

SUMMARY OF PRESENTER COMMENTS
ASSESSMENT OF STATUTORY TEXT
OF ARTICLE 120, UCMJ

I. **“Administration of drug or intoxicant” is currently overbroad and should be narrowed to include only those times when the intoxicant was administered to facilitate a sex crime**

A. **Explanation of Issue**

Prof Steven Schulhofer (Aug 8 Memo to Panel): 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*. . . .

B. **Proposed Solution**

Prof Steven Schulhofer (Aug 8 Memo to Panel): 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.

C. **Alternate Views**

See Infra, Recommendations Against Any Wholesale Statutory Changes.

II. **It is unclear whether “bodily harm” is intended to mean sexual intercourse “without consent” or a sexual act/contact with an additional offensive touching beyond that of penetration or sexual contact**

A. **Explanation of Issue**

Prof Steven Schulhofer (Aug 8 Memo to Panel): “(C)ausing bodily harm” (as it is currently defined) . . . 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 and separate subsections should address them in 120(b)(1).

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

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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 definition) the “bodily harm” that occurs when the penetration is subsequently achieved

Colonel Timothy Grammel (Aug 7, p. 263): (B)ecause of the way bodily harm is defined (non-consensual sexual intercourse is being tried). It says any sexual act or sexual contact without consent would be bodily harm. So all you need there is you need a sexual act, and then no consent, and it’s an offense.

Captain Christian Reismeier (Aug 7, p. 276): . . .when you look at the potential conflicting theories, the problem with the way it’s laid out right now is that the battery theory, which arguably is simply penetration without force, just consensual, when prosecutors put that on a charge sheet along with force and the members come back and acquit of the battery version, somebody has to figure out whether they have impeached the verdict as to the force one.

Lieutenant Colonel Julie Pitvorec (Sept 19, pp. 202-03): (T)he 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

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 . . . it is used by prosecutors in charging 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.

B. Proposed Solution

Prof Steven Schulhofer (Aug 8 Memo to Panel): “(B)odily 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) should apply to intercourse without consent, and that offense should be defined in ordinary language.

C. Alternate View

Ms. Theresa Scalzo (Sept. 19, p. 16): I would also like to note that part of what allows us this broad charging scope is defining bodily harm to include non-consensual acts.

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Although there is much confusion amongst those who are not actual practitioners about the role of consent in this crime, I can tell you that at least among Navy trial counsel we are not confused.

III. Definitions of “incapable of consenting” and “impairment” are unclear

A. Explanation of Issue

Prof Steven Schulhofer (Aug 8 Memo to Panel): “incapable of consenting” . . . 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.

Ms. Theresa Scalzo (Sept 19, p. 16): (T)here is one area that we do struggle with, (it) is the definition of incapable of consent(ing). We know that consent must be given by a “competent person,” but the law provides no further guidance beyond this.

. . . . (An) explanation is not included in the law. Therefore, the issue becomes the subject of expert testimony in almost every trial where incapable of consent is charged.

Lieutenant Colonel Alex Pickands (Sept 19, p. 96): Incapable of consenting right now there's a change in the language from the previous statute of substantially incapacitated. We did have a definition for what that meant. We don't have one presently.

Lieutenant Colonel Chris Thieleman (Sept 19, p. 104): Right now as I've seen it in practice from other military judges, this definition oftentimes is pulled from other portions of the UCMJ, which I would think is inappropriate.

Major Mark Rosenow (Sept 19, page 115): . . . I would appreciate as a trial practitioner a better vector on what exactly impairment is defined as, and incapable of consent.

Major Frank Kostik (Sept 19, p. 171): In short, as has been stated, "incapable of consent" needs a definition.

(p. 172): 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.

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B. Proposed Solutions

Prof Schulhofer (Aug 8 Memo to Panel): The criteria of capacity must be defined.

Ms. Theresa Scalzo (Sept. 19, pp. 16-17): I believe that the standard for competence can be compared to the standard for competence to stand trial, make medical decisions, and sign a contract or a will. The crime is about having a capacity to process information, consider information, and make decisions utilizing that information

(p. 31): I believe it should be about the capacity to process information, the ability to recognize consequences of the action, the ability to recognize the action itself, the ability to recognize alternatives.

