief of Military Judge
ELISHA MORROW
E.J. O'BRIEN, Highly Qualified Expert, U.S. Army Trial Defense Services
LTC ALEX PICKANDS, U.S. Army, Trial Counsel Assistance Program
Lt Col JULIE PITVOREC, U.S. Air Force, Chief Senior Defense Counsel
Maj MARK ROSENOW, U.S. Air Force, Special Victims Unit, Chief of Policy and Coordination

LtCol MICHAEL SAYEGH, U.S. Marine Corps,
Staff Judge Advocate, Training
Command, Quantico, VA
TERESA SCALZO, Highly Qualified Expert, U.S.
Navy Trial Counsel Assistance Program
HON. JACKIE SPEIER, U.S. House of
Representatives
LCDR RYAN STORMER, U.S. Navy, Trial Counsel
Assistance Program
LtCol CHRIS THIELEMANN, U.S. Marine Corps,
Regional Trial Counsel
PROF. RACHEL VanLANDINGHAM, Southwestern Law
School
LTC JAMES VARLEY, U.S. Army, Government
Appellate Division
RONALD WHITE, former Highly Qualified
Expert, U.S. Army Trial Defense
Services
Col TERRI ZIMMERMANNN, U.S. Marine Corps,
Officer-in-Charge (Reserve), Defense
Services Organization

ALSO PRESENT

BILL SPRANCE, Designated Federal Official
Lt Col KYLE GREEN, U.S. Air Force, Judicial
Proceedings Panel Staff Director

* Present via Teleconference

AGENDA

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ENTIRE TRANSCRIPT AVAILABLE AT

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major disruptive effect?

MAJ ROSENOW: Ma'am, not the ones that you listed there, not the capacity, and not the use of another object. It's very interesting the sexual contact, you can actually cause another person to touch, and that's an offense. So, if you use another person's body and I've prosecuted those cases where somebody is manipulating another person's body as the object, it still is a sexual contact. But if you're using an object, you know, a broom, whatever it happens to be, so no, I wouldn't say those would threaten what we're doing here. Those are filling in some gaps we have.

LCDR STORMER: Not at all.

LTC PICKANDS: No, those are clarifying changes, ma'am.

CHAIR HOLTZMAN: Okay. I don't have other questions. Thank you again for your testimony. We'll hear from our next panel. We really appreciate the time you spent.

I want to thank all the panel members for appearing. This is the second set of officers that we'll hear with regard to the issue of prosecution and defense under Article 120. These are all persons with experience in the defense of these cases, and we'll begin with Colonel Terri Zimmermann, U.S. Marine Corps Officer in Charge, Reserve, Defense Services Organization.

COL ZIMMERMANN: Good morning, and thank you, Your Honor, and distinguished panel members. I'm very honored to be here today. Can

you hear me okay?

CHAIR HOLTZMAN: Yes. Well, maybe you should move that mic closer to you. Great.

COL ZIMMERMANN: I'm not generally regarded as soft-spoken but, you know, I'm nervous. I serve as the Reserve counterpart to the Chief Defense Counsel of the Marine Corps. I've been a Marine Corps Judge Advocate since 1993, and I've served in positions such as investigating officer, review officer, trial counsel, defense counsel, appellate defense counsel, and appellate military judge.

In my civilian practice, I represent citizens accused of crime in state, federal, and military courts, as well as —- and I represent them at the trial, appellate, and post-conviction levels. I also handle administrative matters in the military such as administrative separations and discharge upgrades.

I'm board-certified in criminal law and criminal appellate law by the Texas Board of Legal Specialization, and I'm a board certified criminal trial advocate certified by the National Board of Trial Advocacy.

Recently, in my personal practice I have defended Article 120 cases at pretty much every single level of litigation, from investigation, trial, clemency, appeal, and administrative separations.

I really think it's important to say starting as the first defense speaker that nobody in this room, the people at this table included, think that it's ever

acceptable for somebody to sexually assault, or assault in any way another human being. The fact that we represent people accused of this, I think it's important for you to understand, nobody thinks that it's okay to do that.

Sexual assault, in particular, when one service member sexually assaults another, violates every value that we cherish. And we all believe that true crimes should be punished, but our mission should be, and our mission is to insure that the process is fair, and that when people are properly convicted that the punishment is fair.

And in that regard, our highest military court has repeatedly emphasized that our courts-martial have to not only actually be fair, but they have to appear to be fair to the American public. It's very important.

Because of the recent rapid and what I would consider sometimes ill-considered legislative changes to military legal practice, I think that the system has become dangerously out of balance. This is of particular concern in these kind of cases where the consequences are so severe.

Sexual assault convictions carry -— I mean, lifetime confinement as well lifetime sex offender registration. So, my mission today is to give you some insight from my personal experience regarding the practicalities of litigating these cases in the Military Justice system in today's legal and political climate.

And I think that, unfortunately, in the rush to take action against what some people perceive as a crisis, we've shifted from a pursuit of the truth to a

pursuit of conviction. Legislative changes have become result-oriented, supporting not a presumption of innocence but a presumption of guilt in many cases.

Now, this hurts not only service members who are wrongly accused, but it also hurts true victims, and it also hurts the Military Justice system as a whole. I think trials have become a highspeed expressway from allegation to conviction. The speed limits and off-ramps that used to be there in previous years, which gave Commanders discretion to take other actions and dispose of obviously contrived or difficult cases, those options are now off the table.

