

Article 120 – Issues with Statutory Text

ISSUE 4

ISSUE 5

ISSUE 3

ISSUE 6

ISSUE 7

ISSUE 1

Drug or Intoxicant Administration

Sexual Assault by Causing Harm

Definition of “Incapable of Consenting”

Definition of “Threatening Wrongful Action”

Components of “Fear”

Use of Consent throughout the Statute

Code Section

- 120(a)(5)

- 120(b)(1)(B)
- 120(d)
- 120(g)(3)

- 120(b)(3)

- 120(g)(7)

- 120(g)(7)

- 120(g)(8)

Issue

Provision of Article 120 does not require intoxicants be administered intentionally or for the purpose of impairing capacity.

Does “Bodily Harm” mean sexual intercourse “without consent” or a sexual act/contact with an additional offensive touching beyond that of penetration or sexual contact?

The definition of “Incapable of Consenting” is ambiguous and unclear.

“Threatening Wrongful Action” is too narrow or ambiguous.

Statute should not impose both objective and subjective component to “fear.”

Congressional intent regarding “consent” is unclear.

Supporting Change/Potential Solutions

- Amend/Clarify
- Prof Schulhofer

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- Prof Schulhofer
 - COL(R) Grammel
 - Lt Col Pitvorec
 - CAPT Reismeier

- Amend/Clarify
- Prof Schulhofer
 - Ms. Scalzo
 - LTC Pickands
 - LtCol Thielemann
 - Maj Rosenow
 - LCDR Stormer
 - MAJ Kostik

- Amend/Clarify
- Prof Schulhofer
 - LTC Pickands

- Amend/Clarify
- Dean Schenck
 - Col Jackson

- Amend/Clarify
- Mr. White
 - Mr. O’Brien
 - Prof Schulhofer

Counter Argument

- No specific counters other than general recommendations against any wholesale statutory changes

- Do Not Amend
- Ms. Scalzo

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- CAPT Crowe
 - LCDR Stormer

- No specific counters other than general recommendations against any wholesale statutory changes

- Do Not Amend
- Ms. Scalzo
 - LtCol Thielemann

Article 120 – Issues with Statutory Text

ISSUE 8

ISSUE 10

ISSUE 2

ISSUE 9

ISSUE 11

Definition of “Force”

Accused’s Perception of Victim Behavior/ Condition

Consent and Mistake of Fact as to Consent as Affirmative Defenses

Definition of Sexual Contact and Sexual Act

Indecent Acts

Code Section

- 120(g)(5)

- 120(b)(2)
- 120(b)(3)

- Affirmative Defenses

- 120(g)(2)

- N/A

Issue

“Force” is too narrowly defined.

Charging should not be based on the Accused’s perception of victim behavior or condition.

Current version of Article 120 removed affirmative defenses of consent and mistake of fact, which were previously expressly available. Unclear if defenses are still available.

Definition of Sexual Contact is:
(1) Too narrow since it does not include touching accomplished by object;
(2) Overbroad because it includes any touching, (directly or thru clothing)

Latest version of Article 120 deleted “Indecent Acts” from the statute.

Supporting Change/ Potential Solutions

- Amend Statute
- Prof Schulhofer

- Amend Statute
- Dean Schenck
 - Col Jackson

- Amend statute to clarify Congress intent on consent
- Amend statute to expressly provide for mistake of fact defense

- (1) Amend/Clarify
- Ms. Scalzo
- (2) Amend/Clarify
- COL(R) Grammel
 - MAJ Kostik

- Amend Statute
- Dean Schenck
 - LTC Pickands

Counter Argument

- No specific counters other than general recommendations against any wholesale statutory changes

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- Exec Order Could clarify “consent”
- RCM 916(j)(3), “mistake of fact as to consent” still available
- Judge Benchbook currently instructs on both

- (1) & (2)
- Can be defined by Executive Order or case law
- (2) Revise DoD Instruction on reportable offenses

- No specific counters other than general recommendations against any wholesale statutory changes