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To: [REDACTED]
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Subject: Follow up to last week's meeting regarding the theory of "constructive force" in the pre-2007 version of Article 120 regarding coercive or abuse of authority sexual offenses
Date: Monday, July 27, 2015 3:27:00 PM
Attachments: [Old 120 bench book instructions on constructive force.pdf](#)

Subcommittee members-

Judge Jones asked that I locate the subject bench book instructions regarding the pre-2007 theory of constructive force used to charge and convict the instructors at Aberdeen. I have attached and highlighted the relevant portions of those instructions for your consideration.

As you will see, the old theory of constructive force in adult-victim cases required the government to prove "the accused's (actions and words) (conduct), coupled with the surrounding circumstances, created a reasonable belief in the victim's mind that death or physical injury would be inflicted on her and that (further) resistance would be futile."

The instruction also had language for cases in which the accused used his rank or authority to commit the offense: "There is evidence which, if believed, indicates that the accused (used) (abused) his (military) (_____) (position) (and) (or) (rank) (and) (or) (authority) (_____) in order to (coerce) (and) (or) (force) (state the name of the alleged victim) to have sexual intercourse. Specifically, I draw your attention to (summarize the evidence concerning the accused's possible use or abuse of his position, rank, or authority). You may consider this evidence in deciding whether (state the name of the alleged victim) had a reasonable belief that death or great bodily harm would be inflicted on her and that (further) resistance would be futile. This evidence is also part of the surrounding circumstances you may consider in deciding whether (state the name of the alleged victim) consented to the act of sexual intercourse."

In cases in which the accused used parental or analogous compulsion, the instructions provided: "Sexual activity between a (parent) (stepparent) (_____) and a minor child is not comparable to sexual activity between two adults. The youth and vulnerability of children, when coupled with a (parent's) (step parent's) (_____) position of authority, may create a situation in which explicit threats and displays of force are not necessary to overcome the child's resistance. On the other hand, not all children invariably accede to (parental) (_____) will. In deciding whether the victim (did not resist) (or) (ceased resistance) because of constructive force in the form of (parental) (_____) (duress) (compulsion) (_____), you must consider all of the facts and circumstances, including but not limited to (the age of the child when the alleged abuse started) (the child's ability to fully comprehend the nature of the acts involved) (the child's knowledge of the accused's parental power) (any implicit or explicit threats of punishment or physical harm if the child does not obey the accused's commands) (state any other evidence surrounding the parent-child, or similar, relationship from which constructive force could reasonably be inferred). If (state the name of the alleged victim) (did not resist) (or) (ceased resistance) due to the (compulsion) (or) (duress) of (parental) (_____) command, constructive force has been established and the act of sexual intercourse was done by force and without consent."

Finally, in cases where the accused used parental or analogous compulsion AND the victim was a child of tender years, the following was provided: "Sexual activity between a (parent) (stepparent) (_____) and a minor child is not comparable to sexual activity between two adults. The youth and vulnerability of children, when coupled with a (parent's) (stepparent's) (_____) position of authority, may create a situation in which explicit threats and displays of force are not necessary to overcome the child's resistance. On the other hand, not all children invariably accede to (parental) (_____) will. In deciding whether the victim (did not resist) (or) (ceased resistance) because of constructive force in the form of (parental) (_____) (duress) (compulsion) (_____), you

must consider all of the facts and circumstances, including but not limited to (the age of the child when the alleged abuse started) (the child's ability to fully comprehend the nature of the acts involved) (the child's knowledge of the accused's parental power) (any implicit or explicit threats of punishment or physical harm if the child does not obey the accused's commands) (state any other evidence surrounding the parent-child, or similar relationship, from which constructive force could reasonably be inferred). If (state the name of the alleged victim) (did not resist) (or) (ceased resistance) due to the (compulsion) (or) (duress) of (parental) (_____) command, constructive force has been established and the act of sexual intercourse was done by force and without consent.

I submit that these instructions are not of much help in the training environment because, on one hand, they require the victim to be placed in fear of death or physical injury (something Dean Anderson has stated just does not happen in the context of implied threats-it's usually a quid pro quo) - and on the other hand, they require a victim to be of such tender years that it almost becomes strict liability, and our recruits are not of tender years. Accordingly, the subcommittee may want to consider language similar to the following for the training environment and/or cases where the accused has abused his/her rank or authority (this is a hybrid of the foregoing instructions):

"If (state the name of the alleged victim) submitted to the sexual act/contact because of fear of retaliation based on the accused's authority or rank, the sexual act/contact was done without consent. The vulnerability of the subordinate, when coupled with a superior's position of authority, may create a situation in which explicit threats and displays of force are not necessary to compel acquiescence. On the other hand, not all subordinates invariably accede to a superior's will. In deciding whether (name of alleged victim) was placed in fear in the form of duress or compulsion you must consider all of the facts and circumstances, including but not limited to (any implicit or explicit threats of punishment if (name of alleged victim) did not acquiesce) (state any other evidence surrounding the offense from which the victim's fear could reasonably be inferred)."

The charging theory under which such an instruction would apply would be Article 120 (b)(1)(A) for an "act" offense and Article 120(d) for a "contact" offense.

V/R

LtCol Hines