Commanders now are left to rely exclusively —- to put their trust in the fairness of the system, and while I'd like to think that that trust is well-placed, I'm afraid that it may not always be well-placed in today's environment. The civilian and Military Justice systems are manmade and, therefore, by definition they're going to be imperfect.

Three decades of DNA exoneration research has demonstrated that flawed scientific testing contributed to nearly half of the convictions of people who were found to be factually innocent. One-third of the known exonerations involve rape charges. Even confessions are not conclusive proof of guilt in every case. In fact, one in four of those exonerated actually confessed to the rape or the crime, and one in ten pleaded guilty. So, we know that systems can be flawed, and that some innocent service members will be accused and tried for crimes that they did not commit.

We must do our best to ensure that wrongful convictions do not result.

You've heard from the previous panel that these cases are hard to prosecute. And I agree, I've been a prosecutor prosecuting 120 cases, but they're also very hard to defend. I could talk all day about why that is, and I don't have all day, lucky for you. Some of the biggest challenges, though, that I want to discuss with you to fairly litigating these cases include a lack of the precise definitions that I won't belabor because you've heard a lot about it already, over resources of government in terms of investigators, highly qualified experts, and complex trial teams, and the defense's lack of fair access to evidence through subpoenas and the use of expert witnesses.

Also, I have to mention that changes in Article 32 and the Commander's discretion in charging and clemency decisions, plus provisions such as mandatory minimums further demonstrate that the pendulum is just swinging out of control.

So, what are some solutions we can consider? First of all, again, I won't talk about the definitions, so I just want to mention that it's important to remember, especially if we've been talking about strict liability just five minutes ago, it's important to remember that our criminal justice system is intended to punish people who intentionally violate the law. So, let's move on to the second point, which is investigators.

Defense counsel in the Marine Corps and probably in the other

services, as well, have a meager staff, and neither the counsel nor their staff are adequately trained or equipped to be investigators. We wholeheartedly agree with the recommendations and findings of the Comparative Systems Subcommittee to provide independent, deployable defense investigators. Specifically, Finding 37.2 acknowledges that defense investigators are such a basic and critical defense resource they are required for all types of cases, not just sexual assault cases. The CSS conclusions clearly set the bar for constitutionally adequate representation. Failure to properly conduct a defense investigation can have really costly consequences for all parties.

In one California study, 44 percent of the ineffective assistance of counsel claims that were granted involved a failure to investigate. The financial cost of retrial to the government, the impact of incarceration and discharge on the accused, and the lack of finality for the complainant are heavy costs associated with constitutionally inadequate pretrial investigation.

Finally, these investigators that I'm asking for must come from the civilian sector. Government law enforcement agencies are simply unwilling to assume these additional duties. A staff of dedicated defense investigators is not a luxury; it's an absolute necessity.

Now, thirdly, let's talk about expert witnesses. Sexual assault cases are very complex and difficult for both sides, and they often require substantial involvement of medical, psychological, and other expert witnesses for both sides.

Recent federal case law has made it clear that failure to investigate and use defense experts to present defensive evidence and meet the prosecution evidence falls —- if the defense counsel fails to do that, they fall below the standard of care required to provide effective assistance of counsel. And, again, the CSS got it right when they found that the current system is faulty.

I invite you for a moment to imagine the outcry that would result if the trial counsel tasked with prosecuting a sexual assault case had to apply to the defense counsel for the selection of an expert witness, had to explain what that expert witness was going to say, or what topic he was going to consult on. And if the defense counsel could have that requested expert summarily rejected and instead substitute another expert of the defense counsel's choosing, well, that's what happens in the reverse right now.

I'd like to tell you, though, that there is an effective and simple solution. It's widely used in civilian systems, and that solution is to provide a dedicated expert budget for the Chief Defense Counsel to administer based on the particular needs of each case. Many state and federal public defender's offices have successfully employed this model.

Next, let's talk about subpoena —-- CHAIR HOLTZMAN: Excuse me.

COL ZIMMERMANN: I'm sorry.

CHAIR HOLTZMAN: I think we have a restraint on time

because we have four witnesses and we have to question, so can you try to wrap up in a minute or two, please?

COL ZIMMERMANN: Yes, ma'am. I certainly will. I just -- on subpoenas, we agree with the CSS that the current subpoena process is unworkable and faulty for many of the same reasons I just discussed with expert witnesses.

The final issue that I'd like to address is one that I've seen. I have significant concerns for my own observations in cases that I've personally handled, and that is the issue of unlawful command influence, especially in sexual assault cases.

You know, there's various flavors of UCI. There's influence on Convening Authorities, there's influence on members, and there's influence on witnesses. Each of these, as CAAF has so rightly observed, is a mortal enemy of Military Justice, where our leaders make statements about cases positions and the NDAA requires higher review of charging decisions, it causes -- it can cause Convening Authorities to feel pressure to refer cases to trial rather than take some action that might be just under the circumstances. Members of the court-martial panels might feel pressure to convict, and even witnesses might not want to cooperate or provide evidence to defense for fear that their personal or professional lives will suffer repercussions.

Under any of these circumstances, the system is not actually fair,

and it doesn't seem to be fair. So, to conclude, our system must commit to the core belief that these young men and women who have –- first of all, they're innocent until they're proven guilty beyond a reasonable doubt, but they've taken an oath to risk their lives to defend the Constitution, and they deserve the protections of that Constitution. They deserve a fair system. Thank you.