Lieutenant Colonel Alex Pickands (Sept 19, p. 124): (I)t has to go to the process of being able to understand what's happening, to be able to make decisions, express those decisions freely. And I think impairment could easily be defined as something akin to a diminished physical and mental capacity, or capability But the capacity to consent is a threshold that I think needs to be defined so that it's a - there's some legal meaning to it rather than it being a medical term, incapacity from a medical term, so it would be more akin to any competence standard.

Lieutenant Colonel Chris Thieleman (Sept 19, p. 104): (M)odification needs to be made to the definition of impairment, as well as what it means to be incapable of consenting.

. . . .

(However,) I would take issue in part with us trying to define capacity as anything dealing with the ability to enter into a contract. I think that is rife with some problems. I recognize that the capacity to consent should be focused on the ability to process information, but if we leave it at the very bare bones level of is this person able to enter into contract, and the answer is no, that suggests the person is incapable of consenting, is rife with constitutional concerns.

Major Mark Rosenow (Sept 19, p. 129): I would ask that if you go back there and you're considering that, I think it might be worthwhile to consult with a forensic toxicologist and see exactly where and at what level we see the things that matter for things like competence coming up.

(p. 131): I would just ask, at least from my perspective, and again these are just my opinions, for something that takes into account the forensic toxicology background for where we see and how early we can have critical judgment and executive functioning impaired by influence of intoxicants or alcohol.

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Lieutenant Commander Ryan Stormer (Sept 19, pp. 126-27): . . . so I think a definition or an understanding about what, in fact, does competency mean in the context of whether or not somebody can consent to sex, I think would be very helpful to the trial practitioner.

Major Frank Kostik (Sept 19, p. 172): 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.

C. Alternate Views

See Infra, Recommendations Against Any Wholesale Statutory Changes.

IV. Threatening . . . wrongful action” is too narrow or ambiguous

A. Explanation of Issue

Prof Steven Schulhofer (Aug 8 Memo to Panel): “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

Lieutenant Colonel Alex Pickands (Sept. 19, pp. 93-94): The present version of Article 120 seemed to bring into Article 120 the possibility of the abuse of military authority to accomplish a sexual assault simply by removing part of the definition of threat or fear in sexual assault. And by doing so, I understand that the intent was to encompass a lesser degree of harm, which is to say harm that's not necessarily related to physical, violence, or power. Now, by implication that could be a threat, or placing a person in fear of some form of career or economic harm I don't think it's an effective way to get at abuse of military authority because it depends on a threat or fear of some form of wrongful action. And most of the use of military authority to coerce sex is either implicit or the explicit threat relates to something within the scope of the person's duties, and that would be difficult to characterize as lawfully wrongful other than the purpose for which that threat is made.

B. Proposed Solutions

Prof Steven Schulhofer (Aug 8 Memo to Panel): (The definition of threat) should 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 articles 92 and 134, but should be treated as a coercive sexual crime.

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C. Alternate Views

Captain Robert Crow (Sept. 19, pp. 355-56): And I actually do have one case where we did get a conviction for the implied threat, and it was an implied threat, not an outright threat But it was a commanding officer of a vessel, and a junior enlisted that worked for him. So I think that goes directly to your question, does the statute work.

That was the middle statute, the 2007 to 2012 version. However, that particular language in the statute is almost identical to the current version, which would still permit such charging. The one slight difference is it was a guilty plea case, so it was reviewed on appeal as a guilty plea.

Lieutenant Commander Ryan Stormer (Sept 19, p.144): My opinion would be I think we can prosecute these cases under the current Article 120.

(pp. 284-85): But I would say that we do have the ability in my own personal opinion to prosecute these type of cases under the current Article 120 statute.

V. The statute should not impose both an objective and subjective component to fear. It is enough the victim had a subjective fear.

A. Explanation of Issue

Colonel Gary Jackson (Aug 11 email to Panel): Currently to constitute a threat that would support a rape or sexual assault committed by a threat or placement of an alleged victim in fear, the alleged victim's fear must be both honest (subjective) and reasonable (objective). 18 U.S.C. 2241 and 2242, statutes upon which our current rape and sexual assault laws are based, only require the alleged victim's fear be actual/honest and not reasonable. We simply give the military accused more rights to which he is entitled on this issue and place an additional burden on the alleged victim and the prosecution.

