1. Is the current definition of "consent" unclear or ambiguous?

A. Change: **A majority of presenters recommend some change**.

1. *Grammel*: April TR at 194-96. He stated some parts of the definition are contradictory; he would replace "freely given" with "voluntary;" he adds an explanation about types of conditions that do not constitute consent; he also removes terminology regarding a victim needing to resist the attack. See Tab 3 in the June read ahead materials.

2. *Thielemann:* May TR at 104-14. Agrees with Grammel's suggested changes.

3. *Pickands*: May TR at 114-24. Suggests consent should be "outwardly expressed in words or conduct;" suggests removing subparagraph (g)(8)(c) as being redundant with the other subparagraphs. See Tab 4 in the June read materials.

4. *Zimmermann:* May TR at 218-33. The term "competent person" is confusing and unclear and needs to be defined.

5. *Pitvorec:* May TR at 233-45. The definition of consent is internally inconsistent in some places; any terminology requiring "affirmative consent" is not realistic, and affirmative expressions of consent are not the way people interact socially.

6. *Walker:* May TR at 351-64. There needs to be clarification of what a competent person is; the definition provides "a sleeping, unconscious or incompetent person cannot consent," but what about a victim who is not sleeping or unconscious?

7. *Spilman*: May TR at 386-97. The present definition of consent tis too narrow; it needs to be broader.

B. No change

1. *Rosenow*: May TR at 124-35. He believes while the various concepts in the definition could be organized in a simpler manner, the statute provides service members, practitioners and finders of fact with a relatively concise statement of this fundamental legal term. See Tab 7 in the June read materials.

2. *Mr. Wilkinson (Æquitas)*: May TR at 378-86. He does not see a problem with the definition of consent; he stated in the cases he has tried over his career, even when it's not included as a specific element of an offense, he has never tried a sexual assault case where he didn't have to prove that there was no consent, so in his opinion it does not accomplish much to attempt to avoid the consent issue; he doesn't think the law is the problem, rather it is in the implementation of the law, which he describes as the way to appropriately treat victims when they report, and the way the cases are investigated, charged and prosecuted.

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. Change: **A majority of presenters recommend change, at least in clarifying that these two defenses are available and may be raised**.

1. *Grammel*: The statute should clearly state that, if raised, valid consent to the sexual conduct at issue is a defense to all of the offenses in Article 120; the statute should also state that mistake of fact as to consent is an available defense. See Tab 3 in the June read ahead materials.

2. *Ward*: April TR at 249. I am in favor of adding mistake of fact as to consent into the statute.

3. *Orr*: April TR at 190-91. It should be clarified whether the accused has the right to present the defense of consent or mistake of fact as to consent; right now the Benchbook is unclear as to how this issue should be treated.

4. *Pickands*: It would be helpful to list the offenses to which consent might serve as an affirmative defense, in other words, a situation that relieves the accused of guilt even when the prosecution proves all elements of the offense. Listing affirmative defenses in the statutory language would avoid a situation in which judges and practitioners do so ad hoc. See Tab 4 in the June read ahead materials.

5. *Zimmermann*: May TR at 230. Recommends both defenses be clearly stated in the statute, and the defense of mistake of fact as to consent in a sexual assault case be clearly articulated in Rule for Courts-Martial 916.

6. *Kostik*: May TR at 245-253. Recommends putting both defenses back in to the statute to remove any confusion. See Tab 5 in the June read ahead materials.

7. *Spilman*: May TR at 392. Both of these defenses are applicable in a prosecution under Article 120 based on Constitutional principles.

8. *Dean Schenck*: As noted at Tab 17 in your April read ahead materials, subcommittee member Dean Lisa Schenck recommends the defense of mistake of fact as to consent be added back into the statute.

B. No change.

1. *Rosenow*: No. The reference to "any applicable defenses available under this chapter or the Rules for Court-Martial [(R.C.M.)]" in Art. 120(f), U.C.M.J., incorporates each defense where it is raised by the evidence. See Tab 7 in the June read ahead materials.

