

**SUBCOMMITTEE REPORT TO THE
JUDICIAL PROCEEDINGS PANEL**

ON

**ARTICLE 120 OF THE
UNIFORM CODE OF MILITARY JUSTICE**

December 2015

**Subcommittee
to the
Judicial Proceedings since Fiscal Year 2012 Amendments Panel**



JUDICIAL PROCEEDINGS PANEL SUBCOMMITTEE
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December 10, 2015

MEMORANDUM FOR MEMBERS OF THE JUDICIAL PROCEEDINGS PANEL

SUBJECT: Report of the Subcommittee

On April 9, 2015, the Secretary of Defense established this Subcommittee to support the Judicial Proceedings Panel in its duties under Section 576(d) of the National Defense Authorization Act for Fiscal Year 2013. The Secretary established four objectives for the Subcommittee to assess and make recommendations for improvements in the construction, interpretation, and implementation of current adult sexual assault provisions contained in the Uniform Code of Military Justice (UCMJ), to include Article 120 of the UCMJ. The Subcommittee has completed its review and submits to the Judicial Proceedings Panel its report with our assessment, conclusions, and recommendations.

A handwritten signature in black ink that reads "Barbara S. Jones". The signature is written in a cursive, flowing style.

Barbara S. Jones
Subcommittee Chair

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Executive Summary

In its February 2015 assessment of the 2012 version of Article 120 of the Uniform Code of Military Justice (UCMJ), the Judicial Proceedings Panel (JPP) recommended that seventeen issues should be referred to a subcommittee for further evaluation. Eleven of these issues related to the definitions of terms, elements of offenses, defenses, and enumerated offenses under the statute. Some presenters testified to the JPP that a lack of clarity or specificity in certain definitions in Article 120 could create difficulty or uncertainty in prosecuting cases under the statute. Conversely, others told the JPP that further revisions to Article 120—a statute significantly revised twice in recent years—would make prosecutions more complex.

The JPP also recommended that a subcommittee further assess how the military prosecutes crimes under the UCMJ involving abuse of position, rank, or authority, including relationships between trainers and trainees, recruits and recruiters, and senior and subordinate military members in the same chain of command. The JPP heard testimony about whether the 2012 version of Article 120 and other articles of the UCMJ provide sufficient means for the prosecution of coercive sexual offenses, inappropriate relationships, and maltreatment, and the JPP heard proposals to amend Article 120 to more specifically address offenses committed by training instructors against trainees. The JPP recommended that a subcommittee examine these issues and provide recommendations for possible amendments.

To review the issues referred to it by the JPP, the JPP Subcommittee (hereinafter "the Subcommittee") held seven meetings from April 2015 to October 2015. Members of the Subcommittee heard from more than forty witnesses, considered more than one-hundred sources of written material, and deliberated extensively on each issue. In accord with the JPP's directives, the Subcommittee discussed and deliberated on each issue regarding whether amendments to Article 120 of the UCMJ should be recommended, and, if so, what form such amendments should take. This analysis included detailed discussion and debate over specific statutory language and various proposals prepared by the Subcommittee members.

Overall, the Subcommittee determined that Article 120 of the UCMJ provides a reasonably effective statutory framework for prosecution of sexual assault offenses in the military, but that some definitions and terms used in Article 120 are sufficiently confusing or vague as to create uncertainty or concern regarding the effects of these terms on standards of conduct among Service members or on court-martial prosecution of sexual assault offenses. Accordingly, the Subcommittee determined that amendments to Article 120 of the UCMJ and the Manual for Courts-Martial are warranted to address seven issues it reviewed. For ten of the issues it reviewed, the Subcommittee determined that change or amendment is not warranted.

Overview of the Subcommittee's Assessment

In its initial report of February 4, 2015, the Judicial Proceedings Panel (JPP) determined that seventeen issues regarding Article 120 of the UCMJ should be directed to a subcommittee for further evaluation. The first eleven of these issues were related to definitions of terms, elements of offenses, defenses, and enumerated offenses under the statute, and the other six issues were related to coercive sexual relationships and abuse of authority.