CHAIR HOLTZMAN: Thank you very much for your testimony. Our next presenter is Lieutenant Colonel Julie Pitvorec. I hope I'm pronouncing it correctly. U.S. Air Force Senior Defense Counsel.

LT COL PITVOREC: Yes, ma'am.

CHAIR HOLTZMAN: Thank you.

LT COL PITVOREC: Thank you. Good morning, Chairman Holtzman, members of the panel. Thank you for this opportunity to speak to you about the practical applications of the current version of Article 120.

As you said, my name is Lieutenant Colonel Julie Pitvorec, and I have been in the United States Air Force for just over 24 years, and an Air Force Judge Advocate for the past 15. Are you hearing me okay?

CHAIR HOLTZMAN: Yes, ma'am. Thank you.

LT COL PITVOREC: I am currently the Air Force Chief Senior Defense Counsel for the Eastern United States, European and Central Command AOR region. I was previously both an area defense counsel, and a circuit defense counsel, and both tried and defended cases under the pre-2007 and 2007 versions of Article

120.

I currently supervise approximately one-third of the Air Force Defense Counsel, who are responsible for providing zealous, ethical, and professional defense services for our Air Force members. And the vast majority of those -- both area defense counsel and senior defense counsel -- have a robust practice in dealing with those accused of sexual assault, or rape under Article 120.

Although in my current job I am not actively defending military members in trials by courts-martial, in preparation for this hearing I spoke with nearly every one of the Air Force's 19 senior defense counsel who are currently actively doing just that.

Their practical applications or issues with the 2012 version of Article 120 range from a complete rewrite, to no changes at all, but the vast majority focus on the issues that we've talked about already today surrounding the lack of accepted definitions in terms of incapable of consent, impairment, constructive force and bodily harm. The lack of clarity in these definitions have caused over-charging, as well as inconsistent application of law as it's currently written.

Without changes and clarity in the definitions, those accused of sex offenses play judicial roulette, not knowing exactly which definitions and instructions the military judge will apply to the case at hearing. It's difficult to defend a case when the law is ambiguous.

I share my colleagues' concern with legislative changes that could

prove unworkable, or add confusion to the issues. The fixes, if you will, could be more aptly made through changes to the Military Judge's Benchbook, through more detailed instructions and definitions, or through Executive Order. Thank you for this opportunity, and I look forward to your questions.

CHAIR HOLTZMAN: Thank you very much, Colonel. Commander Jason —- our next presenter is Commander Jason Jones, U.S. Navy Defense Service Office. Thank you very much.

CDR JONES: Thank you, ma'am, and members of the panel. My name is Commander Jason Jones. I'm currently the Officer in Charge of Defense Service Office, West Detachment Bremerton, which is outside Seattle, Washington.

I've been a Navy Judge Advocate since 2012. My initial tour I was stationed in San Diego as a defense counsel for the majority of the time.

2004, I was sent to the Naval Criminal Investigative Service, where I was in-house counsel for them in the General Crimes Department, and also taught at the Federal Law Enforcement Training Center, where we focused -- while I didn't litigate these cases, we focused heavily on the investigation of all crimes at NCIS, was investigating, including a large percentage at the time of sexual assaults.

2006 and 2007, I was sent on an IA with the Marine Corps, 1st Marine Logistics Group 4th. I was a senior trial counsel for the Marine Corps in Iraq during that time when we prosecuted cases in theater.

2007 and 2008, I was at the Navy-Marine Corps Court of

Criminal Appeals, where I was a personal law clerk for two Chief Judges.

In 2008, I was sent to the southeast, to what was then called a region defense counsel with a trial defense command pilot project, where my executive officer was -- is Captain Crow, who will testify later. I did two years as a defense attorney there. Then, I became the Navy's senior trial counsel at southeast in Florida, where I operated three prosecution shops in Jacksonville, Mayport, Pensacola, Florida, where I worked with Ms. Scalzo, who has testified previously.

In 2012, I was sent by the Navy to Temple University, where I got LLM in trial advocacy, trial law. I was also stationed in the Eastern District United States Attorney's Office where I was a federal prosecutor for a year.

Currently, I'm the Officer of Charge at DSO West in Bremerton. I report to parent command in San Diego. We defend sailors, Coast Guardsmen, and some Marine Corps from about San Francisco north into Alaska. I'm part of the Navy's military justice career litigation track.

Well, I'd echo a lot of what has been previously said by my colleagues. The defense bar is woefully, inadequately funded. It has little experience and little availability to get help from the government, who is actively fighting you basically every step of the way on the other side.

The changes that have come out with the new 120, I also echo what Lieutenant Commander Stormer has said. The Navy Defense bar has not really faced a lot of constitutional issues in the current 120. The ones that we have tried at

times have been unsuccessful, and so people have gone on and tried on other issues within the statute, the bench book, the definitions themselves.

As you can imagine, lack of clarity at times often plays into the defense hands. So we often do not attempt to clarify things incredibly. We are seeing though, unfortunately, in the prosecutions of 120 things that I think the other people do see, which is unlawful command influence, the political fear that if a command does not send a case forward, they themselves will suffer some sort of career-threatening or career-ending action by the Navy, even if not direct, some sort of other way.

We have litigated these cases in my parent command in San Diego and won them, where commands have -- commanding officers have said I must do this, and we all know why, and those cases have turned out poorly for the government.

