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Air Force Law Review
2011

Military Justice Edition

***269 NEITHER A MODEL OF CLARITY NOR A MODEL STATUTE: AN ANALYSIS OF THE HISTORY, CHALLENGES, AND SUGGESTED CHANGES TO THE “NEW” ARTICLE 120**

Brigadier General (Ret.) Jack Nevin [\[FNa1\]](#)

Lieutenant [Joshua R. Lorenz \[FNa2\]](#)

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*270 I. INTRODUCTION

Consider the following scenario: John is 21 years old and enlisted in the military after three years of post-high school unemployment. Sarah is 18 and enlisted immediately after graduating from high school to earn money for college. Both are assigned to the same unit. Both live in the same dormitory-style barracks on a base in the U.S. The base and the nearby small town lack many outlets for entertainment. Most young servicemembers assigned to the base spend their free time drinking while watching movies or playing video games in their barracks rooms. John, Sarah, and a group of their friends often hang out in the barracks on weekends. One Saturday night, a group has been drinking for several hours in John's room. Their friends depart, leaving John and Sarah alone together for the first time. Both are drunk, but Sarah is almost incoherent after consuming nearly half of a bottle of vodka herself. She lies down on John's bed. John follows shortly after.

The next day, something is wrong. Sarah texts her friend that she cannot remember what happened, but that she thinks she might have been raped. She cannot remember the details, but does recall brief images from last night: images of John on top of her of him having sex with her. She woke up in the morning unsure of what to do or whom to contact. Her friend suggests talking to the sexual assault response coordinator on base. Sarah does, and feels she remembers enough to conclude that she did not consent to sex with John. She reports the incident.

A criminal investigation is initiated. Sarah provides a statement to investigators, and John is questioned under rights advisement. There are no other witnesses to the incident in question, although several servicemembers tell investigators that both John and Sarah had been drinking heavily. The investigators present their findings to John and Sarah's chain of command. After several previous instances involving allegations of sexual misconduct in the unit that went unpunished for various reasons, the commander feels pressure from his superiors to correct a perceived climate of tolerance of such behavior within his command.

The commander brings criminal charges against John and the case is referred to a court-martial. The charges allege that John either had sex with Sarah by force or threat of harm, or while she was unable to consent because she was severely intoxicated. Prior to trial, John provides notice that he intends to claim that either Sarah agreed to the sex, or that even if she did not, he incorrectly but reasonably believed that she had. No other witnesses or evidence corroborates either party's story: the trial will turn on the court's assessment of the credibility of either Sarah's or John's version of events.

*271 A story such as this, while truncated, is not unfamiliar to many in the United States military. [FN1] Sexual assault is a particularly malicious and tragic crime, intentionally inflicted on a victim who often suffers lasting physical and psychological wounds. [FN2] As Justice White observed in *Coker v. Georgia*, “[s]hort of homicide, [rape] is the ‘‘ultimate violation of self.’’” [FN3]

Given the severity of this crime, the role of the military institution in American society, and the complexity of gender relationships in the U.S. military, efforts to combat military sexual assault must include comprehensive education of military members and robust services and support to victims. However, the most important tool available to a commander to respond to military sexual assault is Article 120 of the Uniform Code of Military Justice (UCMJ), [FN4] which defines and prescribes punishment of unlawful sexual conduct.

This article proposes that revisions to Article 120 enacted by Congress in 2007, [FN5] while well-intentioned and largely

effective, require further refinement to clarify the application of the concept of consent in military sexual assault investigations and prosecutions. To support that conclusion, we will first provide context regarding the history of U.S. military sexual assault in Part II. Part III will then examine the legislative history and development of the 2007 amendments to Article 120. Next, Part IV will analyze legal challenges to the new legislative scheme, and identify areas that require further interpretation and refinement. Finally, Part V focuses on two of the most important areas in need of additional interpretations. Part VI concludes.

II. SEXUAL ASSAULT IN THE U.S. MILITARY

Following is an overview of the circumstances and legal landscape that led to the 2007 amendments. First, a review of the role of women in the military will provide a background in which the crime of sexual assault occurs, as the vast majority of victims are female. [FN6] Next, we will examine available statistics on the frequency of sexual assault, which may explain why Congress perceived the need to enact the 2007 amendments. Finally, we will analyze information regarding the effect of sexual assault on *272 military society and effectiveness as an additional reason for changing the criminal legislative scheme in an effort to more effectively address the problem.