Dean Lisa Schenck (Ohio State J. Crim L., pp. 452-53): The 2012 Article 120(g)(7) requires a showing of the victim's "reasonable fear," as opposed to proof of the victim's *subjective* fear, thus giving greater weight to the victim's mental state in deciding whether to comply with demands for sex. As a result, an accused may benefit by selecting a more vulnerable victim who may comply through fear; such a vulnerable victim may succumb in response to a lower level communication or action than that required to meet the "reasonable" person standard. The phrase "a reasonable fear" should be replaced with "the victim to fear."

B. Proposed Solutions

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Dean Lisa Schenck (Ohio State J. Crim L., p. 452): The DoD should also solicit Congress to change the definition of “threatening or placing a person in fear” to recognize and protect vulnerable victims.

C. Alternate Views

See Infra, Recommendations Against Any Wholesale Statutory Changes.

VI. Congressional intent regarding consent is unclear

A. Explanation of Issue

Prof Steven Schulhofer (Aug 8 Memo to Panel): 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.

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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.

Mr. Ronald White (Written Submission to Panel, p. 5): Today we wonder, “what is the legal import of consent in the context of Article 120?” The answer to this question is uncertain. Identifying the uncertainties requires a theory-by-theory analysis of Articles 120(a) and Article 120(b). Article 120(a)(1) defines rape as a sexual act upon another using unlawful force. Article 120(g)(6) defines unlawful force as an act of force done without legal justification or excuse. In my opinion, consent to a sexual act is a legal excuse, and we should recognize it as such. Confusion has been created by those who believe the statute should focus on the conduct of the perpetrator and claim that Congress intended to eliminate consent as a defense. To do so, they must elevate the intent of Congress over the words Congress included in the law. This is incorrect for two reasons. First there is no expression of Congressional intent, and, second, the words of the statute are unambiguous. This means there is no need to resort to Congressional intent.

Mr. E.J. O’Brien (Sept 19, p. 56): (T)he statute defines the word unlawful as without legal justification or excuse, but it modifies the word force. So, if you agree that consent is a legal excuse, unlawful force means consent to the act of force. It doesn't address the act, you know, the charged sexual act. And we're left wondering what is the application of consent to the charged sexual act?

(p. 77): Our point is that when you're not dealing with grievous bodily harm . . . that you're dealing with the force sufficient to accomplish a sexual act, that that force has to be unlawful force. It has to be without justification or excuse as defined the in the statute.

(pp. 67-68): But my other point, which I made in the paper is, and would require some sort of fix, either by Congress, or by the President, or the Army Trial Judiciary is if the case goes to trial, there are outliers and circumstances where a victim could consent to the sexual act, but not consent to the act of force, or the act of administration of a drug, and the accused could still be convicted of rape.

Prof Rachel VanLandingham (Sept 19, p. 45): And with the definition of consent as is, in particular, as Professor Schulhofer more eloquently pointed out than I did, is internally inconsistent. There isn’t a clear message being sent.

B. Proposed Solutions

Prof Steven Schulhofer (Aug 8 Memo to Panel): 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.

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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.

Mr. E.J. O'Brien (Sept. 19, pp. 43-45): What I propose is the Executive Branch, and ultimately it will be the President's signature, look at the way we have handled sexual assault in the past. Has consent to a sexual act been the defense? And, of course it has. We expressed that for decades by having lack of consent as an element of the defense. And in 2006, Congress essentially made consent to the sexual act a legal excuse by making it a statutory defense. The way they did it, by putting the burden on the defense to raise the issue and to prove it by a preponderance, comports with the common law rule for legal excuses. That is the default rule of common law for a legal excuse.

.....

So, who the burden is on and what the standard of proof of consent, I think we can discuss, and negotiate, and come to a satisfactory conclusion. But I think the idea that consent to the sexual act itself excuses, you know, some of the conduct that we're seeing charged.

(p. 59): What I'm recommending is simply recognizing consent to the sexual act as a legal excuse, and then that would clarify it, and it would apply, it would clarify it for both the outlier cases, for the garden variety cases.

C. Alternate Views

Ms. Theresa Scalzo (Sept 19, p. 32): I have not seen a problem with our ability to punish the harms that we seek to punish with our current definition of consent. Capturing it simply as (a) freely given agreement between two competent people has been working.

