DEPARTMENT OF THE AIR FORCE
AIR FORCE LEGAL OPERATIONS AGENCY (AFLOA)

MEMORANDUM FOR: JUDICIAL PROCEEDINGS PANEL SUBCOMMITTEE

FROM: MAJOR MARY ELLEN PAYNE

SUBJECT: Written Commentary Concerning Article 120, UCMJ

I am Major Mary Ellen Payne and I have been a member of the United States Air Force Judge Advocate General Corps for the past eight years. I am currently serving as an Appellate Government Counsel. Prior to my current assignment, I served as a Senior Trial Counsel (Prosecutor), an Area Defense Counsel and a base level prosecutor.

The following opinions are my own, and not those of the Air Force JAG Corps, or any other member of the Air Force JAG Corps.

I would like to elaborate on my testimony before the Panel concerning a few of the issues specified in the Judicial Proceedings Panel's Initial Report from February 2015.

Issue 3 - Should the statute define "incapable of consenting?"

Yes, and this point is illustrated by a case currently pending before the Air Force Court of Criminal Appeals (AFCCA). Both appellate government counsel and appellate defense counsel have submitted briefs in this case, but AFCCA has not yet issued a decision. Although I was not the appellate counsel assigned to the case, I prosecuted the case while I was a Senior Trial Counsel.

In this particular case, Appellant was charged with three specifications of committing sexual assault while the Victim was incapable of consenting. During deliberations the members came back and asked for a definition of "incapable of consenting."

Since "incapable of consenting" is not defined in the current Article 120, trial counsel and defense counsel spent almost two hours arguing in front of the military judge about the proper way to instruct the members. The defense counsel requested the following instruction:

> You may have heard witnesses testify that [Victim] was drunk. Drunk is not synonymous with incapable of consenting. "Drunk" means any intoxication by alcohol which is sufficient to impair the rational and full exercise of the mental or physical facilities. Incapable of consenting means that level of mental impairment due to consumption of alcohol which rendered the alleged victim unable to appraise the nature of the sexual conduct at issue, unable to physically communicate unwillingness to engage in the sexual conduct at issue, or otherwise unable to make or communicate competent decisions.

Trial counsel objected to these proposed instructions because they were not based on any language found in the 2012 version of Article 120. Although the last sentence of the defense proposed instruction is identical to the Military Judge's Benchbook instruction used for the 2007 version of Article 120, Air Force senior prosecutors tend to disfavor this instruction. The phrase "unable to physically communicate" is a difficult burden to meet and tends to create confusion among court members.

Trial counsel instead favored giving instructions that were based solely on the language currently in Article 120. The military judge sided mostly with trial counsel, and gave the following instruction:

> Incapable of consenting for this case means that level of mental impairment due to consumption of alcohol which rendered D.B. unable to freely give agreement to the conduct at issue. An incompetent person cannot consent. "Drunk" means any intoxication by alcohol which is sufficient to impair the rational and full exercise of the mental or physical faculties. Only you, the members of the court, determine what the facts of this case are.

On appeal, Appellant has alleged that the military judge erred by not giving the members the defense's requested instruction. I believe that the United States will prevail on appeal, because it does not appear that there was a basis in law for the military judge to give the defense requested instruction. Nonetheless, this case demonstrates the confusion created in trial practice and at the appellate stage by the lack of a definition for "incapable of consenting."

This panel should also consider clarifying that "incapable of consenting" can mean some level of impairment *short* of a victim being unconscious, passed out or asleep. To trial practitioners looking at the entire text of Article 120, it is obvious that "incapable of consenting" is meant to encompass such a level of impairment because there is another option to charge an accused with committing a sexual act upon an individual who is asleep, unconscious or otherwise unaware the sexual act is occurring (*See* Article 120 a.(b)(2)). However, to a panel member who will only be given the specific charges in the case, it may not be obvious that "incapable of consenting" can mean something *less* than unconscious or asleep. Panel members may bring their own personal beliefs and biases into the deliberation room with them, and without clear instructions, may not apply the law as intended by Congress. Having a statutory definition of "incapable of consenting" that highlights the distinction between "incapable of consenting . . . due to impairment" and being asleep or unconscious will be immeasurably helpful to panel members in applying the law.