2. *Pitvorec*: May TR at 234-45. Both defense's should be available in a sexual assault case and be reflected in Rule for Court-Martial 916.

3. *Walker*: May TR at 358. Believes Article 120(f), which states, “"An accused may raise any applicable defenses available under this chapter or the Rules for Courts-Martial," already provides that an accused may raise consent or mistake of fact as to consent.

3. Should the statute define "incapable of consenting?"

A. Change: **A large majority of presenters recommends the phrase "incapable of consenting" should be defined.**

1. *Grammel*: recommends the following definition: "The term 'incapable of consenting' means unable to appraise the nature of the sexual conduct at issue, physically decline participation in the sexual conduct at issue, or physically communicate unwillingness to engage in the sexual conduct at issue." See Tab 3 in the June read ahead materials.

2. *Maksym*: April TR at 200. I think that's a big anemia in the statute, and I think we have to go in and we have to fill it.

3. *Pickands*: Yes. The current Article 120 is devoid of any definition for "incapable of consenting," an element of sexual assault. This lack of definition renders an already challenging theory of culpability almost useless. By removing the 2007 definition of "substantially incapacitated," Congress left us adrift without a standard by which we can teach Soldiers how to behave, provide notice of criminal behavior, make appropriate charging decisions, and effectively prosecute those who exploit impaired or intoxicated individuals. See Tab 4 in the June read-ahead materials.

4. *Rosenow*: May TR at 121. Suggests the definition be, "The term 'incapable of consenting' means unable to appraise the nature of the sexual conduct at issue, decline participation in the sexual conduct at issue, or communicate unwillingness to engage in the sexual conduct at issue." See Tab 7 in the June read-ahead materials.

5. *Payne*: May TR at 336-47. She had a recent case where this became an issue and is presently on appeal; she has seen defense counsel argue that anything short of the victim being asleep or unconscious means the victim was not incapable of consenting; she suggests the definition contain, "A person does not need to be unconscious or asleep in order to be incapable of consenting to a sexual act due to impairment by a drug, intoxicant or other similar substance," or "A person's level of impairment does not need to rise to the level of unconsciousness or sleep in order for that person to be incapable of consenting to a sexual act due to impairment by a drug, intoxicant or other similar substance." See Tab 6 in the June read ahead materials.

6. *Zimmermann*: May TR at 231. The statute should define "incapable of consenting."

7. *Pitvorec*: May TR at 242-44. The statute should define "incapable of consenting." Agrees with Grammel's suggested definition.

8. *Kostik*: This should be defined. He agrees with Grammel's suggested definition, "The term 'incapable of consenting' means unable to appraise the nature of the sexual conduct at issue, physically decline participation in the sexual conduct at issue, or physically communicate

unwillingness to engage in the sexual conduct at issue." See Tab 5 in the June read ahead materials.

9. *Federico*: May TR at 253-68. We absolutely need the statute to define this term; this becomes an issue as early as the investigative stage, and without an adequate definition our cases end up devolving into a battle of experts giving opinions on the level of intoxication; the concept of "incapable of consenting" also comes into conflict with the training our panels get on alcohol intoxication as it relates to the ability to consent, and without a legal definition the judges cannot assist the panel members on this issue; I believe Colonel Grammel's suggested definition is workable.

10. *Walker*: May TR at 351-64. There needs to be clarification of what it means to be an incompetent person.

11. *Wilkinson*: May TR at 382-84. This is always a fact question, but it helps to give examples in a definition, such as, "less than 16 years old, mentally defective, mentally incapacitated, too intoxicated to appreciate the nature of the act, physically helpless, or unconscious."

12. *Professor Schulhofer*: As noted at Tab 17 in the April read ahead materials, subcommittee member Professor Schulhofer noted the phrase "incapable of consenting" is conclusory and meaningless. For instance, when is a person incapable? What is the test? He noted civilian courts have worked with similar language and managed convictions from time to time, but the ambiguity impedes the law's ability to communicate a normative message and may inhibit prosecution of deserving cases. The criteria of incapacity must be defined.

