These comments are intended to supplement my testimony before the Judicial Proceedings Panel Subcommittee on 7 May 2015. The views expressed herein are derived my experience and that of my prosecutors, but they represent my opinions alone. They do not necessarily represent the positions of The Judge Advocate General or the United States Army.

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

No – but it could be much simpler and clearer. The current definition of consent is workable, which is to say that it has not served as a barrier to effective prosecution under the statute; however, from the discussion at the 7 May subcommittee meeting, it appears that there is at least some consideration of an "affirmative consent" standard. While I do agree that consent should be manifested in some deliberate outward expression, I do not believe the form of that consent should be regulated. In other words, competent adults should be able to express consent by verbal or physical means.

Consequently, I propose the following definition of consent:

> **(8) *Consent*.** The term 'consent' means a freely given agreement to the conduct at issue, outwardly expressed in words or conduct by a competent person.
>
> **(A)** Consent is absent when there has been an expression through words or conduct that there is no consent, or that consent has been withdrawn. A sleeping, unconscious, or otherwise incompetent person cannot consent. A person cannot consent to force causing or likely to cause death or grievous bodily harm or to being rendered unconscious. A person cannot consent while under threat or fear or under the circumstances described in subparagraph (C) or (D) of subsection (b)(1).
>
> **(B)** Consent or lack of consent, as well as whether an agreement was freely given or the result of another person's wrongful actions may be inferred based on the circumstances of the offense. Lack of verbal or physical resistance shall not constitute consent. An agreement or submission procured by the use or threat of force, administration of an intoxicant, or the use of fraudulent representations, cannot be reasonably construed as consent.

I also made some changes for clarity's sake. First, I grouped the circumstances in which there is no consent under (g)(8)(A). I also included a reference to withdrawal of consent. Second, I included a short discussion that lack of consent may be inferred by the circumstances in the absence of a clear expression of consent or refusal to consent in (g)(8)(B). There will always be litigation surrounding scope, duration, and withdrawal of consent, and we must continue to support a "totality of circumstances" analysis to be fair. I removed (g)(8)(C) as redundant.

The last sentences of my revised (g)(8)(A) and (g)(8)(B) might appear redundant; however, in (A), I am saying that consent cannot be present in those circumstances, while in (B) I am saying that an outward

expression of agreement, capitulation, or submission, cannot form the basis of a "reasonable mistake of fact as to consent." This eliminates both defenses of consent and mistake of fact.

Finally, I would like to call attention to another commentator who recommended replacing "freely given" with "voluntary." "Voluntary" is a much narrower term, defining consent as an agreement free from physically compulsive forces, whereas "freely given" implies a decision free of *any* coercion. I vigorously disagree with this commentator; at a minimum, "voluntary" does not contemplates the circumstances in (b)(1)(C) or (b)(1)(D), situations that we know Congress intended to criminalize. We want people making decisions about sexual conduct to be free of coercion generally, not just free from physical violence.

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?

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. This is important because if consent and mistake of fact are incorrectly considered affirmative defenses, the accused may ask the judge to instruct the panel as to that defense.

It is important to distinguish between a "defense theory" and an "affirmative defense." Be wary of shortening either phrase to "defense" (e.g., "X is a defense to Y") because that conflates two separate and distinct concepts. A defense theory merely attacks an element of proof, whereas an affirmative defense relieves a person of culpability even if all elements of the offense are proven.

Therefore, analyze whether consent or mistake of fact (MOF) are affirmative defenses by considering whether the facts establishing the elements of the offense and the elements of the defense *could both be simultaneously true*. I was astonished to read another commentator, a retired judge no less, claim that consent should serve as a defense to *all* Article 120 offenses! Even a cursory analysis demonstrates that consent is *never* an affirmative defense to any Article 120 offense. Consent will almost always be relevant, but *never* an affirmative defense.