Currently, the Military Judge's Benchbook contains an instruction for Article 120 that states, "[a] sleeping, unconscious, or incompetent person cannot consent to a sexual act." Without a set definition of "incapable of consenting," I have seen defense counsel use this instruction to argue that "incapable of consenting" must rise to the level where the victim was essentially unconscious or passed out. (My objections to this argument were overruled on the grounds that defense counsel was making "fair argument.") This further demonstrates the need for a clear instruction on "incapable of consenting."

Potential language to add to a definition of "incapable of consenting" would be:

"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."

Issue 8 – Is the definition of "force" too narrow?

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. My concerns with the current definition of force stem from a recent unpublished decision from AFCCA, United States v. Soto, ACM 38422 (16 Sept 2014). (Attachment).

In Soto, an en banc decision, AFCCA overturned a rape by force conviction under the 2007 Article 120 statute on the basis of factual insufficiency. The definition of force at the time was "using physical strength or power or restraint applied to her person sufficient that she could not avoid or escape the sexual contact."

In Soto, the Victim testified that Appellant hugged her, kissed her, brought her to the bed, pulled down her shorts and had sexual intercourse with her. She testified the act was against her will, she pushed him and said "No, I'm not ready." In describing the pushing she stated, "I tried to get out from it but he's really heavy and he was on top of me. So I just quit. . . my hands just quit because he was heavy and I didn't think I could do anything."

In overturning Appellant's conviction, AFCCA found that the Government did not meet its burden of proving force – that the Victim could not avoid or escape the sexual contact. AFCCA based this decision on several factors, including:

1. The facts presented at trial were very limited.
2. There was no testimony by the Victim concerning her tone of voice when she said, "no, I'm not ready," or if she said it loud enough to be heard.
3. Although the Victim said she was afraid, she didn't seem to be afraid specifically of Appellant.
4. Trial counsel did not ask the Victim if Appellant used any restraint or force other than the fact that he was on top of her to complete sexual act.

What I found most troubling was that AFCCA stated, "trial counsel did not elicit sufficient evidence to indicate **that the Appellant used force to overcome the pushing.**" This could be interpreted to be saying that there was evidence in the case that Victim physically resisted, but not that she resisted "enough" for Appellant's actions to constitute unlawful force or rape.

AFCCA finally stated that although it had the power to affirm a lesser included offense of aggravated sexual assault by bodily harm, it would not do so based on the lack of evidence presented at trial.

Considering that the Victim attempted to avoid the sexual act, but Appellant's body weight and position on top of her precluded her escape, the Soto opinion begs the question of whether AFCCA was reading into the definition of "force" a requirement for a certain level of physical resistance by the victim. Had the definition of force clarified that Appellant can be considered to have used "unlawful force" even if the Victim did not physically resist, perhaps AFCCA's decision in Soto would have been different.

The Soto decision raises the following questions: Could a similar result to Soto occur under the current definition of force under the 2012 version of Article 120? Does the requirement to show force "sufficient to overcome, restrain or injure a person" make clear that the victim is not required to demonstrate any particular level of resistance?[1]

I think the answer is yes, this result could occur under the current definition of force. The word "overcome" could imply that Victim must be engaging in some sort of action that the accused must overcome. It would be useful to clarify in the definition of force that a victim is not required to physically resist in order for the accused to have used unlawful force.

My proposed language is: "A sexual act or sexual contact may be committed by using unlawful force even if the victim did not exert any physical resistance."

Thank you for your time and consideration of my submissions. Should the Panel have any questions, my contact information is located in my signature block below.

Very respectfully submitted,

MARY ELLEN PAYNE, Major, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
(240) 612-4800
mary.e.payne46.mil@mail.mil

[1] Notably, the definition of "consent" under the 2012 version of Article 120 states that, "[l]ack 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." However, "consent" is not currently an element of rape by force. This leaves open the possibility that a finder of fact could interpret that in order to find beyond a reasonable doubt that the accused used unlawful force, the Victim must have used some level of physical resistance that the accused then overcame.

Attachment:
United States v. Soto, ACM 38422 (A.F. Ct. Crim. App.,16 September 2014)(unpub. op.)