B. No change.

1. *Thielemann*: May TR at 110-11. He believes the question of whether the victim was incapable of consenting should be left up to the finder of fact to determine considering the totality of the evidence. If the subcommittee decides to recommend change, he agrees with Grammel's suggested change.

2. *Kirkby*: May TR at 135-41. He believes this question should be left up to the factfinder to determine based on the evidence presented.

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

A. Change.

1. *Grammel*: Believes this phrase to be overbroad. He suggests amending the definition by adding the requirement that the administration of a drug or intoxicant be done for the purpose of impairing the victim's capacity to express a lack of consent to the sexual act. See Tab 3 in the June read ahead materials.

2. *Professor Schulhofer*: As noted in the April read ahead materials, Professor Schulhofer stated that Article 120(a)(5), which criminalizes committing a sexual act by administering a drug or intoxicant to the victim and thereby substantially impairing the victim, may be overbroad as presently written; he recommends further requiring the government to prove the accused intentionally used a drug or intoxicant for the purpose of impairing the victim's capacity to consent.

B. No change: **A small majority of presenters recommend no change**.

1. *Pickands*: There is no indication from the field that, as worded, this provision is capturing conduct that is not exploitative or assaultive. I urge you not to add a specific intent requirement to this offense. If a person spiked a punch bowl at a party and then performed a sexual act on someone who had consumed that intoxicant and become impaired, that should be criminal. Adding a specific intent that the intoxicant be administered with the purpose of rendering people impaired and vulnerable to sexual acts would render this theory un-provable. Doing so would also require the offender to have specifically chosen the victim at the time of administering the substance, when it is just as likely that the offender is targeting a pool of individuals (e.g., anyone who partakes in the punch). See Tab 4 in the June read-ahead materials.

2. *Rosenow*: Recommendations to include a specific intent requirement (e.g., that administration of the drug or intoxicant be for the purpose of impairing a victim's capacity to consent) are misplaced. The discretion of commanders throughout the processing of a case alongside the consistent safety check of judge advocates, including within their Art. 34, U.C.M.J., pretrial advice, make it unlikely this subsection will be applied to situations where the administration is disconnected from the sexual act or sexual contact. Adding a specific intent requirement would, however, undermine prosecutions through this subsection in two obvious circumstances: (1) where the accused formed the intent to commit the offense only after recognizing how intoxicated the victim became and (2) where the accused ingests drugs or intoxicants at the same time and thereby raises the issue of voluntary intoxication. See R.C.M. 916(l)(2). See Tab 7 in the June read ahead materials.

3. *Spilman*: May TR at 387-88. This issue appears to address an incredibly narrow set of hypothetical facts that I don't believe requires preemptive congressional action.

5. Does the definition of "bodily harm" require clarification?

A. Change.

1. *Grammel*: Recommends removing, "including any nonconsensual sexual act or nonconsensual sexual contact" from the definition of bodily harm; he suggests creating a new offense under Article 120 of "wrongful sexual contact," which would capture sexual contact upon another person without that other person's permission. See Tab 3 in the June read ahead materials.

2. *Pitvorec*: As noted at Tab 17 in the April read ahead materials, LtCol Pitvorec noted at a prior JPP public meeting there is just no real definition of "bodily harm" that actually lends itself to be easily defended when it is used in terms of incapacitation or with alcohol. It is used in various different ways. And because of that, it is hard to articulate what exactly "bodily harm" means. So the term "bodily harm" needs to have a definition that is actually workable. This can be done by Executive Order in the Manual for Courts-Martial or it can be handled in the Benchbook instructions.

3. *Professor Schulhofer*: As noted at Tab 17 in the April read ahead materials, Professor Schulhofer noted that the concept of "bodily harm" is confusing as used in several places in Article 120 and should be more clearly defined; it should serve to differentiate more serious cases from those in which there is no injury or threat of injury beyond the harm of unwanted penetration itself. Bodily harm as currently defined in the UCMJ ("any offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact") conflicts with the Model Penal Code's definition of "physical pain, illness or any impairment of physical condition."