To complete these tasks, the Subcommittee considered the JPP's February 2015 report, together with the testimony and written materials regarding these issues previously provided to the JPP during its public meetings in August through December 2014. The Subcommittee held seven meetings, from April through October 2015, and received testimony from forty-four witnesses. These witnesses included retired military judges, senior prosecutors and defense counsel, appellate counsel, civilian practitioners, staff judge advocate legal advisers to training commanders, general and flag officers in command at the Services' entry-level training commands, the Chief of the Joint Service Committee at the time the current version of Article 120 was drafted and submitted to Congress, the Director of Law Enforcement Policy for the Department of Defense (DoD), and one member of Congress along with one of her constituents who was a victim of sexual misconduct during her entry-level military training. In addition to this testimony, the Subcommittee considered the written materials and recommendations provided by the witnesses. The Subcommittee deliberated during five of its meetings. The issues, the material considered, and the Subcommittee's conclusions and recommendations are set forth below.

Summary of Subcommittee Recommendations

The Subcommittee recommends that amendments be made to Article 120 of the UCMJ and the Manual for Courts-Martial to address the following issues referred to it by the JPP:

JPP Issue 1: Is the current definition of "consent" unclear or ambiguous?

Subcommittee Recommendation: The Subcommittee determined that the definition of consent is confusing in some areas and still retains vestiges of outdated rape laws that could be interpreted to require a victim to physically resist an attacker before a fact-finder can conclude there was a lack of consent. The Subcommittee's recommended changes would retain most of the current definition, but remove repetitive and contradictory language about resistance. A lack of resistance would still be relevant for the fact-finder to consider along with all the surrounding circumstances, but the proposed change clarifies that a lack of resistance alone does not constitute consent.

JPP Issue 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?

Subcommittee Recommendation: The Subcommittee determined that there should be clarification in the *Manual for Courts-Martial* so that consent (as an attack on the government's proof) and mistake of fact as to consent (as a clearly delineated defense) may be raised in any case in which it is relevant.

JPP Issue 3: *Should the statute define “incapable of consenting?”*

Subcommittee Recommendation: The Subcommittee determined that practitioners, including military judges, prosecutors, defense counsel, appellate courts, panel members at courts-martial, and Service members as part of their sexual assault training, need a definition for this important term that is an issue in many sexual assault and abusive sexual contact prosecutions under Articles 120(b) and 120(d). Practitioners testified that a majority of the cases that go to trial have an alleged victim who was incapable of consenting due to impairment by alcohol or other intoxicating substances, and the absence of any explanation of this term leaves a “gap” in the statute that makes it difficult for counsel to argue their cases and for judges to instruct panel members on this issue. The Subcommittee’s recommended definition of “incapable of consenting” would appear in the Subcommittee’s recommended redraft at Article 120(g)(8), and further explanatory guidance for practitioners would be set forth in a subsequent executive order explaining in more depth that a totality of the circumstances test applies when determining the ultimate question of whether a victim was incapable of consenting.

JPP Issue 5: *Does the definition of “bodily harm” require clarification?*

Subcommittee Recommendation: The Subcommittee determined that the concept of “bodily harm” is useful for cases in which a sexual act or sexual contact has been committed without a victim’s consent, especially in cases in which the alleged victim has little or no recollection of the incident owing to impairment, but that the term and its present definition are confusing and should be amended. The present language of 120(b)(1)(B) should be amended and replaced with the words “without the consent of the other person.” This would remove any confusion over the term “bodily harm” and would create a baseline theory of liability for any sexual act or sexual contact committed without a victim’s consent. The Subcommittee’s recommended changes would clarify what the presenters told the Subcommittee: that “bodily harm” in Article 120(g)(3), as applied under Article 120 (b)(1)(B) and Article 120(d), means a sexual act or sexual contact done without the consent of the victim, but no further “bodily harm” or physical injury must be shown. This change would further require removing the present definition of “bodily harm” set forth in Article 120(g)(3). Accordingly, the successive definitions set forth in Article 120(g) will also require renumbering. This renumbering is set out in the Subcommittee’s proposed redraft in Enclosure 1 to this report.

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

Subcommittee Recommendation: The Subcommittee determined that the definitions of “sexual act” and “sexual contact” require clarification. The definition of “sexual act” should be modified so that penetration and contact are addressed in separate subsections, and the definition of “sexual contact” should include the use of an object.

JPP Issue 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?*

Subcommittee Recommendation: The Subcommittee determined that the 2012 version of the UCMJ does afford prosecutors the ability to effectively charge some types of coercive sexual misconduct or sexual misconduct involving the abuse of authority. But the Subcommittee also concluded that some offenses in the entry-level training environment involve subtle forms of

coercion not easily captured under the current statutory framework. The Subcommittee therefore recommends a new subsection, Article 120(b)(1)(E), that would create an additional theory of liability for sexual assault or abusive sexual contact in which an accused has abused his or her position, rank, or authority to secure compliance by the other person.