Lieutenant Colonel Chris Thielemann (Sept 19, pp. 106): As a practitioner, I find the definition we have for consent appropriate for the panels that we deal with. I think the definition is not confusing. I think that definition focuses on the totality of the circumstances of any given factual pattern, but at its core comes back to common sense, human experience, and that panel member's understanding of the ways of the world.

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VII. Force is too narrowly defined

A. Explanation of Issue

Dean Lisa M. Schenck (Ohio State J. Crim L., p. 451): The 2012 Article 120 limits “force” to situations where a weapon is *used* as opposed to *displayed* or *suggested*. Article 120(g)(5)(C) was changed from “sufficient that the other person could not avoid or escape the sexual conduct” to two degrees of force: (B) “sufficient to overcome, restrain, or injure a person” and (C) “sufficient to coerce or compel submission by the victim.” Under the current Article 120’s definition, unlike the 2007 version, the degree of force to compel the victim’s submission is more subjective and places less emphasis on whether the victim had the opportunity to escape or avoid the sexual assault.

B. Proposed Solutions

Dean Lisa M. Schenck (Ohio State J. Crim L., p. 452): (T)o better protect victims, the definition of force should include *suggesting* possession of a dangerous weapon. Article 120(g)(5) should include: “(A) the use, display, or the suggestion of use, of a weapon.

C. Alternate Views

See Infra, Recommendations Against Any Wholesale Statutory Changes.

VIII. Charging should not be based on the accused’s perception of victim behavior/ condition

A. Explanation of Issue

Dean Lisa Schenck (Ohio State J. Crim L., p. 453): Another provision in the 2012 Article 120 that should be modified is the provision that results in focusing on the accused’s perception of the victim’s behavior This statutory provision requires the government to prove that the accused “knows or reasonably should know” the victim’s state of consciousness. Even if the victim testifies about her capacity to consent or ability to resist, the government must prove the *accused’s knowledge* or at least that the accused *should have known*. The accused may testify and describe the victim’s behavior to disprove his knowledge of the victim’s condition and support the defense theory of mistake of fact as to consent.

B. Proposed Solutions

Dean Lisa Schenck (Ohio State J. Crim L., p. 453): To further protect victims, this additional element should be deleted.

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Colonel Gary Jackson (Aug 11 email to Panel): Modify Article 120(b)(2) and Article 120(b)(3) by eliminating the requirement that the accused must know or reasonably should know the alleged victim was asleep, unconscious, unaware that the sexual act was occurring or otherwise incapable of consenting to the sexual act due to alcohol/drug impairment or a mental/physical defect. 18 USC 2242, the law upon which Article 120(b)(2) and Article 120(b)(3) are based does not have this extra *mens rea* requirement. This extra *mens rea* requirement gives the accused more rights to which he is entitled on this issue and place an additional burden on the alleged victim and the prosecution.

C. Alternate Views

See Infra, Recommendations Against Any Wholesale Statutory Changes.

IX. Mistake of fact as to consent as an affirmative defense

A. Explanation of Issue

Colonel Gary Jackson (Aug 11 email to Panel): The second iteration of Article 120 specifically stated that mistake of fact as to consent was an affirmative defense to rape, aggravated sexual assault, aggravated sexual contact, and abusive sexual contact. However the new iteration of Article 120 does not contain such language. The absence of this language may erroneously lead practitioners to believe that such an affirmative defense does not exist It is easier to eliminate this defense as it exists in the RCMs; however it would be much more difficult to eliminate this defense if it exists in the statute.

Colonel Timothy Grammel (Aug 7, p. 262): The biggest challenge is still the issue of consent and also the affirmative defense of mistake of fact as to consent

Lieutenant Colonel Julie Pitvorek (Sept 19, p. 203): 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.

B. Proposed Solutions

Major Frank Kostik (Sept. 19, p. 172): "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.

See also discussion regarding clarity of consent in Part VI.

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X. Incomplete/overbroad definitions of sexual contact and sexual act

A. Explanation of Issue

Ms. Theresa Scalzo (Sept 19, p. 78): The problem was that the definition of sexual contact does not include objects, unlike acts, and because stethoscope is an object It's a gap in the statute.

Major Frank Kostik (Sept 19, p. 173): (T)he penetration of the mouth by any body part -- by any part of the body with intent to abuse, humiliate or harass 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.