B. No change. **A small majority of presenters recommend no change**.

1. *Pickands*: "Bodily harm" is well defined through previous versions of Article 120 and a long history as an element of Article 128 assault. I have myself had cases in which the victim was positioned, unclothed, such that the offender penetrated her without having to adjust clothing, bedding, or her body, and without having to use force. Without being able to use the sexual act as the bodily harm, this would not be prosecutable as a sexual assault. This definition also helps in cases of poor or old memories. I have had numerous cases in which the victim remembers being penetrated, but not the details of any physical contact before the penetration. See Tab 4 in the June read-ahead materials.

2. *Thielemann*: May TR at 111-13. Recommends leaving this unchanged because it allows the government to capture acts that are non-consensual and also the scenario where consent is withdrawn.

3. *Rosenow*: This definition accurately captures the legal term and allows prosecutors to criminalize nonconsensual sexual acts and sexual contacts even in situations where the act or contact constitutes the offensive touching. See Tab 7 in the June read ahead materials.

4. *Spilman*: May TR at 388. This issue involves whether nonconsensual sexual activity constitutes bodily harm under the statute. I believe that it's clear that Congress intended to define nonconsensual sexual activity as bodily harm and that this definition is uncontroversial.

5. *Walker*: May TR at 359. This allows the government to charge the bodily harm as the act, and this is useful in cases in which the victim does not have a clear memory of what happened due to impairment by drugs or alcohol.

6. Is the definition of "threatening wrongful action" ambiguous or too narrow?

A. Change.

1. *Pickands*: I actually believe it is too broad; at the JPP 7 May meeting, I caused some consternation with a suggestion that the words "physical or violent" be inserted to qualify "action contemplated by the communication or action." I reiterate that suggestion here. The effect would be to strip non-violent threats out of the sexual assault arena; I am purist; I believe we should reserve the most severe offenses and punishments for those who (a) violate a person's physical integrity (their body) and (b) render ineffective a person's personal autonomy (their ability to decide what happens to their body). Force, violence, threatening coercion, and incompetence – all of these have violence at their core. The victim is compelled to participate, actively or passively, with the sexual conduct. They cannot, or reasonably do not, have the opportunity to escape or avoid the conduct. Economic harms should be addressed elsewhere outside of Article 120, if at all. See Tab 4 in the June read ahead materials.

2. *Spilman*: May TR at 389. I believe that the definition is incredibly broad and presents a uniquely factual question: Was the contemplated action wrongful? This is a question of fact to be determined based on the evidence, and I believe that the definition of wrongful action is adequate to address the issues of coercive sexual relationships and abuses of authority that aren't in these first 11 issues but I know are for the Subcommittee's consideration.

3. *Professor Schulhofer*: As noted at Tab 17 in the April read ahead materials, Professor Schulhofer states this term is either too ambiguous or too narrow in its application to an officer or NCO who seeks sexual favors in return for undeserved favorable treatment, or sexual favors absent which he will report an enlistee's infractions or mention factually accurate shortcomings in the enlistee's personnel report. He recommends it be clarified and these types of scenarios be treated as a coercive sexual crime.

B. No change.

1. *Grammel*: Believes the definition is sufficient. See Tab 3 in the June read ahead materials.

2. *Rosenow*: This definition is sufficiently broad to cover the types of sexual assaults and abusive sexual contacts falling outside of the other theories contained in Art. 120(b)(1), U.C.M.J. That said, a new sexual offense specifically targeting the inherently coercive senior-subordinate relationships unique to the military – especially during basic training – is highly recommended. See Tab 7 in the June read ahead materials.

7. How should fear be defined to acknowledge both subjective and objective factors?

A. Change.

1. *Orr*: April TR at 192. If the focus is on protecting the victim, the panel (jury) should not be permitted to superimpose their own judgment upon the victim, as long as they believe the victim believed he or she was in fear. In such cases, the accused should be responsible for the victim as they find it.

