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

20 May 2015

MEMORANDUM FOR JUDICIAL PROCEEDINGS PANEL SUBCOMMITTEE

FROM: MAJOR MARK F. ROSENOW

SUBJECT: Written Comments to Accompany Testimony of 7 May 2015

1. I am writing to extend my sincere thanks to the Art. 120, Uniform Code of Military Justice (U.C.M.J.), Subcommittee of the Judicial Proceedings Panel (JPP) for inviting me to testify during its 7 May 2015 meeting in New York, New York. The opportunity to contribute to your work in reviewing the prosecution of adult sexual assault under the U.C.M.J. by reference to my own experience as a Senior Trial Counsel in the Special Victims Unit is greatly appreciated. I hope my participation, along with Major Mary Ellen Payne from the Government Trial and Appellate Counsel Division (JAJG), was helpful.

2. As mentioned during my testimony, I am also writing to summarize a few additional points and to capture the specific language I proposed to define "incapable of consenting" under Art. 120(b)(3), U.C.M.J. (2012). These thoughts, like my testimony, are my own and I do not speak on behalf of the United States Air Force or my division. Additionally, this note is best understood in combination with my previous testimony to the JPP on 19 September 2014 and to your subcommittee on 7 May 2015.

3. One more preliminary remark I should offer is that I am absolutely convinced the current statute is constitutionally sound. Although there is a significant opportunity for revision and addition to give greater clarity to the law, I do not believe there is any reasonable argument that any species of offense under Art. 120, U.C.M.J., fails to give notice to any accused or would lose to a void for vagueness challenge.

4. That said and in turn:

*Issue 1: Is the current definition of "consent" unclear or ambiguous?*

No. While the various concepts in the definition could be organized in a simpler manner, the statute provides servicemembers, practitioners and finders of fact with a relatively concise statement of this fundamental legal term.

*Issue 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?*

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.

*Issue 3: Should the statute define "incapable of consenting?"*

Yes. As discussed at length during our meeting, further definition of this phrase would provide significant benefits to investigators, commanders faced with preferral and referral decisions, junior counsel and finders of fact. The equivalent portion of the preceding version of this statute (as amended by the National Defense Authorization Act for Fiscal Year 2006) referenced a victim being "substantially incapacitated" or substantially incapable of at least one of three things. With slight changes, those situations have been included in my proposed definition of "incapable of consenting":

> 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.

The word "physically" has been removed from the last two clauses as it unfairly and, in my experience, unintentionally raises the level of intoxication required of the victim to a medical rather than legal standard. In situations where reasonable people would agree a person is incompetent to give consent, we often find that wholly intoxicated victim capable of standing up and walking, moving to a bathroom before becoming sick as well as forming words that can be generally understood. Removing the modifier "physically" focuses the definition on the standard the statute already directs the finder of fact to consider: whether the victim was capable of reaching a freely given agreement.

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

No. 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).

*Issue 5: Does the definition of "bodily harm" require clarification?*

No. 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.

*Issue 6: Is the definition of "threatening wrongful action" ambiguous or too narrow?*

No. 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.

*Issue 7: How should fear be defined to acknowledge both subjective and objective factors?*

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.

*Issue 8: Is the definition of "force" too narrow?*

No. 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.

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

The definition of "sexual act" is too broad and the definition of "sexual contact" is too narrow. The term "sexual act" set out in Art. 120(g)(1)(B), U.C.M.J., should be changed to remove the words "or mouth" given the expanded types of intent that are criminalized within that clause. The term "sexual contact" set out in Art. 120(g)(2), U.C.M.J., should be changed by adding the clause "or any object" at the end of the final sentence: "Touching may be accomplished by any part of the body." Such an expanded definition would answer any ambiguity as to whether an object (*e.g.*, a sex toy or stethoscope) may be used to accomplish a sexual contact under the current statute. This concern was discussed in depth by many speakers during our last session and is currently under review at the United States Court of Appeals for the Armed Forces on a government interlocutory appeal by the United States Army. *See United States v. Schloff*, No. 20140708 (A. Ct. Crim. App. Dec. 16, 2014).

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

Yes. 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 servicemembers 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.

*Issue 11: Should the offense of "indecent act" be added to the U.C.M.J. as an enumerated offense?*

Yes. 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.

5. Thank you again. If you have any questions or need anything else, Lieutenant Colonel Glen Hines has my contact information.

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