Colonel Timothy Grammel (Aug 7, pp. 302-03): So I would recommend, I guess – if there is a tinkering with the aggravated sexual contact and abusive sexual contact, when we look at the definition for sexual contact, someone made mention, I think it was Mr. Cassara who mentioned a case where someone was charged with abusive sexual contact for kissing someone. We have to all wonder do we really think that deserves to be prosecuted under Article 120? Should that really be a sex offense that someone has to register for the rest of their life? And if not, then we might say, well, tightening up that definition – because the danger is when we have criminal statute that's too broad But I think when any trial practitioners read the definition that says, you know, touching any body part with an intent to gratify your sexual desires, I mean, we can think of hypotheticals where it's absurd. But if the absurdity can be removed from the definition then I think it adds respect to the law.

Mr. William Cassara (Aug 7, pp. 249-52): I have had cases in which a drunken slap on the backside of a female has been charged as an aggravated or as a sexual assault under the touching any body part of a person with the intent to arouse or gratify the sexual desires. Respectfully, I don't know what Congress' full intent was, or what the state's intent is with regards to sex offender registrations. I don't think it is to put that individual on the sex offender registry. And I have seen one case recently in which my client was charged with a sexual assault for kissing a woman against her will to gratify his lust and sexual desires. That is my biggest concern with the new Article 120.

B. Proposed Solutions

Major Frank Kostik (Sept 19, p. 173): The definition of "sex act" should be amended to be consistent with the Federal Code. . . . The change would eliminate potential

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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.

Mr. William Cassara (Aug 7, p. 303): Currently, when a servicemember is convicted in a court-martial, there is a list of qualifying offenses And perhaps the panel would want to look at whether we want to change that methodology of reporting to exclude the kiss, the drunken slap.

C. Alternate Views

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XI. Indecent acts not included in 2012 version of Article 120

A. Explanation of Issue

Lieutenant Colonel Alex Pickands (Sept 19, pp. 97-98): And the first is that indecent acts disappeared from the current statute. Not sure why that is. I suspect it was an oversight. Article 120 had indecent acts in it, and it was imported from Article 134, and then it has vanished.

Dean Lisa M. Schenck (Ohio State J. Crim L., p. 451): The 2012 version, however, inexplicably deleted the prohibited “indecent” conduct from Article 120, which is even more problematic due to the removal of “Indecent Acts with Another” from Article 134 in 2007.

B. Proposed Solutions

Dean Lisa M. Schenck (Ohio State J. Crim L., p. 451): Adding the offense of “Indecent Acts” into Article 120 (as reflected in the proposed legislation in the Appendix to this article) would be more beneficial for the government. The 2007 offense of “Indecent Act” in Article 120(k) along with the definition of the term “indecent conduct” in Article 120(t)(12) should be returned to the UCMJ as a statutory catch-all offense.

C. Alternate Views

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XII. Recommendations against wholesale statutory changes.

Captain Christian Reismeier (Aug 7, p. 243): Speaking with trial practitioners, at least within the Navy, there’s a sense from prosecutors that they would prefer some relative stability and the ability to work through the existing statute to find applications that work

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without, again, altering the fundamentals of the statute. Defense counsel would generally prefer some greater clarity in some of the definitions and perhaps some narrowing of the scope of some of the provisions they believe reach conduct that may be better considered as hazing or battery.

(p. 273): But I think I would say this: the least best option is probably having a fourth version of the statute somehow in operation. The reality is that there may be some adjustments that need to be made, but my suggestion would be that the best way to approach that is to figure out what the least disruptive method of the adjustment would be before coming in with a statutory fix. In other words something that could be fixed through case law should be fixed through case law . . . something that could be addressed through jury instructions should be addressed through jury instructions. Something that should be addressed through presidential action or drafter's analysis should be done that way.

The statutory change is the one that's most likely to be the most disruptive and the most difficult to undo if it doesn't work out quite the way that one would hope.

(p. 293-94): So we're literally having discussion (sic) about whether to change something where the offenses are really just now beginning to get into the criminal pipeline, and we're already saying, well, okay, so how should we change it? I think it's very difficult to say this is how we ought to change it without first seeing what it is that we're changing and then also figure out is that the best way to actually change it The judges just would like the chance to work through all of this.