2. *Dean Schenck*: As noted at Tab 17 in the April read ahead materials, Dean Schenck recommends modifying the definition from a narrower reasonable person standard to a more subjective one that allows a more vulnerable victim's fear to be sufficient to satisfy the fear element.

B. No change. **A majority of presenters recommend no change**.

1. *Grammel*: "Fear" does not need to be defined to acknowledge subjective fear. Subjective fear would be relevant to show objective fear. See Tab 3 in the June read ahead materials.

2. *Pickands*: Fear is defined adequately as written. Subjective fear could be indicative of the reasonableness of a fear reaction to a particular threat, and is therefore already being introduced into court. Proof that a fear reaction would be reasonable under the circumstances is likewise relevant to infer the presence of a subjectively held fear. These forms of proof are available; there is no need for further adjustment. See Tab 4 in the June read ahead materials.

3. *Rosenow*: The "reasonable" requirement of the fear discussed in Art. 120(g)(7) is proper; a subjective but objectively unreasonable fear in a victim would, in cases where the defense was raised, make it impossible for the prosecution to prove beyond a reasonable doubt that the accused did not have an honest and reasonable mistake of fact as to consent. In the marginal case where the accused has knowledge of the victim's objectively unreasonable but subjective fear, the prosecution is free to allege sexual assault or abusive sexual contact by bodily harm as the sexual act or sexual contact would be nonconsensual. See Tab 7 in the June read ahead materials.

4. *Spilman*: May TR at 390. Requiring an objectively reasonable fear is most appropriate because it incorporates the defense of mistake of fact regarding whether the other person was actually in fear. It also avoids prosecuting someone for instilling a fear that is objectively unreasonable.

8. Is the definition of "force" too narrow?

A. Change.

1. *Payne*: I believe that the current definition of force should clarify that a victim is not required to exert any particular level of resistance in order for the accused to be found to have used unlawful force; she noted the case of *U.S. v. Soto*, ACM 38422 (A.F. Ct. Crim. App.,16 September 2014)(unpub. op.), in which the Air Force appellate court overturned a rape conviction because the government did not admit sufficient evidence to prove force, specifically, "trial counsel did not elicit sufficient evidence to indicate that the Appellant used force to overcome the pushing." The *Soto* court appears to have focused on what it perceived was a lack of resistance by the victim. Although this case was prosecuted under the 2007 version of Article 120, Major Payne believes the same result can happen under the present version of the statute. See Tab 6 in the June read ahead materials.

2. *Dean Schenck*: As noted at Tab 17 in the April read ahead materials, Dean Schenck recommends modifying the definition of force to include situations in which the accused suggests he/she has possession of a weapon; at this time the definition only covers situations in which a weapon is actually used.

B. No change. **A majority of presenters recommend no change**.

1. *Grammel*: The definition of "force" is not too narrow. Some of the concerns about situations that are not covered could be addressed by other theories of liability, such as "threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping." See Tab 3 in the June read ahead materials.

2. *Pickands*: At most, one could add "using or brandishing a weapon" to the first prong. For example, one could brandish a Taser, a weapon that would not be likely to cause grievous bodily harm or death, but would serve to compel submission even without completing the act using it. See Tab 4 in the June read ahead materials.

3. *Rosenow*: In my practice, offenses falling under the statute's definitions of rape and aggravated sexual contact are much less common than those qualifying as sexual assault and abusive sexual contact. When "force" is used, it is normally apparent and the language included within Art. 120(g)(5) and (6), U.C.M.J., adequate. See Tab 7 in the June read ahead materials.

4. *Spilman*: May TR at 390. I believe that the statutory definition of force is deliberately narrow and sensibly so when considered in context with the statutory definitions of bodily harm and of threatening or placing in fear.

