



# Subcommittee Report to the Judicial Proceedings Panel

## Article 120 of the UCMJ

# JPP Subcommittee Members

Judge Barbara Jones

Prof Lee Schinasi

Hon. Elizabeth Holtzman

Dean Lisa Schenck

Dean Michelle Anderson

Prof Stephen Schulhofer

Ms. Lisa Friel

BGen (Ret) James Schwenk

Ms. Laurie Kepros

Ms. Jill Wine-Banks

Maj Gen (Ret) Margaret Woodward

# Introduction

Mission: Analyze and answer 17 questions referred by the JPP regarding definitions and terms in Article 120 and coercive sexual offenses and sexual offenses involving abuse of authority

Result:

- 7 recommendations for amendments to Article 120 or the Manual for Courts-Martial
- 10 recommendations for no change

# Assessment Methodology

- Met 7 times between April - Oct 2015
- 40+ presenters:
  - Retired military trial judges
  - Senior prosecutors and defense counsel
  - Appellate government and defense counsel
  - Civilian prosecutors and defense counsel
  - General and flag officers in command at the services' entry-level training installations
  - Staff judge advocates to training commanding officers
  - Chair of the Joint Services Committee at the time the current version of Article 120 was drafted and submitted to Congress
  - Director of Law Enforcement Policy for DoD
  - Member of Congress and one of her constituents who was a victim of sexual misconduct during her entry-level military training
- Considered 100+ written sources

# Subcommittee Deliberations

- Subcommittee's conclusions/recommendations based on information received from witnesses, written sources & document submissions, and discussions and deliberations between Subcommittee members
- Careful to ensure conclusions and recommendations addressed specific issues referred by the JPP
- Alternate views on issues included in Subcommittee's report

# Conclusions and Recommendations

Subcommittee conclusions & recommendations are presented in the following areas:

- Definitions and terms in Article 120 of the UCMJ, Defenses, and the Offense of Indecent Acts  
**(JPP Issues #1 –5, 7-11)**
- Coercive sexual offenses or sexual offenses involving abuse of authority  
**(JPP Issues #6, 12 – 17)**

# ***(Article 120 Definitions and Terms, Defenses, and the Offense of Indecent Acts)***

- 4 recommendations for statutory amendments
- 1 recommendation for change in the Manual for Courts-Martial
- 5 recommendations for no change

# *Terms and Definitions in Article 120*

Issues addressing:

- The definition of “bodily harm” (Issue 5)
- The definition of “consent” (Issue 1)
- The definition of “fear” (Issue 7)
- The definition of “force” (Issue 8)
- The accused’s mens rea. (Issue 10)

## Issue 5: *Does the definition of “bodily harm” require clarification?*

A majority of presenters before the Subcommittee recommended against changing “bodily harm” as a basis for liability in Article 120(b)(1)(B) and recommended against changing its definition in Article 120(g)(3).

## Issue 5: *Does the definition of “bodily harm” require clarification?*

Conclusion: “Bodily harm” as currently defined includes both its ordinary connotation of physical injury and, in addition, any sexual act or sexual contact without consent, even when there is no injury beyond that of the unconsented contact itself. Practitioners understand this dual meaning, but it can be confusing for court-martial members and for the ordinary service personnel for whom Article 120 provides a benchmark in training and education. Because the present definition is confusing for those audiences, it should be amended.

## Issue 5: *Does the definition of “bodily harm” require clarification?*

Recommendation: Change the language of 120(b)(1)(B) regarding bodily harm as follows:



Adobe Acrobat  
Document

## Issue 1: *Is the current definition of consent unclear or ambiguous?*

A majority of presenters advocated for modification to the definition of consent, saying it was unclear.

Conclusion: The definition of consent is confusing in some areas. It retains vestiges of outdated rape laws and could be interpreted to require a victim to physically resist an attacker before a fact-finder can conclude there was a lack of consent.

