

Summary of reading materials for subcommittee members in preparation for April 9 meeting

1. Text of current version of Article 120, UCMJ (2012). (2 pages)

2. Department of the Army Pamphlet 27-9, Legal Services, Military Judges Benchbook (Excerpt-Article 120 Instructions) (53 pages)

- The instructions provided to the panel members prior to deliberation on a rape or sexual assault offenses. The instructions address issues such as elements of particular offenses, consent, lesser included offenses, and the affirmative defense of mistake of fact.

- Excerpt provided is fifty-three pages and only includes instructions regarding the 2012 Article 120, UCMJ.

3. Analysis of Crimes and Defenses 2012 UCMJ Article 120, effective 28 June 2012, Professor Jim Clark (9 pages)

- Describes the changes in Article 120 in 2007 and 2012 and explains the law as it exists today.

4. Sex Offenses Under Military Law: Will the Recent Changes in the Uniform Code of Military Justice (UCMJ) Re-traumatize Sexual Assault Survivors in the Courtroom?, OHIO STATE JOURNAL OF CRIMINAL LAW, 2014, COL (Ret) Lisa M. Schenck (48 pages)

- Reviews the reasons for and recent amendments to Article 120. Discusses problems with most recent 2012 statutory revision to Article 120 and provides recommendations for further statutory amendments.

5. The Redemptive Role of "Justification or Excuse" in Article 120(a) (2011), We Don't Need a New Statute; We Need New Implementation. Ronald White (17 Pages)

- Prepared in preparation for the September 19 meeting of the Judicial Proceedings Panel.
- Addresses the need for better implementation of the 2012 statute, focusing on the need for quicker implementation guidance for judges and practitioners and takes the position that the defenses of actual consent and mistake of fact as to consent are historically recognized.

6. The Article 120 Implementation Challenge: Avoiding Unintended Consequences and Unjust Outcomes. Edward O'Brien (13 pages)

- Prepared in preparation for the September 19 meeting of the Judicial Proceedings Panel.
- Opines that Article 120 does not need statutory changes; any problems with the statute can be fixed by Executive action in the form of amendments to the Manual for Courts-Martial carried out in concert with the Joint Service Committee.

7. Prospectus to revise the Model Penal Code, section 213, prepared by Prof Schulhofer, May 14, 2012 (16 pages).

- Provides questions and analysis that may be useful in analyzing Article 120 of the UCMJ.

8. Proposed Revision, Model Penal Code Section 213 (7 pages)

- Proposed revision to Model Penal Code Section 213, with definitions and offenses (rape and related offenses)

9. Comparison Chart: Article 120, UCMJ vs. Proposed Model Penal Code Section 213 (8 pages)

- A chart reflecting the similarities and differences between the proposed revisions to the Model Penal Code's Article 213 and the current Article 120, UCMJ.

10. Comments to the JPP, Professor Stephen Schulhofer (5 pages)

- Professor Schulhofer provided testimony regarding Article 120 at the August, 2014, JPP meeting and amplified his testimony with these additional written comments, addressing the issues of "force," the administration of intoxicants by an accused to a victim in order to facilitate a sexual crime, "bodily harm," the definition of when a victim is "incapable of consenting," "threatening wrongful action," and "consent."

11. Comments to the JPP, Colonel Gary Jackson, USAF (2 pages)

- Colonel Jackson provided testimony regarding Article 120 at the August, 2014, JPP meeting and amplified his testimony with these additional written comments, addressing the issues of threatening or placing a victim in fear, whether an accused must know or reasonably should know when a victim is incapable of consenting, and whether the defenses of mistake of fact and mistake of fact as to consent should be added back into the text of the statute.

12. *United States v. Schloff*, 2014 CCA LEXIS 894 (A.C.C.A. Dec. 16, 2014)(unpub. op.). (5 pages)

- Army Criminal Court of Appeals opinion finding that charge alleging that appellant committed abusive sexual contact by "touching the victim's breasts with a stethoscope," stated the offense of abusive sexual contact in violation of Article 120(d).

13. *United States v. Torres*, 2014 CCA LEXIS 641 (N-M.C.C.A. Aug. 28, 2014)(unpub. op.). (8 pages)

- Navy-Marine Court of Criminal Appeals opinion affirming conviction for sexual assault in violation of Article 120(b), and finding that government did meet its burden at trial of proving the victim was "incapable of consenting."

14. *United States v. Wylie*, 2012 CCA LEXIS 456 (N-M.C.C.A. Nov. 30, 2012)(unpub. op.). (8 pages)

- Navy-Marine Court of Criminal Appeals opinion affirming conviction of ship commander (O-5) for sexual assault of female subordinate by creating an implied threat to negatively affect her career.

15. JPP Article 120 deliberations chart (2 pages)

- Chart prepared for the JPP's deliberations showing the first 11 issues referred to the subcommittee and listing names of witnesses and arguments made on each issue.