

From: [REDACTED]
To: [WHS Pentagon EM Mailbox Judicial Panel](#)
Subject: Proposed Article
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Attachments: [§ 920. Art 120 Proposed Revision.docx](#)

Ma'am/Sir,

Good morning.

I testified before the Judicial Proceedings Panel (JPP) on September 19, 2014 on the topic of Prosecuting Abuse of Power Offenses under the UCMJ. It was suggested at that time, that I provide a draft proposal of how Article 120, UCMJ, might be amended to better capture the senior/subordinate relationship. I have attached that proposal for your review and consideration.

Please advise if you have any questions or need further analysis.

Very Respectfully,

LtCol Melanie J. Mann
U.S. Marine Corps
Officer-in-Charge
Legal Services Support Team - Miramar

[REDACTED]

§ 920. Art. **120**. Rape and sexual assault generally

(a) Rape. Any person subject to this chapter [10 USCS §§ 801 et seq.] who commits a sexual act upon another person by--

- (1) using unlawful force against that other person;
- (2) using force causing or likely to cause death or grievous bodily harm to any person;
- (3) threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping;
- (4) first rendering that other person unconscious; or
- (5) administering to that other person by force or threat of force, or without the knowledge or consent of that person, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of that other person to appraise or control conduct; is guilty of rape and shall be punished as a court-martial may direct.

(b) Sexual assault. Any person subject to this chapter [10 USCS §§ 801 et seq.] who--

- (1) commits a sexual act upon another person by--
 - (A) threatening or placing that other person in fear;
 - (B) causing bodily harm to that other person;
 - (C) making a fraudulent representation that the sexual act serves a professional purpose; or
 - (D) inducing a belief by any artifice, pretense, or concealment that the person is another person;
- (2) commits a sexual act upon another person when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring; or
- (3) commits a sexual act upon another person when the other person is incapable of consenting to the sexual act due to--
 - (A) impairment by any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known by the person; or
 - (B) a mental disease or defect, or physical disability, and that condition is known or reasonably should be known by the person; is guilty of sexual assault and shall be punished as a court-martial may direct.

(c) Aggravated sexual contact. Any person subject to this chapter [10 USCS §§ 801 et seq.] who commits or causes sexual contact upon or by another person, if to do so would violate subsection (a) (rape) had the sexual contact been a sexual act, is guilty of aggravated sexual contact and shall be punished as a court-martial may direct.

(d) Abusive sexual contact. Any person subject to this chapter [10 USCS §§ 801 et seq.] who commits or causes sexual contact upon or by another person, if to do so would violate subsection (b) (sexual assault) had the sexual contact been a sexual act, is guilty of abusive sexual contact and shall be punished as a court-martial may direct.

(e) Proof of threat. In a prosecution under this section, in proving that a person made a threat, it need not be proven that the person actually intended to carry out the threat or had the ability to carry out the threat.

(f) Defenses. An accused may raise any applicable defenses available under this chapter [10 USCS §§ 801 et seq.] or the Rules for Court-Martial. Marriage is not a

defense for any conduct in issue in any prosecution under this section.

(g) Definitions. In this section:

(1) Sexual act. The term "sexual act" means--

(A) contact between the penis and the vulva or anus or mouth, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight; or

(B) the penetration, however slight, of the vulva or anus or mouth of another by any part of the body or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

(2) Sexual contact. The term "sexual contact" means--

(A) touching, or causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, or degrade any person; or

(B) any touching, or causing another person to touch, either directly or through the clothing, any body part of any person, if done with an intent to arouse or gratify the sexual desire of any person.

Touching may be accomplished by any part of the body.

(3) Bodily harm. The term "bodily harm" means any offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact.

(4) Grievous bodily harm. The term "grievous bodily harm" means serious bodily injury. It includes fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other severe bodily injuries. It does not include minor injuries such as a black eye or a bloody nose.

(5) Force. The term "force" means--

(A) the use of a weapon;

(B) the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or

(C) inflicting physical harm sufficient to coerce or compel submission by the victim.

(6) Unlawful force. The term "unlawful force" means an act of force done without legal justification or excuse.

(7) Threatening or placing that other person in fear. The term "threatening or placing that other person in fear", 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 the wrongful action contemplated by the communication or action. **The wrongful action contemplated must result in the alleged 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: physical injury to another person or to another person's property, a threat to accuse any person of a crime, a threat to expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule, a threat 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.**

(8) Consent.

(A) The term "consent" means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the

conduct at issue shall not constitute consent.

(B) A sleeping, unconscious, or incompetent person cannot consent. A person cannot consent to force causing or likely to cause death or grievous bodily harm or to being rendered unconscious. A person cannot consent while under threat or in fear or under the circumstances described in subparagraph (C) or (D) of subsection (b)(1).

(C) Lack of consent may be inferred based on the circumstances of the offense. All the surrounding circumstances are to be considered in determining whether a person gave consent, or whether a person did not resist or ceased to resist only because of another person's actions.

Proposed Comments:

Threatening or placing that other person in fear: unlawful force and a sexual act are necessary to the offense of rape and sexual assault.

(A) *Rape:* Where intimidation or threats death or physical injury make resistance futile it is said that "constructive force" has been applied, thus satisfying the requirement of unlawful force. Hence, when the accused's (actions and words) (conduct), coupled with the surrounding circumstances (senior/subordinate relationship, trainer/trainee, drill instructor/recruit), create a reasonable belief in the victim's mind that death or physical injury would be inflicted on her/him, the act has been accomplished by force.

(B) *Sexual Assault:* When the sexual act is alleged by threat or by placing in fear, not resulting in death, grievous bodily harm, or kidnapping. When the accused (actions or words) (conduct) coupled with the surrounding circumstances (senior/subordinate relationship, trainer/trainee, drill instructor/recruit), create a reasonable belief in the victim's mind that the wrongful action contemplated will result in the alleged victim or another person being subjected to a lesser degree of harm, the act has been accomplished by force. Lesser included harm includes: physical injury to another person or to another person's property, a threat to accuse any person of a crime, a threat to expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule, a threat 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.

(C) Senior-subordinate relationship: The force used to accomplish a sexual act may be actual or constructive. Constructive force may consist of express or implied threats. The existence and reasonableness of the victim's fear of bodily harm under a totality of the circumstances are questions of fact. *United States v. Hicks*, 24 M.J. 3, 9 (C.M.A. 1987). Rank disparity alone is not sufficient to constitute constructive force, there must be other factors demonstrating the relationship between the offense at issue and the accused's superior rank and position, including; (1) actual size, (2) age, (3) reputation, (4) position, (5) actual and apparent authority in matters other than the sexual act, and (6) location and time of assault. *United States v. Simpson*, 58 M.J. 368, 377 (C.A.A.F. 2003). Explicit threats and display of force by a military superior are not necessary, as long as there is an honest and

reasonable belief by the victim, that he or she would be subjected to the wrongful action contemplated. *United States v. Bradley*, 28 M.J. 197 (C.M.A. 1989). Consent by fraud is valid consent. For example, if the victim and accused are bargaining for some benefit that the victim would not otherwise be entitled to, then there is valid consent. If, however, the accused is threatening the victim with taking some action that could have a negative impact on the victim's career or threatens to take disciplinary action, then consent has been obtained by threat. *United States v. Walker*, 2014 CCA LEXIS 306 (2014).