## **Issue 1: *Is the current definition of consent unclear or ambiguous?***

The Subcommittee's recommended changes to the definition of consent would retain most of the current definition, but remove repetitive and contradictory language about resistance.

A lack of resistance would still be relevant for the fact-finder to consider along with all the surrounding circumstances, but the proposed change clarifies that a lack of resistance alone does not constitute consent.

# Issue 1: *Is the current definition of consent unclear or ambiguous?*

Recommendation: Change the definition in current Article 120(g)(8) – renumbered to Article 120(g)(7) – to read:



Adobe Acrobat  
Document

## **Issue 7: How should fear be defined to acknowledge both subjective and objective factors?**

A majority of presenters before the Subcommittee recommended no changes to Article 120(g)(7), at least in the context of prosecutions under Articles 120(a)(3), 120(b)(1)(A), 120(c), and 120(d), when the accused has been charged with placing the victim in "fear."

Conclusion: No change is necessary to the current requirements that the fear of the victim be both a personal, subjective fear, and also one that is objectively reasonable, as specified by current Article 120(g)(7).

## Issue 8: Is the definition of “force” too narrow?

A majority of presenters before the Subcommittee recommended no change to the definition of force under Article 120(g)(5).

Conclusion: In light of the recommended amendments to the statutory definition of consent in Issue 1, no modification to the Article 120(g)(5) definition of force is recommended.

**Issue 10: *Should the accused's knowledge of a victim's capacity to consent be a required element of sexual assault?***

A majority of presenters before the Subcommittee recommended no changes be made to Article 120(b)(2) or 120(b)(3), which require the government to prove both (1) the victim's incapacity to consent, and (2) that the accused knew or reasonably should have known of that incapacity.

**Conclusion:** The government should continue to be required to prove (1) that the victim was incapable of consenting, and (2) that the accused knew or reasonably should have known of that incapacity.

# ***Terms and Definitions in Article 120, Defenses, and the Offense of Indecent Acts.***

Issues addressing:

- Defenses: Consent and mistake of fact as to consent (Issue 2)
- The definition of “incapable of consenting” (Issue 3)
- Administration of a drug or intoxicant (Issue 4)
- The definitions of “sexual act” and “sexual contact” (Issue 9)
- The offense of indecent acts (Issue 11)

**Issue 2: *Should the statute define defenses relying on the victim's consent or the accused's mistake of fact as to consent in sexual assault cases?***

A majority of presenters requested clarification regarding the defense's ability to raise the issue of consent and the defense of mistake of fact as to consent.

Conclusion: There should be clarification in the Manual for Courts-Martial so that both consent (as an attack on the government's proof) and mistake of fact as to consent (as a clearly delineated defense) may be raised in any case where they are relevant.

**Issue 2: *Should the statute define defenses relying on the victim's consent or the accused's mistake of fact as to consent in sexual assault cases?***

Recommendation: The Manual for Courts-Martial should clearly state that consent (as an attack on the government's proof) and mistake of fact as to consent (as a clearly delineated defense) may be raised in any case where they are relevant.

### **Issue 3: Should the statute define “incapable of consenting?”**

A majority of presenters stated there is a gap in the statute and a need for a definition of this term, which appears in Article 120(b)(3) and arises in many court-martial trials.

Conclusion: Practitioners, including military judges, prosecutors, defense counsel and appellate courts, panel members, and service members in training, need a definition for this important term that is an issue at many sexual assault and abusive sexual contact prosecutions under Articles 120(b) and 120(d).

## Issue 3: *Should the statute define “incapable of consenting?”*

Recommendation: Adopt a definition of “incapable of consenting” as follows:



Adobe Acrobat  
Document

**Issue 4: Is the definition concerning the accused's  
“administration of a drug or intoxicant” overbroad?**

Current language of Article 120(a)(5):

Any person subject to this chapter who commits a sexual act upon another person by—

(5) administering to that other person by force or threat of force, or without the knowledge or consent of that person, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of that other person to appraise or control conduct,

is guilty of rape and shall be punished as a court-martial may direct.