To assist you, I provide the following simplified analysis:

- (a)(1) forcible rape. The element requires "unlawful force." If the government shows that there was no legal justification or excuse (included in the definition of unlawful force), there can be no consent. The presence of consent here would provide a legal justification or excuse, so evidence of consent is simply an attack on the proof of this element. Conversely, mistake of fact could be an affirmative defense if the accused could demonstrate that he was reasonably mistaken that the victim wanted to submit to that application of force (i.e., that the victim was submitting to the sexual act independent of the force being applied, so that the submission to the act was not a result of the application of force). For example, a bondage or sadomasochistic scenario in which the victim consents to the sexual act and the application of restraints or infliction of pain.

- (a)(2) rape by inflicting grievous bodily harm. One cannot consent to an aggravated assault (i.e., an assault involving GBH). Consequently, consent can neither be a defense nor an attack on proof. Likewise, one cannot be reasonably mistaken that another person consented to an aggravated assault.

- (a)(3) rape by threatening death, GBH, or kidnapping. One explicitly cannot consent under these circumstances; see definition of "consent." If the government proves the threat, consent has been disproven. Evidence of consent can at most attack the element of "threatening or placing in fear." One cannot both threaten someone with death, GBH, or kidnapping *and* also be reasonably mistaken that consent was "freely given;" therefore mistake of fact is also not an affirmative defense.

- (a)(4) rape by rendering unconscious. Again, one explicitly cannot consent if unconscious; see definition of "consent." If the government proves that the victim was unconscious, there is no defense of consent available. The defense could claim that she did in fact consent, but only as an attack on the proof of unconsciousness. However, an accused could claim that he reasonably believed that the victim was conscious and that he reasonably believed that she consented. If he could demonstrate that both beliefs were reasonable under the circumstances, he would be relieved of culpability; therefore, mistake of fact is an affirmative defense.

- (a)(5) rape by administering an intoxicant. In this theory, the government must prove, among other things, that the victim was unaware of the intoxicant or forced to consume it and was also rendered impaired by the substance. Consent is expressly disproven in both circumstances, so consent would not be an affirmative defense. In other words, one cannot be physically impaired to the degree required in the statute either unknowingly or forcibly by action of the accused, and also actually and effectively consent to sexual conduct. Again, it is an attack on the proof of impairment, at best. Likewise, mistake of fact is not available, because one cannot both deliberately deliver an intoxicant *and* be reasonably mistaken that the victim was unimpaired and consented to the act.

- (b)(1)(A) SA by threatening or placing in fear. The definition of consent says that a "person cannot consent while under threat or fear…." Therefore, if the government proves the existence of the threat, consent cannot be established. Evidence of consent therefore only serves to attack the proof that the sexual act was *procured by* the threat, an element of the offense. Using the bondage/sadomasochism (BDSM) scenario again, the accused may be able to establish that he was reasonably mistaken that the victim had consented to being threatened or placed in fear (e.g., she consented to being restrained and subjected to various objects being brandished before her). She may not have actually consented to the item being specifically brandished or act being threatened, but he may have been reasonably mistaken (from previous encounters, etc.). This is an outlier scenario, certainly, but demonstrates that mistake of fact can be an affirmative defense.

- (b)(1)(B) SA by causing bodily harm. Bodily harm is presently defined as "an offensive touching," which leaves out the obvious component of injury. This is significant: In the absence of an injury theory, the government *must* prove that the touching was offensive, which in turn necessitates proof that it was not consensual. One cannot both find the touching consensual and nonconsensual; therefore, there is no affirmative defense of consent. If the "bodily harm" element allowed an injury component, consent

would have been an affirmative defense, since one can clearly consent to some amount of injury (less than GBH) during the course of a sexual encounter. As a result, the government could simultaneously prove injury and sexual act, but the defense could establish consent. However, that is not the state of the statutory law here. One can, however, be found to have committed an offensive touching and/or a sexual act *and* have been reasonably mistaken that the touching would not be offensive. Therefore, mistake of fact is an affirmative defense here.

