

SUMMARY OF PRESENTER COMMENTS
**WHETHER ARTICLE 120 SHOULD BE AMENDED TO SPECIFICALLY
ADDRESS ABUSE OF AUTHORITY OFFENSES**

I. The current statutory text provides for criminalization of superior-subordinate relationships and a strict liability provision should not be adopted

Mr. Bill Cassara (Aug 7, p. 253): This consensual activity between a commander and his or her soldier and between a drill sergeant and his or her trainee is a crime in the Military. It is already punished under the Uniform Code of Military Justice. I do not believe that we should criminalize consensual sexual conduct between drill sergeants and trainees or between commanders and their soldiers

Lieutenant Commander Ryan Stormer (Sept 19, p. 144): My opinion would be I think we can prosecute these cases under the current Article 120.

(pp. 284-85): But I would say that we do have the ability in my own personal opinion to prosecute these type of cases under the current Article 120 statute.

Some of the conversations from the last session that has kind of gone into this session, have talked about the issue of threat. I would also put forward that in these type of cases, we have the ability to charge an individual with the concept of bodily harm, focusing on whether or not an individual is in fact of consenting or not consenting to sexual acts. And what I mean by that is that by focusing on the consensual nature of the act, it is my opinion we still can argue the concept of constructive force.

. . . .

And therefore we can charge those cases and make an argument in those cases as a prosecutor that a person in that situation was non-consensual. And so therefore, I think that in these particular situations, we can in fact prosecute these cases under a bodily harm theory in addition to some of the other things that have already been brought up by other panel members as far as threatening and some of those other concepts that we can use in these particular cases.

(p. 287): And it's again, my personal opinion that we do not need strict liability. And we can in fact proceed under the way the current statute is written.

Captain Steven Anderson (Sept 19, p. 261): However my personal opinion is that the existing punitive Articles in the Uniform Code of Military Justice are generally sufficient to capture cases where there is abuse of power in training or in any other environment for that matter.

Colonel Polly Kenny (Sept 19, p. 266): (M)y opinion is that Article 92 does work. And that we have a good history of it working and therefore I would say that as an overall construct I would oppose the changes as set forth by Congresswoman Speier.

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(p. 297): [A] strict liability standard, I'm adamantly opposed to. However, I think we can take the construct of Article 120 as it exists, refine it somewhat and it would be even better in the training environment.

Lieutenant Colonel James Varley (Sept 19, pp. 271-72): And my considered opinion is that Article 120 does not need to be amended to cover an abuse of power offense, because it is adequately covered by the toolkit available to prosecutors now. I believe that Article 92, fraternization and prohibited relationships provides a strict liability offense for drill sergeants who engage in sexual activity with basic trainees or those individuals involved with initial entry training.

That provides for a dismissal as well as two years of confinement. The prosecutor may also elect to prosecute an individual under Article 93 for maltreatment. Under Article 133 if it's an officer, for conduct unbecoming an officer. As well as in situations where there is a threat of something less than bodily harm, of extortion under Article 127, which has a three-year maximum punishment as well as a punitive discharge.

(pp. 298-99): It's a rare case that doesn't involve some form of bodily harm as it could be charged. And that's a fairly straightforward way to charge it, and the panel members understand that.

(pp. 304-05): I would have a hard time saying that guy deserves to be on the sex offender registry for the rest of his life because he accepted the offer of some sexual favor from a trainee in return for some discretionary action that he had the authority and the power to use.

(p. 315): But my perception is registering someone as a sex offender, because they accepted a sexual favor that was offered to them, not through the coercion, but because of their position of authority, they had the ability to grant this, I think it's going to be perceived as unjust.

Lieutenant Colonel Michael Sayegh (Sept 19, p. 277): I would just ask the panel members to consider the complexity of the -- when we use phrases like training and trainee and trainer. It's not as clear as the drill instructor and the boot camp poolee if you will. For instance Training Command does not even get the Marine until after they've gone to boot camp.

