January 8, 2016

From: Deputy Assistant Judge Advocate General (Criminal Law)
To: Judicial Proceedings Panel

Subj: COMMENTS ON THE REPORT OF THE SUBCOMMITTEE ON ARTICLE 120 OF THE UNIFORM CODE OF MILITARY JUSTICE

1. On December 14, 2015, the Judicial Proceedings Panel released its subcommittee report on Article 120 and requested public comment.

2. Navy has the following comments:

a) Issue #9: The proposed change to Article 120(g)(1)(C) "the penetration, however slight, of the vulva or penis or anus ~~or mouth~~ of another by any part of the body or by any object, with intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person."

The addition of "or penis" in this definition of "Sexual act" is inconsistent with the remainder of the definition. While such penetration is theoretically possible, we cannot conceive of a situation in which that penetration would relate to gratification of sexual desire – the cornerstone of sexual acts under Article 120, UCMJ. Additionally, we submit that the proposed amendment to Article 120(g)(2) ("sexual contact"), to clarify that "touching, or causing another person to touch…the vulva, penis, scrotum…" adequately contemplates any offense that the proposed change to "sexual act" could cover. Despite the subcommittee's stated concern that certain offenses could be converted into sex crime acts when they were in fact hazing or battery-type offenses, the proposed addition of "or penis" falls squarely into this category – if it were possible to penetrate the penis without having 'sexual contact" with said penis, such an act would not be a "sex" crime.

b) Issue #15: The proposed change to Article 120 inserting (b)(1)(E) "by using position, rank, or authority to secure compliance by the other person:"

We do not understand the addition of (b)(1)(E) to offer a workable prosecution option to offenses where position, rank or authority are used to overcome consent and commit a sexual act. As drafted this proposal introduces a novel concept in the arena of sexual assault prosecution - "secure compliance" – which is not defined by the subcommittee and seemingly has no history outside the realm of regulatory compliance. We believe this will inevitably lead to either: 1) confusion – members not understanding the relationship between "use of rank to secure compliance" and "consent" especially in cases where the use of rank was to gain a benefit for the "victim," and consent was actually or apparently given; or 2) lack of use by prosecutors, because other avenues of

charging offer greater likelihood of conviction. In the unlikely event that an offender uses precise words of authority to order compliance existing statutes are sufficient to prosecute; in cases where compliance is in response to a threat, it would be appropriate to charge under (b)(1)(A) threatening or placing in fear; in cases where compliance was in response to a request, then prosecution under existing fraternization, general order violations, or other existing offenses, which have an appellate track record, may be appropriate.

c) Amendments not linked to those recommended by the Military Justice Review Group (MJRG).

The recent MJRG proposal, which includes recommendations regarding Article 120, has been submitted to congress as a legislative proposition. We believe any and all changes to Article 120, UCMJ, should be consolidated into a single proposal that is not legally objectionable and allows for the development of case law, appellate review and familiarity by practitioners. The subcommittee recommendations offer further modifications to Article 120 changes proposed by MJRG, and appear to be on a separate and distinct timeline from the MJRG proposal. We believe this will lead to confusion at various stages of practice.

3. If you have any questions regarding this case, my POC is LCDR Stuart Kirkby, who may be reached at [redacted] or [redacted].

W. A. RECORD