- (b)(1)(C) SA by fraudulent representation of a professional purpose. There can be no consent once the government proves the misrepresentation; see definition of consent ("A person cannot consent while … under the circumstances described in subparagraph (C) or (D) of subsection (b)(1)."). Therefore, consent would not even be relevant, much less an affirmative defense. Likewise, the government must prove that the misrepresentation was deliberate, and one cannot deliberately deceive *and* be reasonably mistaken that there was valid consent. No affirmative defense.

- (b)(1)(D) SA by deceiving as to one's identity. There can be no consent once the government proves the artifice, pretense, or concealment; see definition of consent ("A person cannot consent while … under the circumstances described in subparagraph (C) or (D) of subsection (b)(1)."). However, an accused could offer evidence of consent to attack proof of a passive concealment ("it was dark, she consented to A and B, I thought she knew it was me when we changed places"); in other words, proof that there was no deception. Consent would not be an affirmative defense, but would be relevant. One cannot be found to have deliberately deceived the victim and to be reasonably mistaken that she consented, so mistake of fact would not be an affirmative defense.

- (b)(2) SA by acting upon sleeping or unconscious person. There can be no consent here according to the definitions. Consent would be relevant only as an attack on the proof of unconsciousness, sleep, or other incapacity. Mistake is disproven as part of the elements, and therefore cannot be a defense.

- (b)(3) SA by acting upon an incompetent person. Consent is relevant to counter proof of incapacity, but since one cannot both be incapacitated *and* consent, the affirmative defense of consent is unavailable. Likewise, the government must prove that the accused "knew or reasonably should have known" of the incapacity. He cannot reasonably know of the incapacity and also be reasonably mistaken that she was capable and did consent. Mistake of fact is therefore an attack upon this element, not an affirmative defense.

In the final tally:

Theory	Consent Relevant?	Consent Defense?	MOF Relevant?	MOF Defense?
(a)(2)	Yes	No	Yes	Yes
(a)(2)	No	No	No	No
(a)(3)	Yes	No	No	No
(a)(4)	Yes	No	Yes	Yes
(a)(5)	Yes	No	No	No
(b)(1)(A)	Yes	No	Yes	Yes
(b)(1)(B)	Yes	No	Yes	Yes

Theory	Consent Relevant?	Consent Defense?	MOF Relevant?	MOF Defense?
(b)(1)(C)	No	No	No	No
(b)(1)(D)	Yes	No	No	No
(b)(2)	Yes	No	Yes	No
(b)(3)	Yes	No	Yes	No

If "yes," in the first column, judges should instruct on consent as it is relevant as an explanation of the appropriate element. If "yes" in the second column, they should instruct on consent as an affirmative defense, along with the appropriate burdens and standards of proof. Likewise, for offenses with a "yes" in the third column, judges should instruct for MOF as a *concept* relevant to an understanding of the proof of an element. If there is a "yes" in the fourth column, judges should instruct on the defense of MOF with appropriate burdens and standards of proof.

Although it is presently common practice in the Army to give "consent" instructions in almost all (if not all) cases, I do *not* believe that accused should receive instructions regarding consent when consent is not serving as an affirmative defense or as an element of an offense. At best, that would provide the accused an advantage to which he or she is not entitled; at worst, the instruction will confuse the panel terribly. If interpreted as a defense, the judge would have to enquire separately into the defenses as part of a guilty plea inquiry – and risk appellate exposure for not having done so adequately.

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

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.

But what standard should we use? It must be one that is clear enough to put people on notice and to be susceptible of proof at trial, but it also must be one that prohibits exploitative, victimizing behavior *without* denying people the essential freedom to engage in consensual sexual behavior. Article 120 protects the community from experiencing sexual conduct against their will or without their choice. It is the latter threat that is addressed in subsections (b)(2) and (b)(3).

Congress clearly intended to capture conduct committed upon the body of a person who was intoxicated, but still conscious (otherwise (b)(2) would be sufficient by itself). That being the case, we should compose the definition of "incapable" to capture those people who are conscious but unable to appropriately interact with their environment.