(p. 279): So I ask that when you look at making changes to 120, you have to be aware that there's differences in school lengths, there's differences in situations Depending on the language you take, you could find yourself training for your MOS for up to two years to learn Arabic. So the instructor may be only one pay grade above you. And you may have known that instructor for years at a time But I'm a little

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concerned when we talk about strict liability over a period of time when now this entry level Marine that came in at 19 is now 21. And then maybe a sexual contact occurs that was consensual.

(p. 301): I'm just concerned about giving a – creating a law that makes it a strict liability and would require the prosecutor to push for something that in the spirit of the law is probably not what it was intended to do.

Major Melanie Mann (Sept 19, p. 293): My humble opinion is that the existing punitive Articles do adequately address the criminality of a non-violent consensual – or non-consensual sexual act.

I believe that we have the mechanisms. And they're maltreatment, they are orders violations.

Colonel Mike Lewis (Sept 19, p. 391): I think my concern with the statute (proposed by Representative Speier) as drafted is the window of time after the person completes basic training. So the statute covers a 30 day period thereafter where that same strict liability environment might not be quite so necessary.

(p. 392): And my personal view is that we can take the existing Article 120 statute, and we can make clear in the definitions what conduct we are trying to capture without going the extra step of making it a strict liability offense and capturing any offense where we heard in the prior panel that it could go a lot further.

Ms. Charlene Whitman (Aug 7, p. 186): Just I've seen that in how force is applied in case law, how consent is looked at, and there are military cases already that also look at the relationship between the perpetrator and the offender, considering their rank. So I think it's something that exists currently in some -- to some extent. So just seeing how that might be working out in other states and within the military already.

II. A strict liability offense should be adopted for sexual relationships between trainers/instructors and basic trainees

Representative Jackie Speier (Sept 19, p. 211): But what was most telling was the fact that there was no question that when you get an order from an MTI that you follow it, that you obey every command. That as one trainee put it, there is no question mark at the end of an order The basic reality is that the Uniform Code of Military Justice or Article 120 that governs rape and sexual assault does not take into account that when you are in a military training environment that consent is not a mitigating factor. I believe there should be strict liability.

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Lieutenant Colonel Alex Pickands (Sept 19, p. 61): [F]or cadre training conduct really the decision is whether to capture that conduct explicitly other than how it's captured now, which it is criminal now . . . But if you want to categorize it as an Article 120 sexual assault, I think what you would have to do is recognize that it's the unique position of dependence and vulnerability of your victim in those circumstances, legally disclaim consent in those, which is to say make it much like a statute that prohibits sex with under-aged minors So, even expressions of actual consent would not be given legal effect.

(p. 142): But yes, a strict liability offense so it would prohibit all sexual act or contact between someone responsible for the training and care of initial entry training troops, and those troops.

Lieutenant Colonel Chris Thielemann (Sept 19, p. 144): Ma'am, at the initial training level, yes, it should be strict liability.

III. Article 120, UCMJ, should be amended to ensure coercive sexual relationships are criminalized as sexual offenses

See Discussion of "Threat" and "Wrongful Action" Discussed in Statutory Issues Outline

Representative Lois Frankel (Sept 19, p. 225): So I am here to propose a different -- or an addition to the definition of rape We add a definition at the end, which is Subsection 9, which defines position of authority. The term, position of authority, means superior in rank to the other person. So, now this is one way possibly to go. This is not a strict liability, because this is -- this would require trial and proof, and so forth, where obviously a consent defense could be used. But that's just one way to go. I'm not saying that's the best way to go, but I offer that as a possibility.

Ms. Elisha Morrow (Sept 19, p. 233-34): Currently, the article states that in order to commit the act of rape the offender must meet the following criteria. By use of force against the other person; by threatening or placing that person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping; by causing grievous bodily harm; by rendering the victim unconscious; or by administration of drug, intoxicant, or similar substance. However, this article does not include sexual activity that occurs under coercion or order of a superior. Due to this loophole, he was not tried for sexual battery, as he should have been