I think you are also seeing with the current military justice structure sexual offender laws that all our clients care about almost more than jail, more than anything else. And so what you see in a lot of our practice that we see is forcible charging, overcharging, putting things in the 120 that are at times inane or low level touchings or not penetrations, and as soon as that hits our desk comes in a plea to 120(a) where no one thinks this is an actual sexual assault.

It's forcible charging that forces him to charge bargain at a special court-martial. We all know that the lifelong offenses of sexual offender registration

are much more damaging than the actual time in jail that a person usually suffers.

I also want to say that unfortunately in our practice in the Navy we are starting to see a subtle, yet easily identifiable, trend of shifting 120 cases to trial by military judge. And when you talk to sailors about why this is happening, the unfortunate part that you hear sometimes from the accused himself in your office is that because they themselves on the deck plate level, even at a very junior grade, realize that this has a political tinge to it, that it is being forced down through at times good training, and at other times probably bad training, at other times seeing what happens to people, that you see a fear and distrust of their own service members that they themselves may not want to be tried by them, and they will take their chances with the military judge, hoping that someone who is trained in the law can ignore the emotions and can ignore the politics and can go beyond a reasonable doubt in front of one person, who is theoretically inoculated from those types of pressures.

And you've seen that in our system; you've seen it also be very successful in the Navy at times, and I think that will be a definite trend that we will see away from panel members in the Navy to military judge to the bulwark against the pressures of UCI and the fear that individual service members have of the system itself when it goes against them.

I look forward to your questions.

CHAIR HOLTZMAN: Thank you very much for your presentation. Our next presenter is -- I don't know what the initials stand for -- MAJ.

Sorry.

MAJ KOSTIK: Major.

CHAIR HOLTZMAN: Major, okay, Frank Kostik of the U.S. Army, Senior Defense Counsel. Thank you, Major, for coming before us today.

MAJ KOSTIK: Madam Chairwoman and members of the panel, it is my honor to be able to -- to be asked to testify here today and to present the views of Article 120 from the field. As many have said, these are my views and not the views of the Army or the Judge Advocate General.

As stated, my name is Frank Kostik. I'm the Senior Defense Counsel for Fort Leavenworth, Kansas, and I'm the Acting Senior Defense Counsel for Fort Leonard Wood, Missouri. I practice as a prosecutor, a defense counsel, an appellate attorney, and have supervised both trial counsel and defense counsel.

I have also served as an administrative law attorney where I frequently advised Article 32 investigating officers.

I was recently awarded an LLM in military law with a specialty in criminal law from the Judge Advocate General's Legal Center and School, Charlottesville, Virginia. As a senior defense counsel, I both represent soldiers and supervise counsel doing the same. Many of our cases include at least one Article 120 events and are generally contested courts-martial before a military judge or a military panel.

Currently, I am defending or supervising the defense of over 25

service members in various stages of prosecution for allegedly violating Article 120. While my field of vision is not as wide as many that have already testified today, we wrestle with the application of the statute every day in the defense of our clients.

The following are a few issues that we have observed and would recommend consideration by the panel to recommend changes. In short, as has been stated, "incapable of consent" needs a definition. Two, "consent and mistake of fact as to consent" should be added back into the statute. And the definition of "sex act" should be amended to reflect the federal statute, specifically with reference to penetration of the mouth by any body part.

We also anticipate several issues with the new Article 32 and are concerned that changes are going to substantially extend the time it takes for a case to get to trial. This affects our ability to defend our clients and to defend without additional resources, and is going to require additional resources like investigators.

To touch on those topics in just slightly greater detail, currently there is no definition of "incapable of consent." From where we sit, this causes a problem when combined with the word "impairment" in Article 120(b)(3)(A). This raises real issues in the field when the training -- and some of it is very good training -- from our SHARP program is sometimes inartfully taught by the instructors.

And so recently I sat in a SHARP training, and they instructed that a person cannot consent if they are drinking, or words to that effect. If left to the panel to determine what "incapable of consent" means, without a good instruction

from the military judge, the defense is up against the wall to retrain people who are susceptible to receiving and executing training.

A good example of what I am talking about is recently there was a Navy-Marine Corps case that was decided in August where the military judge applied his common sense and the knowledge of human nature to the ways of the world when determining what "incapable of consent" means, and I can only imagine what a panel might do if they were given that instruction to determine what "incapable of consent" means.

And, therefore, I believe it needs to be reviewed to determine an appropriate definition, and my recommendation for appropriate definition would be something similar to the 2007 version of substantial incapacitation.

"Consent and mistake of fact as to consent" should be added back to the statute. The defense was removed from the statute and only remains as an affirmative defense in RCM 916 for the 2007 version of the statute. And this has led to confusion among my counsel as to whether the "defense" applies.

Currently, the general mistake of fact defense applies in the 2012 version, and we have used that. We also believe that it exists in our common law.

We have heard today, and I have read in some of the written submissions for today, that arguments have been made that even with the removal, consent and mistake of fact as to consent still exists using the definition of "unlawful force", which some have argued means without legal justification or excuse.

If that is the case, then what is the harm in adding it back to the statute and making it clear for our prosecutors and defense attorneys as to where the defenses sit and reduce needless litigation?

Three, the definition of "sex act" should be amended to be consistent with the Federal Code. Specifically, the penetration of the mouth by any body part -- by any part of the body with intent to abuse, humiliate or harass. The change would eliminate potential convictions for non-sexual insertion of the finger into the mouth when done to humiliate, harass, or abuse rather than to gratify some sexual desire.