This leads me back to the 2007 definition of "substantial incapacitation." A useful, if somewhat inarticulate standard: "substantially incapable of (A) appraising the nature of the sexual act; (B) declining participation in the sexual act; or (C) communicating an unwillingness to engage in the sexual act…."

The first prong makes sense; if one cannot understand that a sexual act is occurring or about to occur, one is not "aware" and is therefore incompetent. The second and third prongs are difficult to differentiate, unless we take the difference to be the formulation of a decision as opposed to the communication of that decision. If made clearer, this definition would seem to capture those who are insensibly drunk.

I propose the following:

> **(9) *Incompetent Person*.** The term 'incompetent person' means a person who is unable to correctly perceive or knowingly and deliberately interact with his or her environment. For the purposes of this subchapter, a person is incompetent when he or she is unable to—
>
> **(A)** appraise the nature of the sexual conduct at issue;
>
> **(B)** to formulate a decision whether to participate or decline participation in the sexual conduct; or
>
> **(C)** to effectively and affirmatively communicate that decision.
>
> Incompetence may be caused by a mental disease or defect, a physical disability, or an intoxicant.

These three prongs are each distinct and meaningful, unlike the 2007 version, but target the same condition. The first relates to the ability to perceive the world (i.e., the function of awareness). The second contemplates the ability to make decisions (i.e., executive functions of the brain). The third addresses a person's ability to effectuate his or her decision (i.e., functioning of the body). They are connected by the disjunctive "or" because lacking *any* of these three abilities should render them incompetent. One needs perception, cognition, and execution in order to interact with the world.

I styled this as a definition of incompetence generally versus simply a definition of "incapable of consenting." What is that if not incompetent? The best definitions are the ones that are most broadly useful, and this follows the organization of Article 120, which groups incapacity from intoxication with those caused by mental disease or physical disabilities.

I caution against attempting to define "incapable of consenting" in terms of *legally* incompetent (i.e., competence is not recognized by the law for policy reasons) versus medically incompetent (i.e., competence is a function of actual physical and mental capability). This might be attractive from a clarity or policy perspective, in that we might want to capture more conduct or create an artificial bright-line rule. However, I could not conceive of such a definition that would not also – as a necessary consequence – become vastly over-inclusive.

There is also something to be said for allowing people the freedom to make decisions, even poor ones, that do not infringe on other people's physical integrity or personal autonomy. Outside of consumer protection statutes, we do not want to regulate poor decision-making, just actions that infringe on people's freedom and safety.

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

No. 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).

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

No. "Bodily harm" is well defined through previous versions of Article 120 and a long history as an element of Article 128 assault.

I urge you not to require that sexual assault by causing bodily harm require separate harms (i.e., requiring a bodily harm *to accomplish* another bodily harm, namely the sexual act). 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.

Allowing the bodily harm to satisfy both elements 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. This can occur as a result of intoxication, sleepiness, shock, and simply old recollections. The act of being penetrated with an object is one that doctors characterize as being "more arousing" (in a cognitive, not sexual, sense). The nature of intoxication is such that some acts may not rouse a person (e.g., touching, removing clothing) while others do rouse the person to the point of consciousness, awareness, or recollection (e.g., being penetrated). In short, sometimes we don't have evidence of another, percipient bodily harm.

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

Actually, I believe it is both too narrow (in that it does not include enticement) and too broad (in that it ostensibly contemplates threats of economic, career, reputation, and physical harms). It also establishes no low-end threshold – how trivial can the threat be before we do not find it to be criminal? If I threaten to break a $2.00 vase, or steal a $100k car, would either be sufficient "wrongful actions?"

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 these 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.

Threats of an economic, reputation, or career harm are distinctly different. Alternatives to the sexual act are available, if undesirable. Escape can be accomplished. Reporting can be pursued.

