

**Summary of Reading Materials for JPP Subcommittee Members  
in Preparation for August 27 Meeting**

**Tab 1. Summary of Deliberations with Working Group Recommendations (12 pages).**

- Prepared by JPP Subcommittee Staff. Summarizes the status of the deliberations on the first 11 issues, including whether a consensus has been adopted or whether further deliberation on an issue is necessary.

**Tab 2. LtCol Hines' Email to Members Regarding Old Article 120 "Constructive Force" Instructions (2 pages).**

- Email to subcommittee members of 27 July regarding pre-2007 version of Article 120 and "constructive force" theory used to charge trainers during the Aberdeen cases.

**Tab 3. Bench book Instruction from Pre-2007 Version of Article 120 on "Constructive Force." (9 pages).**

- The bench book instructions given by military judges in cases where the government alleged "constructive force," either by intimidation or threats, abuse of military power, parental or analogous compulsion, and victims of tender years.
- This was the theory used by the government in the Aberdeen cases discussed last month by Major General Shadley.

**Tab 4. *U.S. v. Simpson*, 55 M.J. 674 (Army Ct. Crim.App. 2001)(36 pages).**

- Staff Sergeant Delmar Simpson was the primary accused in the Aberdeen cases. He was convicted of numerous charges of raping trainees while an instructor at Aberdeen.
- The Army appellate court addresses whether the evidence at trial was sufficient to conclude that Simpson used constructive force and affirms the convictions.

**Tab 5. *U.S. v. Simpson*, 58 M.J. 368 (C.A.A.F. 2003)(11 pages).**

- Simpson appealed the Army court's decision to the Court of Appeals for the Armed Forces. The Court discussed the theory of constructive force and addressed whether the military judge's instruction regarding constructive force were proper.
- The Court reiterated, "In the context of the special relationship between non-commissioned officers and trainees, we have observed that the NCO cannot create by his own actions an environment of isolation and fear and then seek excusal from the crime of rape by claiming the absence of force especially where, as here, passive acquiescence is prompted by the unique situation of dominance and control presented by appellant's superior rank and position."
- Finding no error, the Court affirmed Simpson's convictions.

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**Tab 6. *Reveille for Congress: A Challenge to Revise Rape Law in the Military*, Captain Alexander N. Pickands, 45 Wm. & Mary L. Rev. 2425 (2004)(14 pages of text).**

- Written about the pre-2007 version of Article 120 and offering the view that it did not effectively prevent sexual coercion, the author discusses coercion and the abuse of rank and authority and concludes there is a gap in the UCMJ that does not effectively address this scenario and is only punished mildly under other articles of the UCMJ.
- Concludes by suggesting a new offense of *criminal sexual conduct* with two elements: (1) That the accused committed an act of sexual contact with another person; and (2) That the act of sexual contact was done without the voluntary consent of the other person.

**Tab 7. *Sexual Abuse of Power*, Michal Buchhandler-Raphael, 21 U. Fla. J.L. & Pub. Pol'y 77 (April, 2010)(35 pages of text).**

- Addresses various forms of sexual coercion based on disparity in power between perpetrator and victim and how the disparity vitiates the notion of consent.

**Tab 8. *The New Gender Panic: Reflections on Sex Scandals and the Military*, Martha Chamallas, 83 Minn. L. Rev. 305 (December, 1998)(26 pages of text).**

- Reviews various sex scandals occurring in the military as of 1998, and discusses how the military addressed prevention and prosecution of sexual assault and otherwise consensual relationships.

**Tab 9. *Consent Obtained by Abuse of Power or Position*, Dan Dobbs, et al, *Dobbs' Law of Torts* (June, 2014)(5 pages).**

- Discusses the abuse of positions of power in order to engage in sexual activity and analyses the subject from a tort perspective. Some examples include employer-employee, lawyer-client, doctor-patient, pastor-penitent relationships. Relevant to the discussion of the disparate power relationships between ranks and within the training environment between trainer and trainee.

**Tab 10. *Summary of Presenter Comments, Whether Article 120 Should be Amended to Specifically Address Abuse of Authority Offenses* (4 pages).**

- Summary of presenters' comments made before the Judicial Proceedings Panel during the JPP's August and September, 2014, public meetings.

