

Summary of the Status of JPP Subcommittee Deliberations on Issues 1-17
(As of 4 September 4, 2015)

Issues Related to Terms and Definitions in Article 120, UCMJ

1. Is the current definition of “consent” unclear or ambiguous?

A. Presenters' recommendation: A majority of presenters recommended change. See Tab 1 in June read-ahead materials. 7 presenters recommended some change.

B. Status: **UNRESOLVED**. Need final consensus vote.

C. Subcommittee deliberations status:

Working Group #3 recommended Dean Anderson's proposed change, in the form of an explanation of the term "consent" which would be issued by Executive Order and become part of the Manual for Courts-Martial at paragraph 45c. This explanation would also be put into the judges' bench book. After significant argument at the 7/22 meeting, she revised it and resubmitted via email on 7/23:

Suggested Explanatory Note on resistance:

Neither verbal nor physical resistance is required to prove nonconsent. As section 120(g)(8)(A) indicates: “Lack of verbal or physical resistance... does not constitute consent.” This is the key phrase in the statute on the question of resistance. Resistance is not required. Its absence alone is insufficient to constitute consent.

Submission alone is also insufficient to constitute consent. As section 120(g)(8)(A) indicates: “submission resulting from the use of force, threat of force, or placing another person in fear does not constitute consent.” This clause means that when a person submits to the will of another due to force, a threat of force, or fear, they have not consented.

The totality of the circumstances to an alleged offense may be considered in determining consent or lack of consent. Section 120(g)(8)(C), which indicates, “All the surrounding circumstances are to be considered in determining whether ... a person did not resist or ceased to resist only because of another person’s actions,” does not mean that resistance is required or that its absence indicates consent. It means that circumstances surrounding the alleged offense may suggest why a person did not resist, felt they could not resist, or felt that resistance would be futile, and why submission to the conduct at issue may derive from the alleged offender’s or “another person’s actions.” *Id.*

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?

A. Presenters' recommendation: A majority of presenters recommended change, at least in clarifying that these two defenses are available and may be raised by the defense. See Tab 1 in June read-ahead materials. 7 presenters recommended clarification on this issue.

B. Status: RESOLVED BY CONSENSUS VOTE (at the June subcommittee meeting)

C. Subcommittee preliminary conclusion:

With respect to the defenses of "consent" and "mistake of fact as to consent," the subcommittee at the June meeting decided to recommend that "consent" be left the way it is now treated, as a defense attack on the government's proof on which the judge instructs the members, and that "mistake of fact as to consent" be clearly added back into the statute or in the Rules for Courts-Martial.

3. Should the statute define “incapable of consenting?”

A. Presenters' recommendation: A majority of presenters recommend change in that there needs to be a definition. See Tab 1 in June read-ahead materials. 11 presenters recommended adopting a definition of this term.

B. Status: **UNRESOLVED**. Need final consensus vote.

C. Subcommittee deliberations status: (July TR at 164-210)

Working Group #2: Ms. Friel recommended the following solution at the July meeting:

Two alternative recommendations:

1. Consent is so interwoven throughout the statute because lack of consent is raised with force, when victim is unconscious, incapable of consenting. To fully define it, the entire statute would need to be re-written, or

2. Define incapable of consenting in section (g) based on 18 USC section 2242, sexual abuse and provide discussion in an EO similar to Kepros' and Grammel's proposals

For Option 2:

Draft language for Art. 120(g) Definitions

(9) Incapable of consent – a person is incapable of consenting if he/she is:

(A) incapable of appraising the nature of the conduct; or

(B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act; or attempts to do so.

Draft language for EO, which would go into MCM or bench book for guidance

For the purposes of Art. 120(b)(3), a person is incapable of consenting if he/she is:

A. incapable of appraising the nature of the conduct; or

B. physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act; or attempts to do so.

A totality of circumstances standard applies when assessing whether a person was incapable of consent. In deciding whether a person was incapable of consenting, many factors should be considered and balanced, to the extent they are known, include, but are not limited to his/her:

- Decision-making ability,

- Ability to foresee of consequences,
- Awareness of whom they are engaging in the act,
- Level of consciousness,
- Amount of alcohol or other intoxicants ingested,
- Tolerance to the ingestion of alcohol or other intoxicants, or
- Ability to walk, talk, and engage in other purposeful physical movements.

The accused must know or reasonably should have known that the person with whom they were engaging in the conduct was incapable of consenting.