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

Subcommittee Recommendation: The Subcommittee determined that although Article 120(b)(1)(A) is used by practitioners to charge coercive sexual misconduct offenses involving the abuse of authority, numerous fact patterns—especially those arising in the entry-level training environment between instructors and recruits—are not easily captured by this theory of liability. Accordingly, the Subcommittee recommends a new subsection, Article 120(b)(1)(E), to address sexual assaults and abusive sexual contact when an accused has abused his or her position, rank, or authority to secure compliance by the other person.

The Subcommittee does not recommend amendments to Article 120 of the UCMJ regarding the following issues referred to it by the JPP:

JPP Issue 4: *Is the definition concerning the accused’s “administration of a drug or intoxicant” overbroad?*

Subcommittee Recommendation: The Subcommittee determined that the definition concerning the accused’s “administration of a drug or intoxicant” under Article 120(a)(5) is not overbroad. The Subcommittee therefore recommends no changes on this issue.

JPP Issue 6: *Is the definition of “threatening wrongful action” ambiguous or too narrow?*

Subcommittee Recommendation: The Subcommittee determined that the definition of “threatening wrongful action” is not so ambiguous or narrow as to require a change to the definition. However, the Subcommittee believes that the concerns expressed by practitioners that this definition is too narrow to capture offenses arising in the entry-level training environment can and should be addressed. The Subcommittee believes that the best approach to the practitioners’ concerns is through its responses to issues 13 and 15 recommending a new subsection under Article 120(b)(1) for sexual assaults and abusive sexual contact when an accused has abused his or her position, rank, or authority to secure compliance by the other person.

JPP Issue 7: *How should “fear” be defined to acknowledge both subjective and objective factors?*

Subcommittee Recommendation: The Subcommittee determined that no change was necessary to the current requirements that the fear of the victim be both a personal, subjective fear and that it be an objectively reasonable fear, as currently specified by Article 120(g)(7).

JPP Issue 8: *Is the definition of “force” too narrow?*

Subcommittee Recommendation: The Subcommittee determined that in light of the recommended amendments to the statutory definition of consent in issue 1, no modification to the Article 120(g)(5) definition of force should be recommended.

JPP Issue 10: *Should the accused’s knowledge of a victim’s capacity to consent be a required element of sexual assault?*

Subcommittee Recommendation: At present, the government must prove both the victim’s incapacity to consent and that the accused knew or reasonably should have known of that incapacity. The Subcommittee determined that the government should continue to be required to prove that the victim was incapable of consenting and that the accused knew or reasonably should have known of that incapacity. Title 18 U.S.C. Section 2242 (Sexual abuse) and Section 2244 (Abusive sexual contact) require the government to prove not only the charged sexual act or sexual contact but also the accused’s knowledge of the victim’s incapacity to consent. The elements in Article 120(b)(2) and 120(b)(3) similarly require the government to prove the act and the accused’s knowledge of the incapacity, but also permit a conviction when an accused “reasonably should have known” of the victim’s incapacity to consent. The Subcommittee considered the specific issue referred by the JPP, as well as whether Article 120’s scienter requirement was overly broad in permitting a conviction for an accused who “reasonably should have known” of the victim’s incapacity to consent, and determined that it would not recommend any changes on this issue.

JPP Issue 11: *Should the offense of “indecent act” be added to the UCMJ as an enumerated offense?*

Subcommittee Recommendation: For the great majority of the UCMJ’s history, “indecent acts” were punishable as a specified offense under Article 134, requiring a showing that the conduct was either prejudicial to good order and discipline or of a nature to bring discredit upon the Armed Forces. An enumerated offense under Article 120 would require no such showing, which could result in overbroad application of the offense. The Subcommittee is aware that the Department of Defense has proposed an Article 134 offense in a recent draft executive order that addresses “Indecent Conduct,” pursuant to the President’s authority under Article 56 of the UCMJ. The Subcommittee takes no position on the contents of that proposal. The Subcommittee does not recommend adding the offense of “indecent act” to the UCMJ as an enumerated offense under Article 120. The Subcommittee’s recommendation does not extend to offenses specified by the President under Article 134 of the UCMJ.

JPP Issue 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?*

Subcommittee Recommendation: The Subcommittee determined that the current practice of charging inappropriate sexual relationships or maltreatment under articles of the UCMJ other than Article 120 (Articles 92 and 93) can be appropriate and effective when sexual conduct is involved.