It may be said that a victim who faces a knife-wielding assailant also have a choice the choice between being assaulted with the sexual act or the knife, but *both* of those acts are violent assaults – there is *no* legitimate choice left to that victim. A choice between an unwanted sexual act and a negative performance report is a choice between an assault and nonviolent maltreatment or harassment. Likewise, a threat to damage property (an economic "wrongful action") is also not an assault. One can choose to say "no" and suffer the economic harm, but then report that harm, see the accused prosecuted, and seek restitution.

Finally, on that point, I have known many victims of violent or physically coercive sexual assault, from age 4 to adult, who might find it insulting that the law should contemplate the harm perpetrated upon them to be the same as that person offered a choice between unwanted sex and a bad report card.

If Congress wants to criminalize misuse of military authority to obtain sex, it should be do so elsewhere. I propose making them theories of criminality under Article 93, Maltreatment (with an enhanced maximum punishment, preferably), or making them separate offenses in Article 120c, Other Sexual Misconduct. The latter would look like the following:

> **Article 120c…**
> **…**
> **(d)** ***Criminal Sexual Extortion*****.** Any person subject to this chapter who coerces another to engage in a sexual act-
> **(1)** by threatening to take adverse action with respect to their military duties, promotion, assignment, or any other administrative matter;
> **(2)** misusing their military authority over the other person; or
> **(3)** threatening to harm their reputation in the community, either through exposure of information, whether true or false, or by other wrongful action;
> is guilty of an offense under this section and shall be punished as a court-martial may direct.
>
> **(e)** ***Criminal Sexual Enticement*****.** Any person subject to this chapter who entices another to engage in a sexual act by promising to take favorable action with respect to their military duties, promotion, assignment, or

any other administrative matter, is guilty of an offense under this section and shall be punished as a court-martial may direct.

This should cover the military authority harms contemplated by the current "threatening or placing in fear" definition without muddying rape and sexual assault. Economic harms should be addressed elsewhere outside of Article 120, if at all.

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

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.

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

No. 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 GBH or death but would serve to compel submission even without completing the act using it.

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

"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.

10. Should the accused's knowledge of a victim's capacity to consent be a required element of sexual assault?

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 MOF 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.

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

I do. 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.

I provide this mark-up version of Article 120 incorporating all recommended edits and changes:

45. Article 120—Rape and sexual assault generally

a. ***Text of statute.***

(a) ***Rape*****.** Any person subject to this chapter who commits a sexual act upon another person by—

(1) using unlawful force against that other person;

(2) using force causing or likely to cause death or grievous bodily harm to any person;

(3) threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping;

(4) first rendering that other person unconscious; or

(5) administering to that other person by force or threat of force, or without the knowledge or consent of that person, a drug, intoxicant, or other similar substance and thereby ~~substantially impairing the ability of that other person to appraise or control conduct~~rendering them incompetent; is guilty of rape and shall be punished as a court-martial may direct.

(b) ***Sexual Assault.*** Any person subject to this chapter who—

(1) commits a sexual act upon another person by—

(A) threatening or placing that other person in fear;

(B) causing to bodily harm to that other;

(C) making a fraudulent representation that the sexual act serves a professional purpose; or

(D) inducing a belief by any artifice, pretense, or concealment that the person is another person;

(2) commits a sexual act upon another person when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring; or

(3) commits a sexual act upon another person when the other person is incompetent and therefore incapable of consenting to the sexual act due to—

(A) impairment by any drug, intoxicant or other similar substance, and that condition is known or reasonably should be known by the person; or

(B) a mental disease or defect, or physical disability, and that condition is known or reasonably should be known by the person; is guilty of sexual assault and shall be punished as a court-martial may direct.

(c) ***Aggravated Sexual Contact.*** Any person subject to this chapter who commits or causes sexual contact upon or by another person, if to do so would violate subsection (a) (rape) had the sexual contact been a sexual act, is guilty of aggravated sexual contact and shall be punished as a court-martial may direct.