A. Women in the Military

An analysis of military sexual assault and associated military justice responses should start with understanding the gender demographics of the U.S. military. The active-duty military population in the Department of Defense totals approximately 1.4 million members, [FN7] of which 14 percent are women. [FN8] Despite this relatively small proportion as compared to the general U.S. population, the numbers of women in the military have consistently increased over the last 40 years. After World War II, legal limitations on the roles of women in the military returned after years of women filling crucial roles supporting the war effort. [FN9] In the 1950s and 1960s, women comprised just over one percent of the active duty population, eventually reaching two percent by the end of Vietnam. [FN10] The end of mandatory conscription in 1973 required a diversification and increase in the roles of female servicemembers in the all-volunteer force, as the military faced a shortage of qualified men to fill previously male-only positions. [FN11] However, despite the slow but steady increase in their numbers, by 2003 women were still prohibited from working in 30 percent of available positions in the U.S. Army. [FN12]

As a result of the historical overrepresentation of men in its ranks, the U.S. military may be, according to one sociologist, “the most prototypically masculine of all social institutions.” [FN13] However, this male dominance does not necessarily directly correlate with a prevalence for sexual assault. One author has postulated that the “inherent implication of inequality” due to grossly unequal representation of the sexes in the military population, could provide some explanation for the “disproportionate rates of unwanted sexual behavior experienced by women in the military” as compared to civilian society. [FN14] While this imbalance and women's inability to participate fully in all military occupational fields likely contributes to a culture that may increase their experience of unwanted sexual conduct, a *273 more complete explanation of the reasons for military sexual assault should consider a broader range of factors. [FN15]

B. Statistics on Instances of Military Sexual Assault

Whatever the institutional reasons that may contribute to the problem, military sexual assaults are clearly numerous. Prior to 2004, neither the Department of Defense (DoD) nor any of the service branches routinely compiled statistics on sexual assault. A 1995 survey of military members provides one source of pre-2004 information. Conducted after several high-profile

military sexual assault and sexual harassment controversies, [FN16] this survey found that 78 percent of female service-members experienced unwanted sexual behavior in the military. [FN17] However, the accuracy of such surveys, while documenting an unacceptably high rate of unwanted conduct in the DoD, may be skewed by the lack of a uniform definition of “unwanted sexual behavior.”

Recognizing both the problem of military sexual assault and the lack of consistent data regarding it, in 2004 Congress passed legislation that required the Secretary of Defense to submit annual public reports of sexual assaults involving members of the armed forces. [FN18] The law ordered DoD to create a uniform definition of sexual assault. [FN19] It required a report on the number of sexual assaults committed by and against members of the armed forces that were reported to military officials. [FN20] DoD also must provide a “synopsis of and the disciplinary action taken in” each substantiated case of sexual assault. [FN21]

In compliance with the 2004 law, DoD provided a definition of sexual assault in a 2005 directive:

[I]ntentional sexual contact, characterized by use of force, threats, intimidation, abuse of authority, or when the victim does not or cannot consent. Sexual assault includes rape, forcible sodomy (oral or anal sex), and other unwanted sexual contact that is aggravated, abusive, or wrongful (to *274 include unwanted and inappropriate sexual contact), or attempts to commit these acts. [FN22]

This roughly matched several criminal offenses defined by Article 120 and Article 125 [FN23] of the UCMJ at that time, as well as Article 80 [FN24] (attempts) and Article 128 [FN25] (assault).

Annually since 2005, DoD has complied with the law by publishing the required reports, including analysis of the data and observations regarding trends. For example, in fiscal year 2009, DoD reported 3230 incidents of sexual assault involving military members, representing an 11 percent increase from 2008 and a 20 percent increase from 2007. [FN26] Furthermore, as a proportion of the total active-duty population, the frequency of reported sexual assaults by servicemembers shows a similar increase over the same time period, from 1.6 reports per thousand servicemembers in 2007 to 2.0 reports per thousand in 2009.

According to the 2009 report, this increase may be attributed, in part, to DoD policies promulgated in 2005 that encourage victims of alleged sexual assaults to report those incidents. These policies include enhanced victims' services and available confidential reporting procedures. [FN27] Despite these new policies, the report also notes that separate DoD studies indicate that only “20 percent of servicemembers who experience unwanted sexual contact report the matter to a military authority.” [FN28] Therefore, this trend of underreporting likely indicates that the real number of sexual assaults is much higher.