(p. 294): So I guess I just start from the point of view that I think we want stability.

Mr. William Cassara (Aug 7th p. 253): In the case that I did last week, another one of my clients was also charged with a sexual assault. Again, he was acquitted, but he was charged three different ways under three alternate theories as to the sexual assault allegation. That has created mass confusion amongst panels, and even amongst military judges.

Colonel Timothy Grammel (Aug 7, p. 265): As Representative Holtzman mentioned in the last segment, it can drive a prosecutor crazy when you keep changing the criminal statute. I'll say if there are changes that are necessary that need to be made, then they need to be made. But just realize the consequences for the trial practitioners, and minimize the number of changes if possible.

(p. 281): It sounds like, from hearing your earlier discussions, the process is going to be a longer process anyhow. So this will contribute to this is to let the statute play out the way it is now and see whether Congress agrees with the way the military has interpreted the statute.

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(p. 281): I don't think the scheme is so broken right now that we need to throw it all out and come up with something totally different and really drive all the trial practitioners crazy. I think you can tweak it without doing that.

Colonel Gary Jackson (Aug 7, p. 270): And I will tell you that I've had cases even now, as a general court-martial convening authority SJA, where the practitioners in the field, they are still not getting it right. They are still charging what should be charged, for example, under the first version of Article 120. They're charging either under the second version or the third version. So it gets more – it just creates more complexity.

Ms. Theresa Scalzo (Sept 19, p. 15): I have yet to hear about a sexual assault allegation that could not be charged under most recent (sic) law due to the inadequacy of the law. The law might be complicated and poorly worded, but we have not seen cases that should have been charged that could not be charged due to the law itself.

Mr. E.J. O'Brien (Sept 19, p. 21): Finally, although Congress and appellate courts can correct the trial judiciary's implementation of statute (sic), the fastest way to make the correction is for the President to act by Executive Order, and the Executive Order will originate with the Joint Service Committee which, of course, is within the Department of Defense.

(p. 43): I agree with the idea that you want to give the law some stability, and not change the statute itself. However, you can probably tell from my submission that I don't agree with the implementation by the trial judiciary. I think they've got it wrong, and I think it creates some gaps and some dangers.

Mr. Ronald White (Sept 19, p. 40): So I agree with Mr. O'Brien that the quickest way to make this happen in theory is to have that Joint Service Committee produced, DoD General Counsel reviewed product, that goes to the President and becomes the Manual for Courts-Martial.

That said, I am sympathetic to the fact that it's been over two years now and we still don't have any guidance, so is it more efficient to, perhaps, go back to Congress? I worry about the risks inherent in that, but I would rather see the Presidential guidance. I think it's easier doing that.

Prof Victor Hansen (Sept 19, p. 49): I would agree that there needs to be more clarification, that it could best be accomplished by Executive Order. But I think I am also of the view that, I believe, Mr. Sullivan expressed in the hearings on August 7th, that generally speaking, it's probably time to let the statute work its way through, and let the appellate courts work their way through the statute, generally.

I would not be in favor - I don't see a need, nor would I be in favor of drastic changes or amendments. I think clarifications through Presidential action, through Executive Order might be useful, but I don't see a need for drastic changes.

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Lieutenant Commander Ryan Stormer (Sept 19, p. 110): And in my personal opinion, is that keeping the continuity, and I think this was echoed earlier in the conversations already by a lot of the panel members, is that keeping the continuity with the current statute understanding that the law can and will change under common law, appellate case law, and those things, that would be the most beneficial to the trial practitioners

Lieutenant Colonel Julie Pitvorec (Sept. 19, p. 162): 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.

(p. 203): 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.

Colonel Mike Lewis (Sept 19, p. 365): So rather than making wholesale changes that's going to give us a fourth statutory scheme to further confuse the issue, I'm suggesting that we let the dust settle and only fix those areas where it's very clear that there's a gap in the law.

Mr. John Wilkinson (Aug. 7, p. 161): The UCMJ Article 120 is a pretty comprehensive code section, and it covers a lot of these areas that we have talked about that many of the states cover in various and different ways. And so it does cover a good number of these things. But, again, the tool is only going to be as good or as useful as the person using it and who has the skill to use it. So we really think that implementation piece is probably the more important piece to the code section piece.