**Issue 4: *Is the definition concerning the accused's "administration of a drug or intoxicant" overbroad?***

A majority of presenters recommended no changes on this issue, which is set forth in Article 120(a)(5). The Subcommittee received no testimony this section of Article 120 has caused problems during trials or been the subject of appellate litigation.

Conclusion: The definition concerning the accused's "administration of a drug or intoxicant" under Article 120(a)(5) is not overbroad. The Subcommittee recommends no changes on this issue.

## **Issue 9: Are the definitions of “sexual act” and “sexual contact” too narrow, or are they overly broad?**

A majority of presenters before the Subcommittee recommended some modification of the definitions of "sexual act" and "sexual contact" under Article 120(g)(1)-(2).

Conclusion: The definitions of "sexual act" and "sexual contact" require clarification. The definition of "sexual act" should be modified so that penetration and contact are addressed in separate sub-sections, and the definition of "sexual contact" should include the use of an object.

**Issue 9: Are the definitions of “sexual act” and “sexual contact” too narrow, or are they overly broad?**

Recommendation: Change the definition of sexual act to:



Adobe Acrobat  
Document

**Issue 9: Are the definitions of “sexual act” and “sexual contact” too narrow, or are they overly broad?**

Recommendation: Change the definition of sexual contact to:



Adobe Acrobat  
Document

**Issue 11: *Should the offense of “indecent act” be added to the UCMJ as an enumerated offense?***

A majority of presenters before the Subcommittee recommended this offense be added back into the Uniform Code of Military Justice. An Executive Order is presently pending that would add “indecent conduct” as an offense under Article 134, UCMJ.

Conclusion: There should not be an enumerated offense criminalizing indecent acts under Article 120, UCMJ. The President has chosen to add this offense back into Article 134, and the Subcommittee takes no position on that proposed offense.

# *Coercive Sexual Offenses and Sexual Offenses Involving the Abuse of Authority*

- 2 issues addressed with 1 recommendation for statutory amendment.
- 5 recommendations for no change.

# *Coercive Sexual Offenses and Sexual Offenses Involving the Abuse of Authority*

Issues addressing:

- The definition of “threatening wrongful action” (Issue 6)
- The current practice of charging inappropriate relationships (Issue 12)
- The ability to effectively charge coercive sexual relationships or those involving abuse of authority under Article 120 (Issue 13)
- The definition of “threatening or placing that other person in fear.” (Issue 14)
- A new provision under Article 120 to specifically address coercive sexual relationships or those involving abuse of authority (Issue 15)
- Relationships between basic training instructors and trainees as per se illegal or strict liability offenses under Article 120 (Issue 16)
- Should coercive sexual relationships currently charged under other articles of the UCMJ be added to DoD’s list of offenses that trigger sex offender registration (Issue 17)

## Issue 6: *Is the definition of “threatening wrongful action” ambiguous or too narrow?*

A majority of presenters recommended some modification to this definition, which they stated was unclear in cases in which an accused is charged with violating Article 120(b)(1)(A) or 120(d) by using his or her position of authority or rank to secure compliance by a victim.

Conclusion: The definition of “threatening wrongful action” is not so ambiguous or narrow as to recommend a change to the definition.

## **Issue 6: Is the definition of “threatening wrongful action” ambiguous or too narrow?**

Recommendation: No changes to the definition, but the Subcommittee believes the concerns practitioners expressed about that this definition being too narrow to capture offenses arising in the entry-level training environment can and should be addressed. The Subcommittee believes the best way to accomplish that is its response to Issue 15 by recommending a new subsection under Article 120(b)(1) for sexual assaults and abusive sexual contact where an accused has abused his or her position, rank, or authority to secure compliance by the other person.

