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The Honorable Elizabeth Holtzman, Chair
The Judicial Proceedings Panel
One Liberty Center
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Madame Chair and Panel Members,

At the conclusion of the public hearing on August 7, you invited me to comment on the current terms of UCMJ article 120 and to provide a “mark-up” of suggested revisions.

You know, of course, that I am not an expert in military law, but even that disclaimer is insufficient. I have not studied in any detail the terms of article 120, the relevant case law or the range of contexts in which relevant issues may arise. In hopes of being helpful, I will offer some reactions, but I do so with great diffidence. All my comments and recommendations below must be understood in that light and are tentative at best. I will, of course, be happy to work with you to clarify the possible application of this civilian perspective to the special circumstances of the UCMJ and the military environment.

As you know, I currently serve as the Reporter for the American Law Institute project to revise Article 213 (the sexual offense provisions) of the Model Penal Code. My comments are shaped by my work in that connection, as well as by my prior academic work, especially my book *Unwanted Sex* (Harvard University Press 1998). My comments here express only my own personal views.

My comments are in two parts. First, parsing the current text of article 120, I identify particular language that strikes me as unsatisfactory. Second, I explain briefly why I think an effort to work within current article 120 (providing a “mark-up” or seeking to improve it by piecemeal amendment) is not optimal and why a fresh start is needed.

I. Salient Problems in Article 120 as it stands:

-- 120(a)(1) (“using unlawful force”): Given 120(g)(5)(B) and modern expansion of what counts as “force,” subsection (a)(1) encompasses abuses markedly less grave than (a)(2) and

(a)(3). The latter two subsections should be in a separate section for aggravated rape carrying the most severe penalties.

-- 120(a), last clause ('punished as a court-martial may direct'): I am aware that unbounded sentencing discretion permeates the UCMJ and is embedded in long-standing military traditions and procedures. Maximum penalties are appropriate for (a)(2) & (a)(3) -- offenses which typically ought to be eligible for life imprisonment. For less grave offenses, the absence of a sentencing cap violates modern principles of criminal legislation and creates pervasive problems for both fairness and effective enforcement; the mere possibility of a life sentence could even be a factor inhibiting military prosecutors from charging rape or sexual assault in cases outside the scope of (a)(2) & (a)(3). I strongly recommend that the last clause should provide that for (a)(1), (4) & (5), the defendant "shall be punished as a court-martial may direct, including by imprisonment not to exceed [20?] years."

--120(a)(5): this provision does not require that the intoxicants be administered intentionally or **for the purpose** of impairing capacity.

-- Criminalization for a sex crime is not appropriate if the defendant *accidentally* put alcohol or a recreational drug in another person's drink, or if the actor thought the other person *was* aware. Such scenarios are not at all uncommon in contexts where "serious partying" occurs.

-- Criminalization for a sex crime where the action was negligent is debatable, but if included, it should not be placed in the most serious grade of the offense. Again, such scenarios are common and should be addressed, but not through counterproductively harsh sanctions.

-- Intentional administration without consent should be criminal regardless of its purpose, but it is tantamount to *rape* only when it is done **for the purpose** of preventing resistance. Non-purpose cases belong in a distinctly less serious category.

--120(b)(1)(B) ("causing bodily harm"): This offense lumps together, in a confusing and counterintuitive way, both (1) sex by causing bodily injury in the conventional sense, and (2) sex without consent. The definition of "bodily harm" should be fixed to distinguish them (see 120(g)(3) below), and separate subsections should address them in 120(b)(1).

--120(b)(3) ("incapable of consenting"): the quoted phrase is conclusory and meaningless. *When* is a person incapable? What is the test? Civilian courts have worked with similar language and managed convictions from time to time, but the ambiguity impedes the law's ability to communicate a normative message and may inhibit prosecution of deserving cases. The criteria of incapacity must be defined.

-- 120(b), last clause ('punished as a court-martial may direct'): Again, the absence of any sentencing cap for the less grave offenses in article 120(b) is a substantial weakness. The last clause should provide that the defendant "shall be punished as a court-martial may direct, including by imprisonment not to exceed [10?] years." An analogous comment applies to the last clauses of 120(c) & (d).