Finally, the 2009 report also includes demographic and geographic data of instances of sexual assault that provide a more detailed picture of the military sexual assault problem. In 2009, 91 percent of victims of sexual assault reported to authorities were female. [FN29] Furthermore, 279 reports alleged sexual assaults in “combat areas of interest,” primarily those countries in and around the Iraq and Afghanistan theaters. [FN30] This represented a 16 percent increase from the number reported in 2008. [FN31]

*275 Although the number of servicemembers deployed to these combat areas varies constantly, at the end of 2008 the total was approximately 294,000. [FN32] Therefore, the rate of sexual assaults per thousand servicemembers in these locations is approximately 0.94, less than half of the 2.0 rate per thousand reported for the overall DoD. This lower rate is likely due to the

“arduous conditions” that make “data collection very difficult” in theater, [FN33] and is at odds with well-documented reports of sexual assaults in Iraq and Afghanistan. [FN34]

C. Effects of Sexual Assault in the Military

“The Department has a no-tolerance policy toward sexual assault. This type of act not only does unconscionable harm to the victim; it destabilizes the workplace and threatens national security.”

- Secretary of Defense Robert Gates, March 2010 [FN35]

“The Department does not tolerate sexual assault of any kind. Such acts are an affront to the institutional values of the Armed Forces of the United States of America. Sexual assault harms individuals, undermines military readiness, and weakens communities.”

- Secretary of Defense Donald Rumsfeld, May 2005 [FN36]

Sexual assault causes numerous effects, which can be classified in two ways. Obviously the victim suffers direct psychological and physiological harm, as well as indirect harm based on her perception of the military's response to the incident if she reported it. Sexual assault also threatens the military's fundamental principles of trust, honor, and respect, if the response fails to reflect prompt and thorough investigation, and fair disposition (including adjudication) of such allegations.

Unlike physical injuries, time alone does not heal the psychological effects of sexual assault on victims. In fact, a 2005 study of veterans of the 1991 Gulf War found that “high combat exposure and sexual harassment/assault” most commonly triggered the Post-Traumatic Stress Disorder diagnosed among the participants [FN37] Furthermore, military sexual assaults result in direct and indirect fiscal costs to DoD, in terms of *276 personnel retention, recruiting, and long term medical treatment. While difficult to estimate, these costs are likely quite large. [FN38]

Sexual assaults also seriously and negatively impact military effectiveness and unit cohesion. For example, the effective operation of a military unit requires trust between fellow servicemembers and also up and down the command and leadership chain. Sexual assault necessarily damages this fragile and critical state of trust, particularly in cases involving one member alleging an offense committed against them by a fellow member, and where such matters inevitably occupy the attention of all members of the unit.

Furthermore, an allegation of sexual assault will often affect a unit even more directly. For example, the military will not normally permit an accused servicemember to change duty stations or deploy during the investigation and adjudication of allegations against them. [FN39] Likewise, receiving medical treatment and other support services, as well as the necessity of participation with investigators and attorneys, will nearly always preclude a victim's effective contribution to the mission of their unit. [FN40] Furthermore, investigation and adjudication may also involve and require the additional participation of other unit members, thereby magnifying the impact.

These negative individual and group effects caused by incidents of military sexual assault likely persuaded Congress to

consider changes intended to combat the problem. Modifying the existing legal framework in order to enable more effective criminal prosecution of military sexual assault would advance both military needs and the rule of law--foundations of the military justice system. Improving punishment of sexual misconduct would further military necessity by reducing negative group effects of sexual assault.

However, any change in the legislative scheme that criminalizes sexual assault in order to further the rule of law must be balanced against equally important considerations to protect and preserve the rights of the accused. According to one author, provisions such as the recent changes in military sexual assault prosecution place “little to no value upon the substantive or procedural rights of an accused, or to the fundamental fairness implicit in the guarantees of due process.” [FN41] Thus, according to these authors, while society does have a military necessity interest in the immediate response to a sexual assault victim, there is an equal rule of law *277 interest in ensuring that any prosecution of the accused is a fair process. [FN42] A proper examination of recent Congressional responses to the problem of military sexual assault must include an assessment of these competing interests.