**Issue 12: *Is the current practice of charging inappropriate relationships or maltreatment under articles of the UCMJ other than Article 120 appropriate and effective when sexual contact is involved?***

A majority of presenters before the Subcommittee stated the current practice of charging inappropriate sexual relationships or maltreatment under Articles 92 or 93 can be appropriate and effective when sexual conduct is involved.

Conclusion: The Subcommittee determined the current practice of charging inappropriate relationships or maltreatment under articles of the UCMJ other than Article 120 can be appropriate and effective when sexual contact is involved. No change recommended on this issue.

**Issue 13: Does the 2012 version of the UCMJ afford prosecutors the ability to effectively charge coercive sexual relationships or those involving abuse of authority under Article 120?**

A majority of presenters before the Subcommittee stated the 2012 version of the UCMJ provides military prosecutors the ability to effectively charge coercive sexual acts or contacts involving the abuse of rank or authority.

Conclusion: Although the 2012 version of the UCMJ affords prosecutors the ability to effectively charge some types of coercive sexual misconduct or sexual misconduct involving the abuse of authority, some offenses in the entry-level training environment involve subtle forms of coercion not easily captured under the current statutory framework.

**Issue 13: Does the 2012 version of the UCMJ afford prosecutors the ability to effectively charge coercive sexual relationships or those involving abuse of authority under Article 120?**

Recommendation: Adopt a new sub-section, Article 120(b)(1)(E), that would create an additional theory of liability for sexual assault or abusive sexual contact in which an accused has used his or her position, rank, or authority to secure compliance by the other person.



Adobe Acrobat  
Document

**Issue 14: *Should the definition of “threatening or placing that other person in fear” be amended to ensure that coercive sexual relationships or those involving abuse of authority are covered under an existing Article 120 provision?***

A majority of presenters before the Subcommittee recommended the definition of “threatening or placing that other person in fear” be amended to ensure that coercive sexual relationships or those involving abuse of authority are better covered under an existing Article 120 provision.

Conclusion: If the proposed Article 120(b)(1)(E) is adopted (see Issues 13 and 15), the definition of threatening or placing another person in fear does not need to be amended with respect to coercive sexual misconduct.

**Issue 15: *Should a new provision be added under Article 120 to specifically address coercive sexual relationships or those involving abuse of authority?***

A majority of presenters before the Subcommittee recommended against adopting a new provision under Article 120 to specifically address coercive sexual relationships or those involving abuse of authority.

Conclusion: Although practitioners testified that Article 120(b)(1)(A) is used to charge coercive sexual misconduct offenses involving the abuse of authority, the Subcommittee found that numerous fact-patterns—especially those arising in the entry-level training environment between instructors and recruits—have not been easily captured by this theory of liability.

**Issue 15: *Should a new provision be added under Article 120 to specifically address coercive sexual relationships or those involving abuse of authority?***

Recommendation: As stated in Issue 13, adopt a new subsection, Article 120(b)(1)(E) to address sexual assaults and abusive sexual contact where an accused has used his or her position, rank, or authority to secure compliance by the other person.



Adobe Acrobat  
Document

**Issue 16: *Should sexual relationships between basic training instructors and trainees be treated as per se illegal or strict liability offenses under Article 120?***

A majority of presenters before the Subcommittee did not recommend that sexual relationships between training instructors and trainees be treated as per se illegal or strict liability offenses under Article 120.

**Conclusion:** Consensual sexual relationships between basic training instructors and trainees should not be treated as a per se illegal or strict liability offenses under Article 120.

**Issue 17: *As an alternative to further amending Article 120, should coercive sexual relationships currently charged under other articles of the UCMJ be added to DoD's list of offenses that trigger sex offender registration?***

None of the presenters before the Subcommittee recommended adding any offenses charged under articles other than Article 120 to DoD's list of offenses that trigger sex offender registration.

**Conclusion:** Sexual relationships currently charged under other articles of the UCMJ, including Articles 92 and 93, should not be added to DoD's list of offenses that trigger sex offender registration.



# Questions/Discussion