We can imagine some sort of scenario in which someone may put their finger in the mouth of another to abuse them or even harass them in front of a group of soldiers or even in the barracks, you know, horse playing, but it doesn't rise to the level of a sexual assault.

Amending the statute in this way is going to help the defense bar, and the Army, really, get to pleas in some cases because sexual offender registration wouldn't be on the table because it would just be an assault.

And, lastly, we anticipate issues with the Article 32. Now, the new Article 32 hasn't taken effect and won't until December of this year. However, we believe that with the new 32 rules the alleged victim is not likely to testify at the Article 32. Under the current deposition rules, we also believe that we are going to have a hard time getting depositions of those complaining witnesses prior to trial,

although there is some argument that the comments section would give us a basis. However, I, for one, do not want to rely on the comments section of an RCM to defend my client.

This litigation is going to extend the trial process, adding more litigation, perhaps giving victims less access to justice. And, of course, as time goes on, memories fade about the facts, thereby possibly harming the accused in his case and the defense.

Lack of a real investigation at the Article 32 is a problem as well. It is no longer an investigation, but, rather, simply a hearing to determine probable cause in which key players don't have to testify. This additional time places more pressure on the accused and really does impact the discipline when the accused, who is accused of a serious sex offense, is sitting in a unit waiting for a trial to happen while his defense counsel and perhaps investigators, if they are granted to us at some point, are investigating the case, so we are not ineffective at trial.

And, lastly, I'll end on why this is so important. As I sit behind a desk and talk to soldiers every day, I hear them talk about their combat experiences and the effects of post-traumatic stress syndrome that they have, and suicide is a real concern. We have gone to giving a specific counseling to all court-martial clients, and soldiers who have committed suicide have a tendency to also be facing UCMJ actions.

And so when we lengthen this process, and we increase the

burden on access -- on the accused because of their access to justice while we do our jobs to defend them, it's a real concern. And my defense counsel in both installations have had soldiers both make gestures, and we have escorted soldiers right over to mental health.

And subject to your questions, that's all I have.

CHAIR HOLTZMAN: Thank you very much for your presentation.

Mr. Taylor?

MR. TAYLOR: First of all, thank you very much to all of the members of the panel for your contributions this morning as well as your service in general. Colonel Zimmermann, I'd like to ask you to follow up a little bit on your idea that somehow the system is vastly out of balance.

And, specifically, I'd like to focus on your comments about over-resourcing resources to the government compared to the training and the resources that the defense receive. And in that context, maybe you could focus on the resources that you cannot remedy through the system.

For example, I assume that if there is a question regarding the availability of an expert witness or the availability of a subpoena, and certainly a referral to a case where you think there has been unlawful command influence, then I assume you would agree that the system provides some way for you as a counsel to address those issues. Is that right?

COL ZIMMERMANN: Yes, sir, it does. However, it doesn't -- it provides a way to remedy, but it's not an effective way. And I'll start with the last question first, if I may.

Here is how it works. I, as the defense counsel, have to ask the trial counsel to please produce these witnesses, whether they're fact witnesses or expert witnesses. And I have to say, "This is what the witness could say," why they're relevant and necessary, and then it's up to the trial counsel to say, "No, I don't want to give you that witness."

And so if this is prior to referral, there is no military judge I can go to. If it's after referral, then I've got to file a motion and ask the military judge to order production of that witness or order appointment of that expert. Actually, I've got to wait for a court date.

And it really is a very inefficient way of doing business because counsel for both sides, and the military judges, are spending a whole lot of time litigating these access to resource issues when they could be working the cases.

So technically, yes, the system does provide a remedy, but as my counsel -- my colleague said, that delay hurts both the government and the defense, especially in our mobile environment in which we operate, where military service members transfer all over the world. So witnesses who are here when things are fresh in their mind and everybody is available, you have to wait to litigate whether they are going to be produced at trial. You've got to wait months and months and

months. They're gone. They're in Afghanistan, they're in Africa. So I don't think it's an adequate way to manage this.

So if we had our own access to investigators and expert witnesses, for example, we could do our jobs better and it would save a lot of time for everybody.

MR. TAYLOR: So, then, to the larger question that I --

CHAIR HOLTZMAN: May I just interrupt one second and just say the whole issue of resources was addressed by the response panel, and recommendations were made on exactly some of these points.

MR. TAYLOR: Okay. Well, thank you.

I'm sorry to ask this question, but did that include detailed training as well for trial counsel and defense counsel? Because that was going to be my next question is about training.

CHAIR HOLTZMAN: No, I don't think so.

MR. TAYLOR: So --

CHAIR HOLTZMAN: Maybe some training of trial counsel. We did something on training.

MR. TAYLOR: Okay. So if I could just pursue that for a moment, since you specifically mentioned not only lack of resources but lack of training, so what is the basic training that a Marine lawyer would expect to receive, and why do you think it's inadequate?

COL ZIMMERMANN: Well, there are several different phases of training, from the initial -- we all have to graduate, just like any Judge Advocate, from an accredited law school and go to initial training. But then, once you become a defense counsel, there is a new defense counsel course. There are various courses offered throughout the year.

We have -- each region -- we, too, are divided into regions like the trial counsel are, and each region holds a one-to two-day CLE every quarter. And then there are one or two sexual assault-specific CLEs that some counsel get to go to, not everybody gets. There is just not funding or space for everyone to get it every time.