III. CONGRESSIONAL RESPONSE: THE “NEW” ARTICLE 120

Beginning with the 2004 legislation requiring annual reports detailing the instances of military sexual assault, Congress began to address the problem it perceived. The statistics denoting the pervasiveness of military sexual assault discussed *supra*, in addition to several cases of military sexual abuse highlighted in the media, certainly contributed to Congress' agenda to consider structural reforms within the military justice system in order to better combat the problem.

Additionally, some military courts noted the limited nature of the pre-2007 Article 120, particularly that it did not “reflect the more recent trend for rape statutes to recognize gradations in the offense based on context.” [FN43] Overall, a review of the legislative history of the amended Article 120 sets the stage for a proper analysis of recent judicial interpretations and proposals for modification to the statute.

A. Congressional Request for Options

President Bush signed the Ronald W. Reagan National Defense Authorization Act (NDAA) for Fiscal Year 2005 on October 28, 2004. [FN44] In addition to the sections requiring the annual reporting of instances of sexual assaults and the creation of a uniform definition of sexual assault, the 2005 NDAA also required the Secretary of Defense to

[R]eview the Uniform Code of Military Justice and the Manual for Courts-Martial with the objective of determining what *changes are required to improve* the ability of the military justice system to address *issues relating to sexual assault* and to conform the Uniform Code of Military Justice and the Manual for Courts-Martial *more closely to other Federal laws and regulations* that address such issues. [FN45]

Thus, in an attempt to address the problem of military sexual assault, Congress sought proposals from the DoD to modify the UCMJ, implicitly *278 recognizing that the provisions in the UCMJ that dealt with sexual assault required modification for improvement.

A subcommittee of DoD's Joint Service Committee (JSC) for Military Justice took up the task of developing recommendations to go to Congress. The JSC is comprised of representatives of the major stakeholders in the DoD's uniformed and

civilian legal community, and is responsible, in part, for reviewing the Manual for Courts Martial (MCM) and proposing updates to the UCMJ. [FN46] The subcommittee reviewed the then-current UCMJ, MCM, several federal criminal statutes, and the American Law Institute's Model Penal Code, and, ultimately presented DoD's recommendations to Congress in March 2005. [FN47]

The subcommittee unanimously recommended against any changes to the UCMJ. Its members could identify no military sexual misconduct that could not be effectively prosecuted under the existing UCMJ and MCM. [FN48] Furthermore, the JSC subcommittee asserted that any “rationale for significant change [would be] outweighed by the confusion and disruption that such change would cause.” [FN49] Finally, the subcommittee emphasized that given the “well-developed, sophisticated jurisprudence” in the military justice system, changes in the UCMJ or other regulations would not likely result in any significant increase in prosecutions of sexual offenses. [FN50]

However, the subcommittee further stated that “if higher authorities direct a UCMJ change to substantially conform to [federal criminal law],” one of potential changes it had considered represented the option “that best takes into account unique military requirements.” [FN51] This option would divide sexual misconduct into degrees according to various aggravating factors. [FN52] Despite the fact that the subcommittee explicitly advocated no change in existing law as necessary or prudent to deal with the problem of military sexual assault, this option soon formed the basis of the amendments to Article 120 that Congress later enacted. [FN53]

***279 B. The “New” Article 120**

Contrary to the primary recommendation of the DoD subcommittee, the 2006 National Defense Authorization Act included a complete rewrite of Article 120. [FN54] Unfortunately for those seeking to understand Congress' intent, the available legislative history provides little explanation of the specific reasons or purposes for the complete revision.

For example, the report of the House Committee on Armed Services' version of the NDAA included only one paragraph summarizing the rewrite of the article. [FN55] Furthermore, the Conference Report on the combined House and Senate bill noted that the Senate version of the NDAA bill did not include a revision to Article 120. [FN56] Additionally, floor debate in Congress contains only a single apparent reference to the rewrite. Representative Loretta Sanchez of California noted that the rewritten Article 120 provided for a “modern complete sexual assault statute that protects victims [and] empowers commanders and prosecutors.” [FN57] Furthermore, she stated that the amended statute “affords increased protection for victims by emphasizing acts of the perpetrator rather than the reaction of the victim during the assault.” [FN58]

The President signed the 2006 NDAA and its Article 120 rewrite into law on January 6, 2006. [FN59] According to the statute, the new Article 120 would not go in to effect until October 1, 2007. [FN60] The revised article now specifies 14 categories of sexual assault offenses, including rape, aggravated sexual assault, aggravated sexual contact, and abusive sexual contact. [FN61]