9. Are the definitions of "sexual act" and "sexual contact" too narrow, or are they overly broad?

A. Change: **A majority of presenters recommend change**.

1. *Grammel*: The definitions of "sexual act" and "sexual contact" are too broad. For "sexual act," it could be adequately fixed by deleting two word – "or mouth" – from only subparagraph (B). For "sexual contact," it should be corrected by deleting the majority of subparagraph (B), which criminalizes touching any body part with any body part, including through the clothing, if it is accompanied by an intent to arouse or gratify the sexual desire of any person. That last phrase with the specific intent should be added to subparagraph (A). In addition, with this change, an ambiguity in the last sentence can be corrected, and "or by any object" can be added after "by any body part." See Tab 3 in the June read ahead materials.

2. *Rosenow*: May TR at 131. "Sexual act" is too broad and "sexual contact" is too narrow; remove "or mouth" from the definition of "sexual act," and add "or any object" to the definition of "sexual contact." See Tab 7 in the June read ahead materials.

3. *Kostik*: Agrees with Grammel's suggested changes, but would add to the definition of sexual contact that "Touching may be accomplished by any part of the body or by any object when the object is used to arouse or gratify the sexual desire of any person." See Tab 5 in the June read ahead materials.

4. *Federico*: May TR at 264. Agrees with Grammel that "or mouth" should be deleted from the definition of sexual act; also agrees with Grammel's suggested change to the definition of sexual contact.

5. *Stephens*: May TR at 332-36. Believes 120(g)(1)(B) and 120(g)(2)(B) – subparagraphs to the definitions of sexual act and sexual contact - are overly broad and should be removed.

6. *Walker*: May TR at 361. The definition of sexual contact is too narrow because it should include the use of an object.

7. *Spilman*: May TR at 390-91. Both definitions are too broad. Not every superficially sexual activity needs to be, is, or even should be chargeable as a sexual offense.

B. No change.

1. *Pickands*: "Sexual act" is correctly defined. Penetration of any orifice with the requisite intent should be a sexual crime. Perhaps, at most, limit the intent during penetration of the mouth to a sexual intent versus the intent to abuse, humiliate, or degrade. The definition of "sexual contact" is adequate, although I would add "or an object" to the last sentence. See Tab 4 in the June read ahead materials.

2. *Kirkby*: May TR at 139. Suggests waiting for CAAF's decision in *United States v. Schloff* to resolve the issue of whether sexual contact can be accomplished with an object.

10. Should the accused's knowledge of a victim's capacity to consent be a required element of sexual assault? (Presently, in a prosecution for sexual assault under Article 120(b)(2)-(3) or abusive sexual contact under Article 120(d) and the government alleges victim incapacity to consent, the government must prove both the victim's incapacity to consent and that the accused knew or reasonably should have known of that incapacity.)

A. Change.

1. *Dean Schenck*: As noted at Tab 17 in the April read ahead materials, Dean Schenck recommends deleting this requirement and returning to the 2007 version that required only that a victim be substantially incapacitated or substantially incapable of—(A) appraising the nature of the sexual act; (B) declining participating in the sexual act; or (C) communicating unwillingness to engage in the sexual act.

B. No change: **A majority of presenters recommend no change**.

1. *Grammel*: The requirement that the accused knew or should have known of the victim's incapacity to consent should remain as a required element of sexual assault. See Tab 3 in the June read ahead materials.

2. *Pickands*: It will be a required item of proof whether it is a stated element or it is raised as a defense. In its current form, the statute simply takes the affirmative defense of mistake of fact and incorporates it. In other words, one cannot be reasonably aware of the victim's incapacity and reasonably mistaken that she consented. If you remove this requirement, it will only appear as an affirmative defense instead of an attack on the proof of the offense. See Tab 4 in the June read ahead materials.

