

# Article 120 – Issues with Statutory Text

	Drug or Intoxicant Administration	Sexual Assault by Causing Harm	Definition of “Incapable of Consenting”	Definition of “Threatening Wrongful Action”	Components of “Fear”	Use of Consent throughout the Statute
Code Section	<ul style="list-style-type: none"> <li>120(a)(5)</li> </ul>	<ul style="list-style-type: none"> <li>120(b)(1)(B)</li> <li>120(d)</li> <li>120(g)(3)</li> </ul>	<ul style="list-style-type: none"> <li>120(b)(3)</li> </ul>	<ul style="list-style-type: none"> <li>120(g)(7)</li> </ul>	<ul style="list-style-type: none"> <li>120(g)(7)</li> </ul>	<ul style="list-style-type: none"> <li>120(g)(8)</li> </ul>
Issue	Provision of Article 120 does not require intoxicants be administered intentionally or for the purpose of impairing capacity.	Does “Bodily Harm” mean sexual intercourse “without consent” or a sexual act/contact with an additional offensive touching beyond that of penetration or sexual contact?	The definition of “Incapable of Consenting” is ambiguous and unclear.	“Threatening Wrongful Action” is too narrow or ambiguous.	Statute should not impose both objective and subjective component to “fear.”	Congressional intent regarding “consent” is unclear.
Supporting Change/Potential Solutions	<u>Amend/Clarify</u> <ul style="list-style-type: none"> <li>Prof Schulhofer</li> </ul>	<u>Amend/Clarify</u> <ul style="list-style-type: none"> <li>Prof Schulhofer</li> <li>COL(R) Grammel</li> <li>Lt Col Pitvorec</li> <li>CAPT Reismeier</li> </ul>	<u>Amend/Clarify</u> <ul style="list-style-type: none"> <li>Prof Schulhofer</li> <li>Ms. Scalzo</li> <li>LTC Pickands</li> <li>LtCol Thielemann</li> <li>Maj Rosenow</li> <li>LCDR Stormer</li> <li>MAJ Kostik</li> </ul>	<u>Amend/Clarify</u> <ul style="list-style-type: none"> <li>Prof Schulhofer</li> <li>LTC Pickands</li> </ul>	<u>Amend/Clarify</u> <ul style="list-style-type: none"> <li>Dean Schenck</li> <li>Col Jackson</li> </ul>	<u>Amend/Clarify</u> <ul style="list-style-type: none"> <li>Mr. White</li> <li>Mr. O’Brien</li> <li>Prof Schulhofer</li> </ul>
Counter Argument	<ul style="list-style-type: none"> <li>No specific counters other than general recommendations against any wholesale statutory changes</li> </ul>	<u>Do Not Amend</u> <ul style="list-style-type: none"> <li>Ms. Scalzo</li> </ul>	<ul style="list-style-type: none"> <li>No specific counters other than general recommendations against any wholesale statutory changes</li> </ul>	<u>Do Not Amend</u> <ul style="list-style-type: none"> <li>CAPT Crowe</li> <li>LCDR Stormer</li> </ul>	<ul style="list-style-type: none"> <li>No specific counters other than general recommendations against any wholesale statutory changes</li> </ul>	<u>Do Not Amend</u> <ul style="list-style-type: none"> <li>Ms. Scalzo</li> <li>LtCol Thielemann</li> </ul>

# Article 120 – Issues with Statutory Text

	Definition of “Force”	Accused’s Perception of Victim Behavior/ Condition	Consent and Mistake of Fact as to Consent as Affirmative Defenses	Definition of Sexual Contact and Sexual Act	Indecent Acts	Recommendations Against Wholesale Changes
Code Section	<ul style="list-style-type: none"> <li>120(g)(5)</li> </ul>	<ul style="list-style-type: none"> <li>120(b)(2)</li> <li>120(b)(3)</li> </ul>	<ul style="list-style-type: none"> <li>Affirmative Defenses</li> </ul>	<ul style="list-style-type: none"> <li>120(g)(2)</li> </ul>	<ul style="list-style-type: none"> <li>N/A</li> </ul>	<ul style="list-style-type: none"> <li>120</li> </ul>
Issue	<p>“Force” is too narrowly defined.</p>	<p>Charging should not be based on the Accused’s perception of victim behavior or condition.</p>	<p>Current version of Article 120 removed affirmative defenses of consent and mistake of fact, which were previously expressly available. Unclear if defenses are still available.</p>	<p>Definition of Sexual Contact is:                      (1) Too narrow since it does not include touching accomplished by object;                      (2) Overbroad because it includes any touching, (directly or thru clothing)</p>	<p>Latest version of Article 120 deleted “Indecent Acts” from the statute.</p>	<p>Concern for continued changes to Article 120.</p>
Supporting Change/ Potential Solutions	<p><u>Amend Statute</u></p> <ul style="list-style-type: none"> <li>Prof Schulhofer</li> </ul>	<p><u>Amend Statute</u></p> <ul style="list-style-type: none"> <li>Dean Schenck</li> <li>Col Jackson</li> </ul>	<ul style="list-style-type: none"> <li>Amend statute to clarify Congress intent on consent</li> <li>Amend statute to expressly provide for mistake of fact defense</li> </ul>	<p>(1) <u>Amend/Clarify</u></p> <ul style="list-style-type: none"> <li>Ms. Scalzo</li> </ul> <p>(2) <u>Amend/Clarify</u></p> <ul style="list-style-type: none"> <li>COL(R) Grammel</li> <li>MAJ Kostik</li> </ul>	<p><u>Amend Statute</u></p> <ul style="list-style-type: none"> <li>Dean Schenck</li> <li>LTC Pickands</li> </ul>	<p>Numerous Speakers</p>
Counter Argument	<ul style="list-style-type: none"> <li>No specific counters other than general recommendations against any wholesale statutory changes</li> </ul>	<ul style="list-style-type: none"> <li>No specific counters other than general recommendations against any wholesale statutory changes</li> </ul>	<ul style="list-style-type: none"> <li>Exec Order Could clarify “consent”</li> <li>RCM 916(j)(3), “mistake of fact as to consent” still available</li> <li>Judge Benchbook currently instructs on both</li> </ul>	<p>(1) &amp; (2)</p> <ul style="list-style-type: none"> <li>Can be defined by Executive Order or case law</li> </ul> <p>(2) Revise DoD Instruction on reportable offenses</p>	<ul style="list-style-type: none"> <li>No specific counters other than general recommendations against any wholesale statutory changes</li> </ul>	<ul style="list-style-type: none"> <li>No specific counters other than general recommendations against any wholesale statutory changes</li> </ul>

# Article 120 – Abuse of Authority and Bifurcation

## Code Section

Abuse of Authority

- 120(b)(1)(A)
- 120(g)(7)
- Also Articles 92, 93, 134

Bifurcation

- 120

## Issue

- Should Article 120 be amended to include a provision on Superior/Subordinate relationships?
- Should there be a strict liability standard?

Should penetration offenses be bifurcated from non-penetrating offenses?

## Supporting Change/ Potential Solutions

### Amend Statute with Strict Liability for Trainee Offenses

- Representative Speier
- LTC Pickands
- LtCol Thielemann

### Amend Statute for Abuse of Power

- Representative Frankel

### Amend Statute

- Col Jackson

## Counter Argument

### Do Not Amend

- Mr. Cassara
- LTC Varley
- LCDR Stormer
- LTC Sayegh
- CAPT Anderson
- Maj Mann
- Col Kenny
- Col Lewis

### Do Not Amend

- Mr. Sullivan
- CAPTReismeier
- COL Grammel