Understanding the categories of offenses under the revised article requires first examining the definitions of “sexual act” and “sexual contact.” The statute defines a “sexual act” as contact between the penis and vulva or penetration of a genital opening of another by hand, finger, or other object with intent to abuse, humiliate, harass, or degrade, or to arouse or gratify sexual desire. [FN62] It defines “sexual contact” as the intentional touching of another with the intent to abuse, humiliate,

harass, or degrade, or to arouse or gratify sexual desire. [FN63] After initially identifying the nature of the conduct between the perpetrator and the victim, determination of the *280 specific offense then requires further consideration of numerous aggravating factors, including the use of weapons, force, or threats of bodily harm. [FN64]

Along with the enumeration of several new offenses, the amended Article 120 includes two other important changes. First, the statute eliminated the previous requirement in rape and sexual assault prosecutions that the government prove the accused committed the sexual conduct without the consent of the victim. The new Article 120 replaced this requirement with provisions for the accused to raise and assert consent, and reasonable mistake of fact as to consent, as affirmative defenses to the alleged offenses of rape, aggravated sexual assault, aggravated sexual contact, or abusive sexual contact. [FN65] This differs considerably from the previous version of Article 120, which required the government to prove the accused committed the act of sexual intercourse, with force, and without consent. [FN66]

Second, the new Article 120 requires an accused that raises the affirmative defense(s) of consent and/or reasonable mistake of fact as to consent, to support the defense(s) by a preponderance of the evidence. [FN67] After the defense satisfies this initial quantum of proof, the burden of proof then shifts to the government to disprove the existence of consent or reasonable mistake of fact as to consent, beyond a reasonable doubt. [FN68]

These two provisions effect the changes worked by the new legislative scheme, as Representative Sanchez described them: that the law will now shift the focus of sexual assault prosecutions away from the victim and toward the conduct of the accused. However, these two provisions triggered very serious appellate challenges that have resulted in judicial conclusions that the new law may be unconstitutional. The new law clearly needs further legislative refinement and interpretation to survive further scrutiny and to further Congress' apparent intent.

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VI. CONCLUSION

The military justice system alone will not solve the problem of military sexual assault. The pervasiveness of the issue, evidenced by the increasing instances of sexual assault and the long history of gender inequity in the military, demonstrates the need for additional measures beyond a revised military sexual assault statute. Regardless, the 2007 rewrite of Article 120 represents a positive effort and first step towards improving the military legal system's protection of victims, and mitigating the effect of sexual assault on unit cohesiveness, trust, and overall military readiness. The purposes for enacting the rewrite reflect Congress' attitude towards the military sexual assault problem and should be at the forefront when considering additional revisions and interpretations as to the role of consent in sexual assault courts-martial. As this issue exemplifies the tension between an accused's right to a fair trial and the military necessity of combating a corrosive internal threat, expect the issue of Article 120 to receive continued attention from the military's appellate courts.

[FN1]. Brigadier General (Ret.) Jack Nevin (B.A., Washington State University; J.D., M.S., M.B.A., Gonzaga University) Pierce County, Washington, District Court Judge, 1997-present; Adjunct Professor, Comprehensive Trial Advocacy and Military Law, Seattle University School of Law; Adjunct Professor, Kessler Edison Trial Techniques Program, Emory University School of Law; Lecturer, U.S. Department of State, U.S. Department of Justice; Lecturer, Humanitarian Law, Catholic University of Lublin, Lublin, Poland; Brigadier General (Ret.) U.S. Army Reserve Judge Advocate General's Corps.

[FN2]. Lieutenant Joshua R. Lorenz, USN (B.A., Gustavus Adolphus College; J.D., *magna cum laude*, Seattle University School of Law) serves as a trial counsel at Region Legal Service Office Mid-Atlantic, Norfolk, Virginia.

This article is based upon a paper submitted by LT Lorenz in satisfaction of the requirements of the Seattle University School of Law seminar, Military Law, taught by Judge Nevin. LT Lorenz deserves credit for the thesis and content of this article.

[FN1]. *See, e.g.*, MIC HUNTER, HONOR BETRAYED: SEXUAL ABUSE IN AMERICA'S MILITARY 165-166 (2007) (noting that an Army criminal investigator referred to such scenarios as “very typical.”).

[FN2]. Throughout this article, the term “sexual assault” will be used when discussing unlawful sexual contact, as defined in Department of Defense (DoD) Directive 6495.01. *See infra*, Part II.B.

