

# **SUMMARY OF PRESENTER COMMENTS**

## **WHETHER ARTICLE 120 SHOULD BE AMENDED TO BIFURCATE PENETRATIVE & NON-PENETRATIVE OFFENSES**

### **I. Bifurcation is necessary for clarity**

**Colonel Gary Jackson (Aug 7, p. 280):** I think it would help if we were to bifurcate the penetrating offenses away from the non-penetrating offenses. I don't know whether or not you all have looked at the Manual for Court-Martial and how Article 120 is laid out, but it has, essentially, all the offenses, all the sexual offenses . . . you have one article that talks about rape and sexual assault that involves obviously a sexual act. But then you have the same article talking about abusive sexual conduct, which involves sexual conduct as opposed to a sexual act. And you have to keep running back and forth, back and forth to the particular definitions of sexual act and sexual conduct, trying to apply it to the alleged facts to make a determination whether or not you can prescribe it.

**(p. 281):** I think it would help, personally, I think it would help practitioners if you were to bifurcate the non-penetrating offenses out of Article 120 and put it under some other article. That way, I think folks will be more attuned to know that if they're talking about rape, as rape is traditionally looked upon, (sic) a penetrating offense, they're going to go to that particular article, as opposed to trying to somehow squeeze it into some other type of theory, I guess.

**(p. 297):** I think it becomes much more confusing if everything is contained under one particular article, as opposed to breaking it out and perhaps even creating an Article 120(d), for example. So that way, the practitioners know that when they're dealing with a penetrating type offense, they're going to go to one particular article. And then when they're dealing with a non-penetrative type of offense, they're going to go to an Article 120(d), for example. I think it's less confusing.

### **II. Bifurcation is not necessary**

**Mr. Dwight Sullivan (Aug 7, p. 298):** I would caution against any statutory change that isn't absolutely necessary . . . (L)et's hypothesize that Congress were to change it to create a new 120(d). Then you're going to be in a situation again where it's necessary for the prosecution to prove beyond a reasonable doubt, in that scenario, for a 120(d) prosecution that the act occurred on or after the date of enactment of 120(d) versus occurring, versus it being a 120 or a 120(d) under the previous statute . . . So, again, I would caution against any statutory change that isn't viewed as absolutely necessary, and I would say that a reorganization of the statute isn't necessary. That's something to deal with through training.

**Captain Christian Reismeier (Aug 7, p. 300):** I would agree with Mr. Sullivan. I mean, in a perfect world, it might be nice to cabin these some so that people don't have to sift through so much language to find out which one is theirs. But at the end of the day, they're going to have to read it all whether it's separated out or not because they still have to figure out which version it is.

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**Colonel Timothy Grammel (Aug 7, p. 301):** Yes, I would advise against separating it out, unless it had some kind of significant impact. If we're looking at conduct that we didn't think should be reported to be registered in a sex offender registration or something like that, we got to pull it out that had some impact besides what label we put on it, then that would be fine. But I don't think we're looking at that . . . but I don't think the benefit of pulling it out outweighs the danger of confusing everyone.

**(p. 119):** I think the only circumstance which rests well with me in terms of criminalizing explicitly is that training cadre situation. Outside of that, the fact that I'm more senior to a person that I'm in a relationship with doesn't make it more likely that I will inflict physical force or violence upon them. I don't know that I would characterize those relationships in any respect as a sexual assault.