3. *Rosenow*: The requirement that the accused "knows or reasonably should know" of the victim's capacity to consent is properly included as part of Art. 120(b)(2), (b)(3)(A) and (b)(3)(B), U.C.M.J. I believe it strikes the proper balance between criminalizing sexual acts (as well as sexual contacts through Art. 120(d), U.C.M.J.,) against victims in states making them incapable of consent and not unfairly punishing service members who were both honestly and reasonably mistaken about that status. In courts-martial taking up these charges and involving evidence of such a mistake of fact, the accused will appropriately be held to the standard of a reasonably careful, ordinary, prudent and sober adult under the circumstances at the time of each offense. See Tab 7 in the June read ahead materials.

4. *Spilman*: May TR at 391. The government should have to prove the accused had some knowledge that the victim was incapable of consenting.

11. Should the offense of "indecent act" be added to the UCMJ as an enumerated offense?

A. Change. **A majority of presenters recommend change**.

1. *Ward*: Apr TR at 200-01. Indecent acts should be brought back into the Code; the breadth and amount of things that younger generations will do today, that are completely incompatible with what the public believes the military culture is, needs to be back in there.

2. *Pickands*: Yes. The tougher question is whether to put it into Article 120c versus having the President add it back to Article 134's enumerated offenses. The former solution relieves the government of having to prove that the conduct was service discrediting or prejudicial to good order and discipline. The importance of this is not that it saves the government effort; it is that Indecent Acts could then be a lesser-included offense of other Article 120 crimes. If it is an Article 134 offense, the additional element of proof prevents its use as a lesser offense. See Tab 4 in the June read ahead materials.

3. *Rosenow*: May TR at 134-35. An offense of indecent acts should be added back into the code, although it could be placed under Article 120 or Article 134. Investigators and trial practitioners at all levels should be aware of the availability of this offense and its maximum punishment should be greater than a general disorder offense falling under Art. 134, U.C.M.J. Nonconsensual sexual encounters regularly include elements of abuse that are not well-captured within the present statutory scheme, including where the accused ejaculates on his victim while he or she is asleep or incapacitated and without consent. Although I have been able to successfully prosecute this offense and our approach survived challenge on appeal (*see United States v. Feldkamp*, No. 38493 (A.F. Ct. Crim.App. May 1, 2015)), the fair administration of military justice by the consistent charging of these crimes in similar fact patterns would benefit significantly by adding indecent acts back into the U.C.M.J. as an enumerated offense. See Tab 7 in the June read ahead materials.

4. *Dean Schenck*: As noted at Tab 17 in the April read ahead materials, Dean Schenck recommends adding an offense of indecent acts back in to Article 120.

B. No change.

1. *Grammel*: The offense of "indecent act," which existed in the statute between 2007 and 2012, should not be added as an enumerated offense under Article 120. A majority of what was in that offense between 2007 and 2012 has been moved to Article 120c(a). The remainder of indecent acts that that should be criminalized and is not covered by Articles 120, 120b, 120c, or 125, can fall within Article 134, as does the offense of indecent language. If the President thinks it warrants being specifically enumerated as an offense under Article 134 in part IV of the Manual for Courts-Martial, then the President can accomplish that by executive order, which is how indecent acts was handled in the past. See Tab 3 in the June read ahead materials.

2. *Spilman*: May TR at 391-92. Article 134 already provides the means by which to prosecute indecent conduct.

Presenters who offered general comments regarding Article 120, UCMJ

1. *Jamison*: May TR at 314-18. Unlike the predecessor statute, I do not sense any significant infirmities associated with the 2012 statute that, at this time, necessitates a major course correction. I recommend some strategic patience to allow the statute to settle a bit, to be informed by the President's rulemaking authority under Article 36.

2. *Christensen*: May TR at 397-402. I believe Article 120 as written is working as Congress intended. I believe that it effectively criminalizes every penetrative and contact sexual offense that could be invented that puts military members on appropriate notice of which conduct is illegal. I think it would be a mistake to make major changes to Article 120 as it would be the fourth major change within the last ten years.

3. *Smith*: May TR at 347-51; 366. The problem with the statute generally is the accused is forced to prove a mistake of fact as to consent, and the burden to prove a lack of consent by the victim should be placed back on the government.