[FN3]. *Coker v. Georgia*, 433 U.S. 584, 597 (1977).

[FN4]. 10 U.S.C. § 920 (2011).

[FN5]. *See Pub. L. No. 109-163*, § 552(a)(1).

[FN6]. *See* OFFICE OF THE SECRETARY OF DEFENSE SEXUAL ASSAULT PREVENTION AND RESPONSE OFFICE, FISCAL YEAR 2009 DEPARTMENT OF DEFENSE REPORT ON SEXUAL ASSAULT IN THE MILITARY, 68 (March 2010) [hereinafter SAPRO FY09 REPORT]), *available at* http://www.sapr.mil/media/pdf/reports/fy09_annual_report.pdf.

[FN7]. See Armed Forces Strength Figures for April 30, 2011, available at <http://siadapp.dmdc.osd.mil/personnel/MILITARY/ms0.pdf>.

[FN8]. See Department of Defense Female Active Duty Military Personnel by Rank/Grade, Sept. 30, 2010, available at <http://siadapp.dmdc.osd.mil/personnel/MILITARY/rg1009f.pdf>.

[FN9]. See David R. Segal & Mady Wechsler Segal, Population Reference Bureau, *America's Military Population*, POPULATION BULL., Dec. 2004, at 27.

[FN10]. See *id.*

[FN11]. See *id.*

[FN12]. See *id.*

[FN13]. Jessica L. Cornett, Note, *The U.S. Military Responds to Rape: Will Recent Changes be Enough?*, 29 WOMEN'S RTS. L. REP. 99, 100 (2008).

[FN14]. *Id.* at 102-103.

[FN15]. See, e.g., HUNTER, *supra* note 1, at 33-149 (discussing, among other topics, “the code of hyper masculinity,” hazing, prostitution, and homophobia as possible attributing factors to military sexual assault).

[FN16]. See *id.* at 185-187 (listing scandals of military sexual abuse and assault, including incidents at the Army's Aberdeen Proving Ground, the Navy's 1991 Tailhook Convention, and the U.S. Air Force Academy).

[FN17]. See Cornett, 29 WOMEN'S RTS. L. REP., *supra* note 13, at 105.

[FN18]. See Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, 118 Stat. 1920, § 577(f) (2004) [hereinafter 2005 NDAA]).

[FN19]. See *id.*, 375, § 577(a)(3).

[FN20]. See *id.*, 375, § 577(f)(2).

[FN21]. *Id.*, 375, § 577(f)(2)(B).

[FN22]. U.S. DEPARTMENT OF DEFENSE, DIR. 6495.01, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM, Encl 2, para. 1.13 (2008), available at <http://www.dtic.mil/whs/directives/corres/pdf/649501p.pdf>.

[FN23]. See 10 U.S.C. § 925 (2011).

[FN24]. See 10 U.S.C. §880 (2011).

[FN25]. See 10 U.S.C. §928 (2011).

[FN26]. See SAPRO FY09 REPORT, *supra* note 6, at 58-59.

[FN27]. See *id.*

[FN28]. *Id.*

[FN29]. See *id* at 69.

[FN30]. *Id.* at 76.

[FN31]. See *id.*

[FN32]. See CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS NO. R40682, TROOP LEVELS IN THE AFGHAN AND IRAQ WARS, FY2001-FY2012: COST AND OTHER POTENTIAL ISSUES, (July 2, 2009), at 6, available at <http://www.fas.org/sgp/crs/natsec/R40682.pdf>.

[FN33]. SAPRO FY09 REPORT, *supra* note 6, at 76.

[FN34]. See, e.g., Sara Corbett, *The Women's War*, N.Y.TIMES MAGAZINE, Mar. 18, 2007.

[FN35]. SAPRO FY09 REPORT, *supra* note 6, at i.

[FN36]. Memorandum from Sec'y of Def. to Secretaries of Military Departments, et al, (May 3, 2005) (on file with author) [hereinafter Rumsfeld Memo]).

[FN37]. *Id.* at 182.

[FN38]. See TERRI T.S. NELSON, FOR LOVE OF COUNTRY: CONFRONTING RAPE AND SEXUAL HARASSMENT IN THE U.S. MILITARY, 189-213 (2001).