----120(b)(3) in general: The two identified situations of per se incapacity to consent [(A) and (B)] seem unduly narrow, even when considered in connection with 120b provisions applicable to minors under 16. Some situations call for prohibition even when a minor is 16 or 17

years old. Adult situations that warrant per se prohibition include encounters between: patients and a mental health counselor, inmates and guards, and probationers and their probation officers.

>>>In a military context, I would think that relationships between trainees in boot camp and their drill sergeants certainly call for similar treatment, and other supervisory relationships probably warrant consideration as well. Of course, such relationships violate articles 92 and/or 134, but “fraternization” doesn’t and shouldn’t carry the opprobrium of sexual assault. Overly coercive encounters should be treated as assaultive crimes.

>>>>That said, I am personally cautious about per se prohibitions that might apply to all relationships between parties of different rank, whether different at the outset or different because one of them gets promoted, etc. Given the importance of making military careers attractive to women, such per se prohibitions can be overbroad and counterproductive in the many contexts where military personnel have limited opportunity to socialize with civilians. (I discuss this issue at greater length in *Unwanted Sex*, pp. 170-172, 188-189).

--120(g)(3): The concept of bodily harm should serve to differentiate more serious cases from those in which there is no injury or threat of injury beyond the harm of unwanted penetration itself. The definition here elides all those cases and makes it difficult to achieve needed differentiation, not to mention ready comprehension of what 120(b)(1)(B) means.

The interaction between (b)(1)(B) and (g) also is potentially contradictory, because (1)(B) requires that the accused commit the sexual act “by” causing bodily harm. A natural interpretation of that language would be that the bodily harm is used to induce the other person’s submission, and therefore *would not* include (contrary to the implication of (g)) the “bodily harm” that occurs when the penetration is subsequently achieved. A soldier, a prosecutor or the court martial members might imagine that assault by bodily harm under 120(b)(1)(B) requires proof of bodily harm in the ordinary sense of the English language, even though a broader meaning is intended under (g). A court might conclude that (1)(B) and (g)(3) are in tension and that the narrower meaning should govern for (1)(B) purposes. In short:

>> “bodily harm should be defined in terms on the order of “physical pain, illness or any impairment of physical condition,” cf. Model Penal Code 210.0(2).

>> a separate offense under 120(b) [or other provision] should apply to intercourse without consent, and that offense should be defined in ordinary language.

--120(g)(7) “Threatening ... wrongful action” is either ambiguous or too narrow in its application to an officer or NCO who seeks sexual favors in return for undeserved favorable treatment, or sexual favors absent which he will report an enlistee’s infraction of some sort or mention factually accurate shortcomings in the enlistee’s personnel report. Is it “wrongful” for the officer to report the infraction or the factually accurate shortcomings? Is it “wrongful” for an officer *not* to give a subordinate undeserved privileges? These are classic cases of extortion when money is demanded but typically are not covered when sexual favors are sought. Subsection (g)(7) could be stretched to reach the right result (i.e. liability) in such cases, but its vagueness might be a barrier to conviction and to communicating the desired message. Again, the relationship would violate arts. 92 and/or 134, but should be treated as a coercive sexual crime.

--120(g)(8) (“Consent”): In current American law there are roughly four prevalent definitions of consent: (1) nothing counts other than an affirmative expression of willingness – silence or passivity is *not* consent (e.g., New Jersey); (2) silence and passivity count as consent but a verbal “no” negates consent (many states); (3) silence, passivity and even a verbal “no” can

sometimes amount to consent – only some degree of “reasonable” physical resistance can negate consent (some states); (4) consent always depends on the totality of the circumstances – a verbal “no” is not sufficient unless “a reasonable person in the actor’s situation would have understood [the other] person’s words and acts as an expression of lack of consent . . . under all the circumstances” (New York for the felony offense and many other states).

