

Recommended Amendments to Article 120¹
MAJ Frank E. Kostik, Senior Defense Counsel

(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 or causing to be administered to that other person by force or threat of force, or without the knowledge or consent of that person, for the purpose of impairing that person's capacity to express a lack of consent to the sexual act, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of that other person to appraise or control conduct;

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 bodily harm to that other person;
 - (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 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

¹ My recommendations are largely based on the recommendations and analysis submitted by COL Timothy Grammel submitted to the subcommittee on 10 April 2015. The additional changes and reasoning are related to my testimony and discussion of the presenters and panel at the subcommittee on 7 May 2015.

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) **Wrongful Sexual Contact.**— Any person subject to this chapter who, without legal justification or lawful authorization, commits or causes sexual contact upon or by another person without that other person’s permission is guilty of wrongful sexual contact and shall be punished as a court-martial may direct.

(ef) **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.

(fg) **Defenses.**— As defined in subsection (h)(8), valid consent to the sexual conduct at issue, if raised by the evidence, is an affirmative defense to the offenses in subsections (a) (rape), (b) (sexual assault), (c) (aggravated sexual contact), (d) (abusive sexual contact), and (e) (wrongful sexual contact). Mistake of fact as to consent, if raised by the evidence, is an affirmative defense to the offenses in subsections (a) (rape), (b) (sexual assault), (c) (aggravated sexual contact), (d) (abusive sexual contact), and (e) (wrongful sexual contact). An accused may raise any applicable defenses available under this chapter or the Rules for Courts-Martial. Marriage is not a defense for any conduct in issue in any prosecution under this section.

(gh) **Definitions.**— In this section:

(1) **Sexual act.**²— 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

² In my previous testimony in September 2014, I recommended that this provision be amended to be consistent with the Federal Code. Since that time, I have considered COL Grammel’s recommendation and believe it to be a better solution and adopt it herein.

~~(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 by any object when the object is used to arouse or gratify the sexual desire of any person.

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

(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 action contemplated by the communication or action.

(8) **Consent.**—

(A) The term “consent” means a freely given voluntary 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

³ It is simply not logical that the same sexual act or contact can be the bodily harm that causes the act. As amended, the harm can still be a sexual act or contact, just not the same act as the prohibited conduct. For example, an offender, may cause bodily harm by holding the inner thigh of another in order to accomplish a sexual act or contact. In the example, holding the inner thigh could be a sexual contact which also meets the definition of bodily harm and is the cause of the sexual assault. In my view, this would be permissible under the recommended change above.

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, ~~or unconscious, or incompetent~~ person cannot consent. A person cannot consent to sexual activity if impairment by any drug, intoxicant, or other similar substance or a mental disease or defect, or physical disability, causes the person to be 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. 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 An agreement given as a result of threat or in fear is involuntary and not valid consent. or An agreement given under the circumstances described in subparagraph (C) or (D) of subsection (b)(1) is not an agreement to the true~~ conduct at issue and is not valid consent.

(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.~~

(9) **Incapable of consenting.**— 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.