[FN39]. See Major Jennifer S. Knies, *Two Steps Forward, One Step Back: Why the New UCMJ's Rape Law Missed the Mark, and How an Affirmative Consent Statute Will Put it Back on Target*, ARMY LAW., Aug. 2007, at 14.

[FN40]. *See id.*

[FN41]. Lieutenant Keith B. Lofland, *The Neglected Debate Over Sexual Assault Policy in the Department of Defense*, 55 NAVAL L. REV. 311, 313 (2008).

[FN42]. *See id.* at 330.

[FN43]. *United States v. Leak*, 61 M.J. 234, 246 (C.A.A.F. 2005) (“Article 120 is antiquated in its approach to sexual offenses.”).

[FN44]. *See* 2005 NDAA, *supra* note, at 18.

[FN45]. *Id.*, §571(a) (emphasis added).

[FN46]. U.S. DEPARTMENT OF DEFENSE, DOD DIR. 5500.17, ROLE AND RESPONSIBILITIES OF THE JOINT SERVICE COMMITTEE (JSC) ON MILITARY JUSTICE (2003), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/550017p.pdf>.

[FN47]. Sex Crimes and the UCMJ: A Report for the Joint Service Committee on Military Justice at 1 (Feb. 2005) *available at* http://www.defenselink.mil/dodgc/php/docs/subcommittee_reportMarkHarvey1-13-05.doc, [hereinafter Sex Crimes and the UCMJ].

[FN48]. *Id.*

[FN49]. *Id.* at 2.

[FN50]. *Id.*

[FN51]. *Id.*

[FN52]. *See id.* at 85.

[FN53]. *See* Lieutenant Colonel Mark L. Johnson, *Forks in the Road: Recent Developments in Substantive Criminal Law*, ARMY LAW., Jun. 2006, at 27 (referencing discussions with a House Armed Services Committee attorney who served as a member of a drafting committee for the new sexual assault legislation).

[FN54]. *See* National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3137 (2006) [hereinafter 2006 NDAA].

[FN55]. *See* H.R. Rep. No. 109-089, § 555 (2005) (noting that the amended Article 120 would include both “a series of graded

offenses relating to rape, sexual assault and other sexual misconduct” and “a precise description of each offense.”).

[FN56]. See H.R. Rep. No. 109-360, § 552 (2005).

[FN57]. 151 Cong. Rec. H3912-02, 3920 (2005).

[FN58]. *Id.*

[FN59]. See 2006 NDAA *supra* note, at 54.

[FN60]. See *id.*

[FN61]. See 10 U.S.C. § 920, (a) - (h) (2011).

[FN62]. 10 U.S.C. § 920(t)(1).

[FN63]. 10 U.S.C. § 920(t)(2).

[FN64]. See 10 U.S.C. § 920(t)(3) - (t)(8).

[FN65]. See 10 U.S.C. § 920(r).

[FN66]. See Johnson, *supra* note 57, at 27.

[FN67]. See 10 U.S.C. § 920(t)(16).

[FN68]. See *id.*

[FN69]. See, e.g., Major Howard H. Hoeg III, ““Oversight” The Unconstitutional Double Burden-Shift on Affirmative Defenses in the New Article 120, ARMY LAW., May 2007, at 2.

[FN70]. United States v. Crotchett, 67 M.J. 713 (N-M. Ct. Crim. App. 2009)), *rev. denied*, 68 M.J. 222 (C.A.A.F. 2009).

[FN71]. United States v. Neal, 68 M.J. 289 (C.A.A.F. 2010), *cert. denied*, 131 S. Ct. 121 (2010).

[FN72]. United States v. Prather, 69 M.J. 338, *reconsideration denied*, 70 M.J. 30 (C.A.A.F. 2011).

[FN73]. See *Crotchett*, 67 M.J. at 714.

[FN74]. *See id.*

[FN75]. *See id.*

[FN76]. *See id.*

[FN77]. *See id.*

[FN78]. *See id.* at 715.

[FN79]. 10 U.S.C. § 920(t)(14).

[FN80]. *See Crotchett*, 67 M.J. at 715.

[FN81]. *See id.*

[FN82]. *See Neal*, 68 M.J. at 291.

[FN83]. *See id.* at 297.

[FN84]. *Id.* at 291.

[FN85]. *Neal*, 68 M.J. at 302.

[FN86]. *Id.*

[FN87]. *See id.* at 303.

[FN88]. *See id.*

[FN89]. *See id.*

[FN90]. *See id.*

[FN91]. *Id.*

[FN92]. *Prather*, 69 M.J. at 341-43.