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**Tab 11. State and Federal Statutes Criminalizing Sexual Acts with Prisoners, Detainees, or Wards (6 pages).**

- Taken from *Æquitas Summary of Rape and Sexual Assault Analyses and Laws*. Lists state and federal criminal statutes that make sexual relationships between prisoners, detainees or wards and a category of persons with authority over them a crime without consideration of consent.

**Tab 12. Proposed Revision to Model Penal Code, Section 213.2, tentative draft by American Law Institute, April 30, 2014 (excerpt - 27 pages).**

- Provides insight into civilian jurisdiction criminalization of sexual relationships which are deemed to be coercive by virtue of an individual's position of authority.
- Sets forth the elements in the proposed Model Penal Code revision of Section 213 for a felony offense in the third degree for engaging in sexual intercourse through coercion or imposition.
- Coercion includes threatening to accuse someone of an offense, expose negative information, or inflict substantial economic or financial harm. Coercion also includes situations in which the accused knows or recklessly disregards the risk that the other person is less than eighteen years of age or in a custodial institution.
- The commentary to this section discusses the need for additional statutory coverage for those individuals in a custodial institution because of the pervasive ability of correctional officers or others in positions of power to deploy more subtle threats and improper offers of special privileges in order to induce inmates to submit in the context of confinement.
- The author notes the potential for overreaching and abuse in these situations and the lack of a countervailing interest in allowing the parties to pursue a relationship.

**Tab 13. HR 430ih, *Protect Our Military Trainees Act* (4 pages)**

- Bill offered by Congresswoman Jackie Speier during the 113th Congress, which would impose strict liability under Article 120, UCMJ, for sexual assault or abusive sexual contact when a trainer commits a sexual act or sexual contact upon a trainee. Consent is not a defense under the Bill.

**Tab 14. Major Ryan Oakley, *A Lifetime of Consequences: Registering Convicted Military Sex Offenders*, *The Reporter* (2013)(8 Pages).**

- Provides an overview of procedural requirements for both prosecutors and defense counsel following a conviction of a qualifying offense. The article also provides insight into how one determines whether a military offense constitutes an offense for sex offender registration purposes. However, the DoD's classification of offenses may not predict state registry requirements, as states have individual registration requirements based on their own determinations. Defense counsel must advise accused clients of state registry requirements.

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- Pursuant to the Sexual Offender Registration and Notification Act (SORNA), Military personnel convicted of a “qualifying” offense are required to register as a sex offender in the jurisdiction in which they reside. Under SORNA, a person is a sex offender when convicted of a sex offense.
- UCMJ offenses determined to qualify are incorporated into Department of Defense Instruction 1325.07 as qualifying offenses.
- This article provides the procedural framework for ensuring reporting requirements under SORNA are met. Specifically, the author details the individual responsibilities of defense counsel, government representatives, and the accused.

**Tab 15. DoD Sex Offender List of Qualifying Offenses (DoDI 1325-07\_Encl 2 \_Appx 4\_RSO)(5 pages).**

- List of UCMJ offenses for which military offenders are reported out to federal and state authorities as sex offenders.
- Mr. John Awtrey, Director, Law Enforcement Policy, will present during the afternoon sessions and can answer questions regarding DoD sex-offender registration policies.

**Tab 16. *Military Sex Offender Reporting Act of 2015* (2 pages).**

- Requires the Secretary of Defense to notify the Attorney General of military sex offenders in order to comply with Sexual Offender Registration and Notification Act (SORNA).

**Tab 17. *DoD Draft Policy Amendments on Sex Offender Reporting* (DTM 15-003\_SubCh\_LSR)(12 pages).**

- Draft of DoD policy memorandum to implement Military Sex Offender Reporting Act of 2015.
- The following language is inserted into the DoD policy: "The Department of Defense will provide to the Department of Justice the information described in Section 16914 of Title 42, U.S.C. to be included in the National Crime Information Center, National Sex Offender Registry File and the Dru Sjodin National Sex Offender Public Website for individuals released from military corrections facilities who are required to register under SORNA."