

## **Staff summary of reading materials for JPP members in preparation for Sept 19 public meeting**

### **A. Materials on Assessment of Article 120 of the UCMJ**

#### **1. Paragraph 45, Manual for Courts-Martial (2012), Article 120, UCMJ, Maximum Punishments (1 page).**

*Addresses concern posed by Prof. Schulhofer in his submission following the August 7 meeting regarding a lack of maximum punishments for offenses under Article 120 of the UCMJ.*

- Provides the maximum punishments authorized for offenses charged under Article 120, UCMJ (2012).
- Pursuant to Articles 36 and 56, UCMJ, Congress provided the President with authority to prescribe pre and post-trial rules, and to establish maximum punishments.
- Article 120, UCMJ, took effect on June 28, 2012, and the maximum punishments for Article 120 were defined by the President, through Executive Order 13643, on May 15, 2013.

#### **2. Professor Victor Hansen, *Military Crimes and Defense Treatise*, Excerpt on Article 120 UCMJ (2013)(32 Pages).**

*Prof Hansen is participating by phone in the 0845-1000 session.*

- Provides historical overview of the codification of rape and sexual assault law in the military and changes that have taken place in recent years.
- Provides an in-depth analysis of the current statutory language of Article 120, UCMJ. The analysis is limited strictly to the statutory text, as the President has not yet prescribed the elements of the offense pursuant to Article 36, UCMJ.

#### **3. Ronald White, *The Redemptive Role of "Justification or Excuse" in Article 120(a) (2011), We Don't Need a New Statute; We Need New Implementation (20 Pages).***

*Mr. White is participating in the 0845-1000 session.*

- Prepared in preparation for the September 19 meeting of the Judicial Proceedings Panel.

#### **4. Ronet Bachman, Ph. D. and Raymond Paternoster, Ph. D, *A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come?*, J. of Crim. Law and Criminology (1993)(13 Pages).**

*Provides information on the success and impact of statutory reform to rape and sexual assault laws. While the article is somewhat dated, it has been cited in numerous law review articles, including most recently in 2013, and serves as a citing reference for more current empirical studies.*

- Attempts to provide a national accounting of the extent to which rape law reforms: (1) reduced the reluctance of victims to report; (2) increased the conviction rates for rape and sexual assault offenses; and (3) increased the probability that rape offenders who victimize acquaintances will be convicted of a sexually based offense.
- Provides a brief overview of the types of rape law reform and previous empirical studies.
- The authors ultimately conclude that statutory rape law reform has not had a very substantial effect on either victim behavior or actual practices in the criminal justice system. They found "no large increase" in the reporting of sexual assault offenses, and a very small increase in the likelihood that individuals who raped an acquaintance would be imprisoned.

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### **5. Major Ryan Oakley, *A Lifetime of Consequences: Registering Convicted Military Sex Offenders*, The Reporter (2013)(8 Pages).**

*Provides an overview of procedural requirements for both prosecutors and defense counsel following a conviction of a qualifying offense. The article also provides insight into how one determines whether a military offense constitutes an offense for sex offender registration purposes. However, the DoD's classification of offenses may not predict state registry requirements, as states have individual registration requirements based on their own determinations. Defense counsel must advise accused clients of state registry requirements.*

- Pursuant to the Sexual Offender Registration and Notification Act (SORNA), Military personnel convicted of a “qualifying” offense are required to register as a sex offender in the jurisdiction in which they reside. Under SORNA, a person is a sex offender when convicted of a sex offense.
- UCMJ offenses determined to qualify are incorporated into Department of Defense Instruction 1325.07 as qualifying offenses.
- This article provides the procedural framework for ensuring reporting requirements under SORNA are met. Specifically, the author details the individual responsibilities of defense counsel, government representatives, and the accused.

### **B. Materials on Abuse of Authority**

### **6. U.S. Department of Defense, *Report on Protections for Prospective Members and New Members of the Armed Forces During Entry-Level Processing and Training (May 2014)*(13 Pages).**

*Provides DoD and Service perspectives on the need for an additional provision under Article 120, UCMJ, to criminalize sexual relationships between a superior and a subordinate. Additionally, the article summarizes current regulations within the individual Services that address these issues.*

- Section 1741(d) of the FY14 NDAA required DoD to address whether a new UCMJ article is required to address violations of the Military Services’ policies protecting prospective members and new members of the military during entry-level training.
- After discussing various charging mechanisms currently available for circumstances in which new Service members are victimized by persons in a supervisory capacity, the DoD determined a new article is not necessary. The DoD found that “because the UCMJ already criminalizes conduct that violates the policy set out in 1741(a) . . . a new UCMJ article addressing such violations is not required.”
- Report also lists and discusses every service policy addressing prohibited relationships within each service.

### **7. *Proposed Revision to Model Penal Code, Section 213.2*, tentative draft by American Law Institute, April 30, 2014 (excerpt - 27 pages).**

*Provides insight into civilian jurisdiction criminalization of sexual relationships which are deemed to be coercive by virtue of an individual's position of authority.*

- Sets forth the elements in the proposed Model Penal Code revision of Section 213 for a felony offense in the third degree for engaging in sexual intercourse through coercion or imposition.
- Coercion includes threatening to accuse someone of an offense, expose negative information, or

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inflict substantial economic or financial harm. Coercion also includes situations in which the accused knows or recklessly disregards the risk that the other person is less than eighteen years of age or in a custodial institution.

- The commentary to this section discusses the need for additional statutory coverage for those individuals in a custodial institution because of the pervasive ability of correctional officers or others in positions of power to deploy more subtle threats and improper offers of special privileges in order to induce inmates to submit in the context of confinement.
- The author notes the potential for overreaching and abuse in these situations and the lack of a countervailing interest in allowing the parties to pursue a relationship.

### **8. Michal Buchhandler-Raphael, *Sexual Abuse of Power*, University of Florida Journal of Law and Public Policy (2010)(32 Pages).**

*Provides a broader perspective on whether coercive sexual relationships are an issue in civilian environments and whether such relationships have been criminalized.*

- Article's thesis is that different forms of sexual abuse of power can and should be treated as criminal conduct, and, in particular, as one subcategory of sexual offenses. Contends that all sexual abuses of power inflict similar harms stemming from the perpetrator's wrongful conduct, and therefore may justify criminalization. Specifically argues sexual abuses of power should be treated as an example of a nonconsensual sexual relationship.
- Proposes a doctrinal model that would enable criminalizing cases that typically lie outside the boundary of criminal sexual misconduct. In particular, the author contends his model will apply to cases that traditionally have not been viewed as criminal conduct, such as those occurring in the workplace or academic settings where victims are competent adults.
- Author challenges the current statutory definitions of "authority" and "consent." In particular, he argues that a definition of consent should be adopted that would capture the link common to all sexual abuses of power: that consent to sex is not obtained when it is induced by fears and pressures stemming from an abuse of power.
- In proposing a modified definition of consent, the author: (1) describes how sexual abuse of power is an example of harmful sexual conduct; (2) examines the problem of apparent consent and the current judicial interpretations of consent; and (3) compares and contrasts abuses of power by public officials and private employers to show these abuses share similar features and justify criminalization.