And I don't know how -- honestly how the training opportunities defense counsel have compared to what the trial counsel have, because I haven't looked at the curricula for both sides. But what I meant was, I mean, as Colonel Thielemann testified, there is already three highly qualified experts supporting a trial counsel in the Marine Corps. We have one. We received permission to hire a second one, but we haven't hired her yet, or him.

So, I mean, right there that's a three to one. And then, with respect to investigators, when I was a trial counsel, all I had to do was pick up the phone and call NCIS or CID and say, "Can you go talk to Private Smith?" Well, as a defense counsel, I don't have anyone I can call unless my client is independently wealthy and can hire his own private investigator. But Lance Corporal Smith doesn't

have those kind of funds.

So that's what I mean by over-resourcing. They've got these complex trial teams now. And they've got beefed up funding for training, and we have had some funding for training as well. But just generally there is an imbalance, and I think the Judge is correct, that that is -- a lot of those issues are addressed by the CSS, and we agree with those evaluations.

MR. TAYLOR: Okay. Thank you.

Commander Jones, I would like to ask you to follow up, if you would, on your observation that there have been more cases in which the focus has shifted from trial by panels to trial by judges alone, because of what you think has to do with the emotions and the subtle pressures perhaps that service members would feel. Can you comment more about that, please?

CDR JONES: Yes. We have seen it both with junior enlisted who are being tried, fearful after going through themselves some level of training or some -- or at least talking to at times, you know, a drink means no one can consent irrespective other actions, and just -- we have had it with officers.

We tried -- the latest Naval Academy rape allegation was tried last month before a military judge solely because part of the concern was the allegation itself happened in Bancroft Hall at the Naval Academy, and how are people going to view this, and what has been played in the press before about this.

So you'll see people have a fundamental distrust at times of what

is going to happen to them at trial because you have so many competing factors brought into the trial outside of a military judge's instruction to them about what the law may be. And I think that is something that we in the Navy defense bar have seen also somewhat successful, taking these cases before military judges and trying them, too.

So it has been a repeated pattern that we are seeing. Part of it certainly has to do with the strength of a case, as others have said. These cases at times are very difficult to prosecute, and it may be at times a good call for the defense to do this, too. But, unfortunately, part of it is driven by our own clients' fear of the others training them or judging them based on political aspects of a case, pressures brought to bear.

The Navy does publish all accounts of trials, the results of trials, and so there is a large amount of pressures today that weren't there five years ago or when I started under the original statute in 2002. So there is a subtle shift in the mind-set of people that people are wary of. And the idea that a judge who is kept away from these things, who has experience, often in the Navy on both sides with our military career litigation track that we have, we're able to keep those away. And that's something that we see repeatedly.

MR. TAYLOR: Thank you very much, Madam Chair.

CHAIR HOLTZMAN: Admiral Tracey?

VADM TRACEY: Thank you. Do you know whether data to

this effect has been collected and is being monitored on both requests for a trial by military judge and the increase in the numbers of cases actually going to trial? Are you in a position to know whether that data is being collected?

CDR JONES: I don't believe it actually is collected -- the defense bar is pretty decentralized to some degree. We report to a Chief of Staff for Defense Services Office. But while we report our results, I do not think that we are required to report the form itself. So I cannot point to a specific study that we would have that would say this. What it comes from is every so often all the defense counsel talk, either at conferences or commonly.

VADM TRACEY: Do you know, Colonel?

COL ZIMMERMANN: Yes, ma'am. The Marine Corps does track what form is used for

each case.

VADM TRACEY: Related question. Do you have a structure similar to the trial counsels, where there is an opportunity for someone at your level, for instance, to advise defense counsels who are trying 120 cases?

COL ZIMMERMANN: Yes, ma'am. That's part of my job description as the reserve chief defense counsel. My goal is to help train and mentor the active duty counsel, and I travel around the country periodically and give classes to them. And they all have my cell phone number, and they can call me and they do call me.

We also have Kate Coynes in the audience here. She is our sole highly qualified expert for the defense in the Marine Corps. She is available to them as well. So there are some opportunities for these very young, very inexperienced, very enthusiastic but, nonetheless, inexperienced counsel to get some help, but they don't get as much help or have as much resources available to them as the government does.

VADM TRACEY: Last question, if I may. It sounded as if for trial counsel there is some mandated oversight of Article 120 cases in particular. Is that true for defense?

COL ZIMMERMANN: My understanding -- and, again, I'm a reservist, so I am not there every day -- but from my travels and my exposure, my understanding is that each case is evaluated when it comes in the office. And if it is a 120 case or any other serious case, there is going -- the senior defense counsel will appoint at least two lawyers, will detail two lawyers to that case, and those cases are all tracked.

So the senior defense counsel, the regional defense counsel, and the chief defense counsel are all aware of the cases that are pending.

VADM TRACEY: True in the other services?

MAJ KOSTIK: Ma'am, it is not exactly for the Army. In the Army, as a case comes in, I evaluate it and I base my decision on who to detail based on the experience of each counsel I have in the case. If it's a particularly serious case, I

will often detail myself as the detail counsel, along with one of my junior counsel, so they are sitting right next to me through the entire process.

We also try to detail two members, two defense counsels to every case in which we believe it is going to be contested, whether it is going to be a military judge alone case or a panel, as well as each region has regional defense counsel that senior defense counsel often reach back to, and typically our regional defense counsel are true experts in criminal law.

So while we don't have a formal program for oversight of 120 cases within the Army defense community, we have various stages of reach back and assist, including our defense counsel appellate program. And you heard from some of those folks earlier this morning.