[FN93]. *See id.* at 340-41.

[FN94]. *Id.* at 340.

[FN95]. See U.S. DEPT OF ARMY, PAM. 27-9 (Jan. 1, January 2010), available at http://www.apd.army.mil/pdffiles/p27_9.pdf (The Benchbook is utilized by military judges in courts-martial through all four branches of service) [hereinafter DA PAM. 27-9].

[FN96]. See *Prather*, 69 M.J. at 340.

[FN97]. *Id.* at 340.

[FN98]. *Id.*

[FN99]. *Prather*, 69 M.J. at 340-343.

[FN100]. *Id.* at 343.

[FN101]. See *id.*

[FN102]. *Id.* at 344

[FN103]. See *id.* at 344-45.

[FN104]. *Id.*, at 345 n.10.

[FN105]. See Hoege, *supra* note 69, at 15.

[FN106]. See *Prather*, 69 M.J. at 345.

[FN107]. See *id.* at 347-351-52 (Baker, J., dissenting as to Part A and concurring in the result).

[FN108]. See, e.g., Marcus Fulton, *CAAF Provides Answers, Raises Questions in Prather*, CAAFLOG (Feb. 9, 2011), available at <http://www.caaflog.com/2011/02/09/caaf-provides-answers-raises-questions-in-prather/>.

[FN109]. See *Prather*, 69 M.J. at 340 (“... the statutory interplay between the relevant provisions of Article 120 ... *under these circumstances*, results in an unconstitutional burden shift to the accused.” (emphasis added)); *Id.* at 345 (“As we have found that the initial burden shift in Article 120(t)(16) ... to be unconstitutional *under the circumstances presented in this case*, the issue involving the second burden shift becomes moot.” (emphasis added)).

[FN110]. *Id.* at 344, n.9.

[FN111]. *Id.* In addition, *Prather's* holding should have no blanket effect on the applicability of the holding in *Crotchett*. Where *Prather* dealt with the burden shifting scheme as applied to a charge under Article 120(c)(2) (“substantially incapacitated”), *Crotchett* involved the burden shifting scheme as analyzed in a charge under Article 120(c)(2)(C) (“substantially incapable of ... communicating unwillingness to engage in the sexual act.”).

[FN112]. *United States v. Boore*, Misc. Dkt. No. 2011-01 (A.F. Ct. Crim. App., Aug. 3, 2011).

[FN113]. *See id.* at 1.

[FN114]. *See id.*

[FN115]. *See id.* at 2, citing *United States v. Medina*, 69 M.J. 462, 465 n.5, reconsideration denied, 70 M.J. 35 (C.A.A.F. 2011).

[FN116]. *See* U.C.M.J. Article 62, 10 U.S.C. §862(a)(1)(A).

[FN117]. *Boore*, slip op. at 3.

[FN118]. *See id.* at 3-4.

[FN119]. *See id.* at 4.

[FN120]. *See id.* at 5.

[FN121]. *Neal*, 68 M.J. at 305 (Ryan, J., concurring in part and dissenting in part).

[FN122]. 10 U.S.C. § 920(r).

[FN123]. *Neal*, 68 M.J. at 301-02.

[FN124]. *Id.* at 304.

[FN125]. 10 U.S.C. § 920(t)(16).

[FN126]. 10 U.S.C. § 920(t)(16).

[FN127]. *See id.*

[FN128]. *See Hoege*, *supra* note 69 at 12.

[FN129]. *Id.*

[FN130]. *Neal*, 68 M.J. at 304.

[FN131]. *Prather*, 69 M.J. at 334, 344, n.9.

[FN132]. *Medina*, 69 M.J. 462.

[FN133]. *United States v. Stewart*, No. NMCCA 201000021 (N-M. Ct. Crim. App. Jan. 31, 2011), *review granted*, ___ M.J. ___, No. 11-0440/MC (C.A.A.F., Aug. 10, 2011).

[FN134]. *See id.* at 7.

[FN135]. *See id.* at 8.

[FN136]. *See id.* at 8-9.

[FN137]. DA PAM 27-9, *supra* note 9796, Approved Change 11-02 (Article 120 Affirmative Defenses), *available at* <http://www.caaflog.com/wp-content/uploads/BB-change.pdf>.

[FN138]. *Medina*, 69 M.J. at 465, n.5.

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