>>> Subsection (g)(8) clearly rejects position #3 but it seems to adopt all of the others simultaneously. The first sentence of 8(A) adopts #1. But the second and third sentences seem to require something like #2; especially given the third sentence, mere silence or passivity apparently CAN count as consent when the explanation is something other than force or *acts by the accused* that (presumably are *intended to*) place the victim in fear – i.e. *not including* passivity due to drunkenness, confusion, surprise, or “frozen fright” (not attributable to intentional defendant actions). Finally, 8(C) seems to adopt #4 – all the surrounding circumstances have to be considered; arguably the word “no” by itself might not satisfy the second sentence of 8(A) if there are other surrounding circumstances suggestive of willingness or not clearly suggestive of unwillingness.

>>> These issues under (g)(8) of course fold back into (g)(3). The first sentence of (g)(8) says what the term “consent” means, but the term consent has no operational importance in art. 120. The operational term is nonconsent [(g)(3)]. That term, nonconsent (presumably equivalent to “lack of consent”) does have a (g)(8) definition, but that definition doesn’t support #1 – i.e. the lack of “freely given permission” – it only supports #2 or #4.

>>> On top of these problems, *if* the first sentence of (g)(8) is important, what does “**freely given**” consent mean?

>>> I’d hate to be a court martial member or appellate judge trying to figure out what (g)(8) means.

II. Whether to amend or start over.

Article 120 is already awkwardly structured and hard to understand, even for a lawyer versed in this area. Piecemeal amendments can only make that situation worse.

More fundamentally, an important function of the law in this area is *not* merely to enable effective prosecution in cases that come into the system. An equally important (arguably more important) function is to give prosecutors confidence that they are not overreaching, and – still more crucially – to communicate expectations and appropriate norms of behavior to the broader community whose conduct the law seeks to influence, in this case *all* military personnel. That last function is especially important in situations (which may include some military settings) in which currently embedded social norms and habits are deeply at odds with the best understanding of what respectful interpersonal behavior requires. An awkwardly structured law that relies on language that is vague and contradictory (“consent”), not self-explanatory (“incapable of consenting”) or counterintuitive in its meaning (“bodily harm”) cannot serve these purposes.

The American Law Institute faced similar issues in connection with the question whether to proceed by amending the current text of MPC Article 213 or instead to strike Article 213 in its entirety. For reasons related to those above, the ALI decided to make an entirely fresh start.

I do not know all the reasons why prevention and prosecution of sexual crimes in the military are thought to be inadequate, but I would be very surprised if the current awkwardness of article 120 is not among them, even with respect to situations that it technically can be read to cover. The shift from the old, force-based concept of the sexual offenses to a concept centered on the absence of consent is fundamental, and efforts to patch it on to an existing force-based framework inevitably leads to cumbersome drafting and poor communication to non-lawyer audiences.

Lastly, the absence of any UCMJ limitations on sentencing discretion seems very likely (from my limited perspective) to muddy the law's normative message and inhibit aggressive charging and legitimate plea bargaining when appropriate. I would urge your panel to study this issue, even though steps to change the status quo in this regard may be unrealistic in terms of achievable reform at this time.

In sum, I do not think an effort to "mark-up" article 120 can be productive. I suggest instead that your panel propose a fresh start. For an illustration of how a revised article 120 could be structured, you could, for example, work from the currently pending tentative draft of our proposed revision of MPC Article 213. I have already provided to your staff a copy of this document (Tentative Draft No.1, April 30, 2014), and for convenience I attach another pdf. copy here.

Tentative Draft No.1 carries no official ALI imprimatur. Though it is the result of considerable research and consultation, for the time being it expresses only my own personal judgments as Reporter. Nonetheless, it could provide one example that your Panel might possibly find helpful in thinking about matters of organization and vocabulary, as well as substantive line-drawing in difficult borderland areas such as abuse of authority. The Draft includes both suggested black-letter statutory text and extensive commentary explaining the issues and drafting choices made. A revised and more complete Draft will be available in September. For even greater detail, especially with regard to criminalization in areas of asymmetric power and authority, you can find further discussion in my book mentioned above (*Unwanted Sex*, 1998).

Please let me know if I can be of further assistance in your important work.

Sincerely,

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