VADM TRACEY: Thank you.

LTCOL PITVOREC: For the Air Force, I am the detailing authority for the Eastern European regions. And for every 120 case that is set to go to an Article 32 investigation, we do include a senior defense counsel on that case. Right now, the landscape is just so complex that we really do need the experts sitting in the courtroom for every piece of litigation that goes on.

CDR JONES: Ma'am, for the Navy, the Navy has a military justice litigation career track now, which usually has one officer at each detachment, maybe two at a parent command, whose sole career now, like myself, is just to do criminal litigation. We don't have a formal structure about 120s, but the Navy does

not allow first tour judge advocates to be defense counsel at trial, at courts-martial, so no first tour judge advocate is faced with a 120.

We have more senior people, usually second or third tour lieutenants doing it, under supervision of someone who is in the military justice career track. We also have a defense counsel assistance program, like the others do, for assistance. So you're not going to be alone as a first tour on a 120. It would either -- in my office it would either be myself with the junior -- a junior attorney with them, or two lieutenants together, second or third tour lieutenants, with my assistance behind the scenes.

VADM TRACEY: Thank you.

CHAIR HOLTZMAN: Mr. Stone?

MR. STONE: Lieutenant Colonel Pitvorec, you had mentioned at the end of your testimony four terms that you thought needed more definition, and one was impairment, one was incapacity. What were the other two?

LTCOL PITVOREC: Constructive force and bodily harm.

MR. STONE: Okay. And this question is for Commander Jones. You were talking about how these cases are handed. At what stage do the defense counsel get to try and negotiate a plea? Is it before it goes to the commanding officer? Is it after it goes to the commanding officer? Does the commanding officer have a veto if the prosecutor then wants to plead the case out to a lesser offense? How does that work exactly?

CDR JONES: Yes, sir. It is somewhat personality driven by the offices that you're in. For example, at my office I know the senior trial counsel very well, and so we have a pretty good open line of communications. When a case first hits my desk and we start to assign it, oftentimes if the government is seeking a lesser deal, we often have these 120 offenses for touchings over the clothing. We call them, you know, "butt grab cases", which will result in offender registration.

Almost the day that case hits my desk my phone will ring and the government will offer battery to avoid the sex offender registration. So that will happen very quickly.

The much more egregious, more serious cases usually don't start getting into any sort of plea negotiation until after an Article 32.

MR. STONE: But they could.

CDR JONES: They certainly could. And, obviously, the more egregious case there is, the less concerned you are with sex offender registration versus an incredibly long time in jail, so the balance shifts. So if we have had extremely egregious cases at the time -- we took an 18-year deal not too long ago -- those kind of plea negotiations start early and often where we will whittle down to what we are actually going to do.

MR. STONE: Have you had a case, or is there authority for the convening authority or the commanding officer to negate the deal that you have made with the prosecutor?

CDR JONES: Absolutely. The talking with the prosecutor usually are done informally with our general knowledge based on our working relationship, because once you get in the military justice career track you usually know the people around you, because you are dealing with them your entire career.

MR. STONE: Sure.

CDR JONES: For example, I know Ms. Scalzo. I know Captain Crow. These people are speaking generally on behalf of the convening authority. And so if you tell me it is going to be two years and you come back later and tell me it's going to be three years, that will injure that working relationship enough that that won't be a system that goes on.

So we often have to rely upon the good working between them, but obviously nothing matters until the final pen to paper.

MR. STONE: What I think I'm hearing is that the convening authority or the commanding officer doesn't typically veto the deal that that prosecuting authority is ready to make with you. Is that right?

CDR JONES: Correct. Not typically. Only on very large cases where there are bigger picture issues or sometimes we have children involved and things like that, which are high profile.

MR. STONE: Okay. And, Major Kostik, you got into some discussion about the Article 32s and the fact that after December, you won't have the right to put those victims on the stand and cross-examine them or perhaps get

depositions.

I have to say that I think the Department of Justice prosecutors that I know were horrified at the 22 hours of cross-examination that the victim got in the Naval Academy case. And the vast majority of victims that I have dealt with in 40 years would never have been subject to anything like that, cross-examination or deposition, in any kind of federal prosecution in any federal district, which means the entire country.

And so I guess what I'm -- since you are lamenting the loss of that, and perhaps the loss of the right to depose victims, rather than just get their sworn statement before trial, I'd like to know if there is some federal case or precedent that you are relying on when you seem to suggest that that's either unfair or unconstitutional.

MAJ KOSTIK: Sir, I'm relying primarily on the military's practice. So since the establishment in the code, that has been a right of the accused, which has now under the NDAA of 2014 been removed. So I am not comparing it to our federal system. And our case law has called the Article 32 investigation "an important right of the accused".

And so without this important right of the accused, I am suggesting that there are going to be other things that are going to have to fill that vacuum, perhaps defense investigators. Perhaps the trial process gets lengthened, which isn't good for good order and discipline.

MR. STONE: But the victims don't have to speak to the trial -- to the defense investigators. They don't in federal cases. So why do you think it's going to lengthen anything? Most of them -- if it -- conceivably, like the Naval Academy case, the woman is going to probably decide on her own, which she is free to do, but she is probably going to decide on her own she is not interested in being cross-examined because she has given a long statement.

So why do you think that is going to lengthen the process?

MAJ KOSTIK: I think it is going to lengthen the process because without the -- without that testimony, the defense, in order to effectively defend their client, is going to have to prepare for trial in some way.