(d) ***Abusive Sexual Contact.*** Any person subject to this chapter who commits or causes sexual contact upon or by another person, if to do so would violate subsection (b) (sexual assault) had the sexual contact been a sexual act, is guilty of abusive sexual contact and shall be punished as a court-martial may direct.

(e) ***Proof of Threat.*** In a prosecution under this section, in proving that a person made a threat, it need not be proven that the person actually intended to carry out the threat or had the ability to carry out the threat.

(f) ***Defenses*****.** An accused may raise any applicable defenses available under this chapter or the Rules for Court-Martial. Marriage is not a defense for any conduct in issue in any prosecution under this section.

(g) ***Definitions*****.** In this section:

(1) ***Sexual act.*** The term 'sexual act' means—

(A) contact between the penis and the vulva or anus or mouth, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight; or

(B) the penetration, however slight, of the vulva or anus or mouth of another by any part of the body or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

(2) ***Sexual contact.*** The term 'sexual contact' means—

(A) touching, or causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, or degrade any person; or

(B) any touching, or causing another person to touch, either directly or through the clothing, any body part of any person, if done with an intent to arouse or gratify the sexual desire of any person. Touching may be accomplished by any part of the body or an object.

(3) ***Bodily harm.*** The term 'bodily harm' means any offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact.

(4) ***Grievous bodily harm.*** The term 'grievous bodily harm' means serious bodily injury. It includes fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other severe bodily injuries. It does not include minor injuries such as a black eye or a bloody nose.

(5) ***Force.*** The term 'force' means—

(A) the use of a weapon;

(B) the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or

(C) inflicting physical harm sufficient to coerce or compel submission by the victim.

(6) ***Unlawful Force.*** The term 'unlawful force' means an act of force done without legal justification or excuse.

(7) ***Threatening or placing that other person in fear.*** The term 'threatening or placing that other person in fear' means a communication or action that is of sufficient consequence to cause a reasonable fear that non compliance will result in the victim or another person being subjected to the wrongful physical or violent action contemplated by the communication or action.

~~**(8)** ***Consent.***~~

~~**(A)** The term 'consent' means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue shall not constitute consent.~~

~~**(B)** A sleeping, unconscious, or incompetent person cannot consent. A person cannot consent to force causing or likely to cause death or grievous bodily harm or to being rendered unconscious. A person cannot consent while under threat or fear or under the circumstances described in subparagraph (C) or (D) of subsection (b)(1).~~

~~**(C)** Lack of consent may be inferred based on the circumstances of the offense. All the surrounding circumstances are to be considered in determining whether a person gave consent, or whether a person did not resist or ceased to resist only because of another person's actions.~~

(8) ***Consent.*** The term 'consent' means a freely given agreement to the conduct at issue, outwardly expressed in words or conduct by a competent person.

(A) Consent is absent when there has been an expression through words or conduct that there is no consent, or that consent has been withdrawn. A sleeping, unconscious, or otherwise incompetent person cannot consent. A person cannot consent to force causing or likely to cause death or grievous bodily harm or to being rendered unconscious. A person cannot consent while under threat or fear or under the circumstances described in subparagraph (C) or (D) of subsection (b)(1).

(B) Consent or lack of consent, as well as whether an agreement was freely given or the result of another person's wrongful actions may be inferred based on the circumstances of the offense. Lack of verbal or physical resistance shall not constitute consent. An agreement or submission procured by the use or threat of force, administration of an intoxicant, or the use of fraudulent representations, cannot be reasonably construed as consent.

(9) ***Incompetent Person.*** The term 'incompetent person' means a person who is unable to correctly perceive or knowingly and deliberately interact with his or her environment. For the purposes of this subchapter, a person is incompetent when he or she is unable to—

(A) appraise the nature of the sexual conduct at issue;

(B) to formulate a decision whether to participate or decline participation in the sexual conduct; or

(C) to effectively and affirmatively communicate that decision.

Incompetence may be caused by a mental disease or defect, a physical disability, or an intoxicant.