4. Is the definition concerning the accused’s “administration of a drug or intoxicant” overbroad?

A. Presenters' recommendation: A majority of presenters recommended no change. See Tab 1 in June read-ahead materials. 3 presenters recommended no change.

B. **UNRESOLVED**. Need final consensus vote.

C. Subcommittee deliberations status:

Working Group #2 (Ms. Friel) recommended no change here, but did not have time to report at July meeting.

5. Does the definition of “bodily harm” require clarification?

A. A majority of presenters recommend no change. See Tab 1 in June read-ahead materials. 5 presenters recommended no change.

B. **UNRESOLVED**. Need final consensus vote.

C. Subcommittee deliberations status: (July TR at 5-93)

Working Group #1 recommended Ms. Kepros' proposal at the July meeting with two alternatives:

Proposal 1: Technical change to remove the term “bodily harm” from the statute.

- DELETE Art 120(g)(3) [definition of “bodily harm”]
- REPLACE “causing bodily harm to that other person” in Art 120(b)(1)(B) with “causing an offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact;”

Proposal 1 Rationale: This proposal is a minimal, technical change to the statute that simply removes “bodily harm” from statute and incorporates that term’s definition into the text of the statute itself. The term would eliminate confusion that results from the term

Proposal 2: Replace the “bodily harm” theory of liability for sexual assault with one based on “physical harm.” Add an additional theory of liability for sexual assault based on offensive touching or nonconsensual act.

- DELETE Art 120(g)(3) [definition of “bodily harm”]
- CHANGE Art 120(b)(1)(B) to “causing nonconsensual physical harm to that other person;”
- ADD Art 120(b)(4) “commits a nonconsensual sexual act upon another person.”

Proposal 2 Rationale: The Working Group's second proposal separates the two main elements presently contained in the bodily harm section of Article 120--any offensive touching and nonconsensual sex act--and puts them into two different sections. The first element of the proposal is to replace “bodily harm” with “physical harm” in (b)(1) in order to retain the concept of physical injury that is less than “grievous bodily harm” as a ground for criminal liability and to retain it as a subsection of (b)(1), which contains more "serious" kinds of sexual assault. The working group recommends the term “physical harm.” It is used elsewhere in the statute (Art 120(g)(5)(C)), and the JPP has not received any information about confusion regarding the term. Further, the continued use of the term of art “bodily harm” would inject prior interpretations of that language into this statute.

The act portion of the second element of the existing statute (g)(3)--any nonconsensual sexual act--is placed into a new section (b)(4). The reason for this is to make it crystal clear that nonconsensual sex standing alone is a crime under Article 120; that fact is obfuscated and obscured by the placement of the non-consensual sexual act language under the heading of bodily harm, which suggests that some kind of physical harm aside from the sex act is required. Nonconsensual sexual contact is captured under Art 120(d).

7. How should fear be defined to acknowledge both subjective and objective factors?

A. A majority of presenters recommended no change. See Tab 1 in June read-ahead materials. 4 presenters recommended no change.

B. **UNRESOLVED**. Need final consensus vote.

C. Subcommittee deliberations status:

Working Group #3 recommends no changes. A majority of presenters recommend no change, and the prevailing view of the members is that the government must prove the victim's fear was objectively reasonable.

8. Is the definition of “force” too narrow?

A. A majority of presenters recommended no change. See Tab 1 in June read-ahead materials.
4 presenters recommended no change.

B. **UNRESOLVED**. Need final consensus vote.

C. Subcommittee deliberations status: (July TR at 93-95)

Working Group #1 recommended no change, but suggested this be looked at in light of the resolution of Issue # 1.

9. Are the definitions of “sexual act” and “sexual contact” too narrow, or are they overly broad?

A. A majority of presenters recommended change. See Tab 1 in June read-ahead materials. 7 presenters recommended change.

B. **UNRESOLVED**. Need final consensus vote.

C. Subcommittee deliberations status:

Working Group #2 recommends revising the definitions with sex act mirroring the organization of the Federal statute and choose whether to refer to "genitalia" or to list out the "vulva, penis, scrotum, or anus."

10. Should the accused's knowledge of a victim's capacity to consent be a required element of sexual assault? (Presently, the government must prove both the victim's incapacity to consent and that the accused knew or reasonably should have known of that incapacity)

A. A majority of presenters recommend no change. See Tab 1 in June read-ahead materials. 4 presenters recommended no change.