So even if the alleged or the complaining witness, whether male or female, decides not to participate and not to communicate with the defense counsel, we are still going to have to look at the sworn statements, look at the trial counsel, investigate, you know, all of the witnesses that are at a party. For example, in a very common scenario, a party equals, you know, drunken sex.

MR. STONE: And that is stuff you don't do now?

MAJ KOSTIK: It is stuff we do now, but it's stuff we do now in a two-day process or a one-day process in an Article 32 investigation. We literally can go through an Article 32 in one day, get almost everything we need for trial, and then a few weeks later, you know, the judge has docketed the case for trial, we have handled motions, and the case is executed.

And that achieves that dual purpose of the military justice system to achieve good old earned discipline, which perhaps the civilian sector and the federal side don't have that same twin aim. And so I'm just suggesting that that length and period of time, perhaps your question -- the premise of your question is correct, it won't affect.

But where I sit, I think it will, and I will, as a defense counsel, advise my junior counsel as well to -- we've got to make sure that we're still crossing our T's and dotting our I's. Just because the complaining witness hasn't testified at the Article 32, although she gets to sit in the Article 32 and listen to all of the other folks testify about the case, and perhaps sway her or his testimony in one way or another for trial, they still have to do a complete investigation.

CHAIR HOLTZMAN: Okay. Colonel Pitvorec, I just want to go back to your statement about the need for clarity with regard to two of the terms that we haven't heard before. We have heard from a number of people that "impairment" and "incapacity" are terms that need clarification. But we haven't heard very much about "bodily harm" and "constructive force" until you mentioned them. Could you elaborate on what the problems are as you see it with the term "constructive" -- or with the -- with "constructive force" and with the definition of "bodily harm"?

LTCOL PITVOREC: Yes, ma'am. Bodily harm -- excuse me, I have my notes from everyone. All 19 people. I have tons of emails. In essence,

the issue with bodily harm is that the definition of "bodily harm" is an offensive touching. And then, an offensive touching means without consent. So there is question about whether or not there is consent -- that it was intended to be part of that definition or not.

And so as you are preparing for trial, if you are operating under this kind of contrived term "bodily harm" and trying to figure out exactly what it means, and the other thing is is that it is used by prosecutors in charging in various different ways.

So there is just no real definition of "bodily harm" that actually lends itself to be easily defended when it is used in terms of incapacitation or with alcohol. It is used in various different ways. And because of that, it is hard to articulate what exactly "bodily harm" means. Does it include a definition or does it include the term "consent" or not? And so that's one of the issues that my folks are having.

And then, I mean, I can read directly from that. It says, "When the new 120 came out, there was nothing regarding the lack of consent when the alleged assault was a result of bodily harm. But fundamentally a touching cannot be offensive if you consent to it."

So there seemed to be some recognition that consent played a role in a bodily harm case.

And then, there was a case of -- United States v. Neal found that

consent was not an element, and this is under the 2007 version, but it was still relevant to the element of force. So the term "bodily harm" needs to have a definition that is actually workable. And, again, I think it goes back to the -- what we have talked about before, consent and to the mistake of fact as to consent is whether or not those are part of the definition or whether or not those are viable defenses under the current law.

CHAIR HOLTZMAN: Can that problem be addressed by executive order, or can that -- does that require a statutory change?

LTCOL PITVOREC: I believe that it can be done by executive order, and I think it can also be done by an iteration of the judge's bench book that actually goes to the instructions that the judges give, because I think that's where ultimately this comes down is actual trial practice, what is -- what are the instructions that the judge gives, and what are the definitions that the judge employs when explaining to the jury exactly what the charged offenses are and what those definitions include.

CHAIR HOLTZMAN: Could you also focus on the issue of constructive force?

LTCOL PITVOREC: Yes, ma'am. One of the issues that has come up is that -- and I know I'm going back to my -- we'll say the old, old days, pre-2007, where, you know, sexual assault or rape was by force and without consent. And there is -- and I think it also goes to part of this whether or not there is an interplay

in rank that applies to constructive force.

And I think that's one of the definitions that is being used is that whether or not -- just by virtue of a rank disparity, whether or not that constructive force is used in order to compel someone to submit to a sexual act.

CHAIR HOLTZMAN: And I don't see -- can you guide me with regard to where the rank disparity would come in there?

LTCOL PITVOREC: I'm not saying that it's part of the regulation or part of the law. I guess my point is is that that constructive force language is being used in order to prosecute cases where there is a rank disparity, whether or not there was actual consent.

CHAIR HOLTZMAN: But that wouldn't be under the new Article 120; that would be under the old Article 120.

LTCOL PITVOREC: Let me get back to you on that, ma'am.

CHAIR HOLTZMAN: Would you mind? I'd appreciate understanding that, because I think one of -- we have been charged with trying to identify the problems with the new statute, and we'd like to know about that, and I would appreciate your help. And if anybody wants to clarify their testimony or give us any additional examples, you should feel free to do that.

LTCOL PITVOREC: Yes, ma'am.

CHAIR HOLTZMAN: I think -- and that goes to all the members of the panel. Thank you very much.

I haven't addressed the issues that Colonel Zimmermann raised and that others have raised with regard to disparity of resources and undue influence, because we addressed that in the response panel at great length, and we are very troubled about these issues.

But I want to thank all of the members who have come here to testify today and to present to us. Thank you very much.

We are ending on time. Thanks.

(Whereupon, the above-entitled matter went off the record at 12:00 p.m.)