B. RESOLVED.

C. Subcommittee deliberations status:

Working Group #3 recommends no changes. The consensus at the June meeting was to recommend no change; the government must prove that the accused knew or reasonably should have known that the victim was incapable of consenting.

11. Should the offense of “indecent act” be added to the UCMJ as an enumerated offense?

A. A majority of presenter recommended this offense should be added back into the UCMJ. See Tab 1 in June read-ahead materials. 3 presenters recommended change.

B. **UNRESOLVED**. Need final consensus vote.

C. Subcommittee deliberations status:

At the June meeting, members requested materials on the old version of indecent acts under Articles 134 and 120. Those materials were sent to them via email on July 2, 2015.

Issues Related to Coercive Sexual Misconduct and Abuse of Authority

6. Is the definition of “threatening wrongful action” ambiguous or too narrow? (The subcommittee decided to address Issue #6 in the context of coercive sexual misconduct and abuse of rank/authority offenses)

A. Several presenters told the subcommittee the definition is unclear and the bench book instruction is not helpful.¹ Professor Schulhofer noted at Tab 17 in the April read ahead materials that this term is either too ambiguous or too narrow in its application to an officer or NCO who seeks sexual favors in return for undeserved favorable treatment, or sexual favors absent which he will report an enlistee’s infractions or mention factually accurate shortcomings in the enlistee’s personnel report. He recommends it be clarified and these types of scenarios be treated as a coercive sexual crime. Presenters at the August meeting recommended making the definition more explicit and suggested using the definition in the 2007 version of Article 120 as a guide:

“Threatening or placing that other person in fear” (for aggravated sexual assault and abusive sexual contact) means a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the victim or another person being subjected to a lesser degree of harm than death, grievous bodily harm, or kidnapping. Such lesser degree of harm includes:

(A) physical injury to another person or to another person's property; or

(B) a threat:

(i) to accuse any person of a crime;

(ii) to expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or

(iii) *through the use or abuse of military position, rank, or authority, to affect or threaten to affect, either positively or negatively, the military career of some person.*

The presenters also recommended the definition clarify that any threat can be express or implied.

B. PRELIMINARILY RESOLVED.²

C. Subcommittee deliberations status: Yes, this definition is ambiguous and too narrow and should be explained. The explanation in the 2007 version of Article 120 is better and a helpful

¹ Major Payne, Major King, LCDR Gullo, Captain Shure, Colonel Morgan, LtCol Wilson

² This is based on a general consensus among the 8 members present in person or by phone at the August meeting, but recognizing some members were absent.

starting point, but it should be modified to clearly state that wrongful action can be anything done by an accused using his or her rank and authority to coerce a victim into engaging in sexual acts or contact.

12. Is the current practice of charging inappropriate relationships or maltreatment under articles of the UCMJ other than Article 120 appropriate and effective when sexual conduct is involved?

A. A majority of presenters stated the current practice of charging inappropriate sexual relationships or maltreatment under Articles 92 or 93 is appropriate and effective when consensual sexual conduct is involved.³

B. PRELIMINARILY RESOLVED.

C. Subcommittee deliberations status: Yes, the current practice of charging inappropriate sexual relationships or maltreatment under articles of the UCMJ other than Article 120 (Articles 92 and 93) is appropriate and effective when sexual conduct is involved.

³ LCDR Gullo, Captain Olson, Captain Shure, Lieutenant Hochmuth, Colonel Morgan, Colonel Mendelson, LtCol Wilson, LCDR Casey

13. Does the 2012 version of the UCMJ afford prosecutors the ability to effectively charge coercive sexual relationships or those involving abuse of authority under Article 120?

A. A majority of presenters told the subcommittee the present version of Article 120 gives prosecutors the ability to effectively charge coercive sexual relationships or those involving abuse of rank and authority.⁴

B. PRELIMINARILY RESOLVED.

C. Subcommittee deliberations status: Yes, the 2012 version of the UCMJ affords prosecutors the ability to effectively charge coercive sexual relationships or those involving abuse of authority under Article 120, but the definition of "threatening or placing that other person in fear" is unclear and should be explained in an Executive Order or in the bench book. Dean Anderson has agreed to draft a proposed explanation that would more accurately explain what this definition means.

⁴ LCDR Gullo, Captain Olson, Captain Shure, Lieutenant Hochmuth, Colonel Morgan, LtCol Wilson, LCDR Casey

14. Should the definition of “threatening or placing that other person in fear” be amended to ensure that coercive sexual relationships or those involving abuse of authority are covered under an existing Article 120 provision?

A. A majority of presenters told the subcommittee the definition of “threatening or placing that other person in fear” should be expanded to ensure that coercive sexual relationships or those involving abuse of authority are better covered under the present version of Article 120.⁵

B. PRELIMINARILY RESOLVED.

C. Subcommittee deliberations status: Yes, the definition of “threatening or placing that other person in fear” should be amended to ensure that coercive sexual relationships or those involving abuse of authority are better covered under an existing Article 120 provision. See recommendation on Issue 13.

⁵ Major Payne, Major King, LCR Gullo, Captain Shure, Colonel Morgan, LtCol Wilson, Lieutenant Hochmuth

15. Should a new provision be added under Article 120 to specifically address coercive sexual relationships or those involving abuse of authority?

A. None of the presenters recommended a new sub-section be added to Article 120; they believe the present Article 120 framework is sufficient to address coercive sexual misconduct and abuse of rank or authority.

B. PRELIMINARILY RESOLVED.

C. Subcommittee deliberations status: No, there should not be a new provision added under Article 120 to specifically address coercive sexual relationships or those involving abuse of authority.

16. Should sexual relationships between basic training instructors and trainees be treated as strict liability offenses under Article 120?

A. A majority of presenters told the subcommittee they do not recommend that sexual relationships between training instructors and trainees be treated as per se illegal or strict liability offenses under Article 120. Major Payne stated she is opposed to making these offenses per se illegal or strict liability because (1) it is overly paternalistic to tell adults they can never consent to sex while simultaneously telling them they must act and be treated as adults in the military, (2) labeling someone a sex offender for having a consensual sexual relationship with an adult is unjust, (3) these relationships are already criminalized under Article 92, and that is an effective deterrent and method of prosecution, and (4) per se/strict liability for what are factually consensual relationships is an overcorrection in sexual assault policy. The other presenters, including prosecutors and training command legal advisers, agreed with her assessment.⁶

The legal advisers to the training commands also noted that recruits are given thorough training that even consensual relationships are inappropriate and illegal for both recruits and trainers and that recruits sign acknowledgment forms indicating their understanding of these regulations. The legal advisers also noted that instructors already express fears in dealing with trainees and that continued overcriminalization would further erode the important mentoring relationship that must be created between instructors and recruits.⁷

At the July meeting, some former and current training commanders gave differing views from the prosecutors and legal advisers. MG Peggy Combs (Army) opined that making sexual relationships per se illegal under Article 120 or a different article not currently used would provide commanders with an additional tool to deter this misconduct. MG Gina Grosso (Air Force) expressed views similar to the prosecutors and legal advisers. She was skeptical of making these offenses per se illegal under Article 120, but suggested modifying Article 120 so as to cover situations involving "constructive force" by instructors. RADM Cari Thomas (Coast Guard) supported "an expansion of Article 120 to be able to accommodate for this imbalance of power" between instructors and recruits. BGen Austin Renforth (Marine Corps) stated he is not opposed to strict liability in boot camp (entry-level training) alone, but beyond that he believes the present framework is sufficient.

B. PRELIMINARILY RESOLVED.

C. Subcommittee deliberations status: Sexual relationships between basic training instructors and trainees should not be treated as a per se illegal/strict liability offense under Article 120.

⁶ Major King, Major Heimann, LCDR Robertson, LCDR Gullo, Major Wardle, Captain Olson, Captain Shure, Lieutenant Hochmuth, Colonel Morgan, Colonel Mendelson, LtCol Wilson, LCDR Casey.

⁷ Colonel Mendelson, Colonel Morgan, LCDR Casey

17. As an alternative to further amending Article 120, should coercive sexual relationships currently charged under other articles of the UCMJ be added to DoD's list of offenses that trigger sex offender registration?

A. None of the presenters recommended adding any offenses charged under articles other than Article 120 to DoD's list of offenses that trigger sex offender registration.

B. PRELIMINARILY RESOLVED.

C. Subcommittee deliberations status: Coercive sexual relationships currently charged under other articles of the UCMJ, including Articles 92 and 93, should not be added to DoD's list of offenses that trigger sex offender registration.