JPP Issue 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?*

Subcommittee Recommendation: The Subcommittee determined that if the proposed Article 120(b)(1)(E) is adopted (see issue 15), the definition of threatening or placing another person in fear does not need to be amended with respect to coercive sexual relationships.

JPP Issue 16: *Should sexual relationships between basic training instructors and trainees be treated as per se illegal or strict liability offenses under Article 120?*

Subcommittee Recommendation: The Subcommittee determined that consensual sexual relationships between basic training instructors and trainees should not be treated as per se illegal or strict liability offenses under Article 120.

JPP Issue 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?*

Subcommittee Recommendation: The Subcommittee determined that 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.

Subcommittee Review of Issues

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

Current definition of “consent” in Article 120(g)(8) of the UCMJ:

(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.

A. JPP Rationale for Referring This Issue to the Subcommittee. Some witnesses who appeared before the JPP in late 2014 testified that the current UCMJ definition of consent¹ is inconsistent and confusing. According to JPP witness and Subcommittee member Professor Stephen J. Schulhofer of the New York University School of Law, this definition of consent mixes three of the four definitions of consent used throughout many American jurisdictions. He observed that the current version of Article 120 is awkwardly constructed and the consent language is vague and contradictory. He suggested that the JPP propose a fresh start to the sexual assault statute rather than attempt to amend it piecemeal. In contrast, other witnesses, including trial practitioners, said that the definition is clear, unambiguous, and should not be altered. Given these opposing viewpoints, the JPP referred this issue to the Subcommittee for further analysis.²

B. Testimony and Information Received by the Subcommittee. A majority of the presenters before the Subcommittee recommended some change to the definition of consent. A retired Army military judge stated that some parts of the consent definition are contradictory. He suggested replacing the term “freely given” with “voluntary.” He also suggested removing terminology regarding a victim needing to resist the attack.³ A senior Marine Corps prosecutor and

¹ See 10 U.S.C. § 920(g)(8).

² JUDICIAL PROCEEDINGS PANEL, INITIAL REPORT 26–27 (Feb. 2015) [hereinafter JPP INITIAL REPORT], available at http://jpp.whs.mil/Public/docs/08-Panel_Reports/JPP_InitialReport_Final_20150204.pdf.

³ *Written Statement of Colonel Timothy Grammel, U.S. Army (Ret.)* (Apr. 10, 2015).

former military judge agreed.⁴ A senior Army prosecutor recommended that consent should be “outwardly expressed in words or conduct.”⁵ He suggested removing subparagraph (g)(8)(c) as being redundant given the other subparagraphs.⁶

The reserve Chief of the Marine Corps Defense Services Organization testified that the term “competent person” is confusing and unclear and needs to be defined.⁷ A senior Air Force defense counsel stated that the definition of consent is internally inconsistent in some places, that any terminology requiring “affirmative consent” is not realistic, and that affirmative expressions of consent are not how people interact socially.⁸

An Army appellate government counsel who litigates sexual assault convictions on appeal testified that there needs to be clarification regarding what a competent person is; the definition provides that “a sleeping, unconscious or incompetent person cannot consent,” but she suggested that there is a gap in the definition when applied to a victim who is not sleeping or unconscious.⁹ A civilian practitioner who formerly served on active duty as a Marine Corps prosecutor and defense counsel stated that the present definition of consent is too narrow and needs to be broader.¹⁰

A smaller number of presenters recommended no changes to the definition of consent. For instance, a senior Air Force prosecutor stated that while the various concepts in the definition could be organized in a simpler manner, the statute nevertheless provides Service members, practitioners, and finders of fact with a relatively concise statement of this fundamental legal term.¹¹ And a civilian attorney and former prosecutor testified that he does not see a problem with the definition of consent in Article 120. He noted that over his career, he never prosecuted a sexual assault case where he didn’t have to prove that there was no consent, even when lack of consent was not included as a specific element of an offense; in his opinion attempting to avoid the consent issue does not accomplish much. He does not think the law is the problem; rather, the problem is in the implementation of the law, which he describes as how cases are investigated, charged, and prosecuted, and how victims are treated.¹²

C. Conclusion: Some Subcommittee members noted a concern with the definition’s “residual reference to resistance.”¹³ The definition and the bench instructions given to the court-martial panel members can be interpreted as requiring a victim to physically resist an attacker before

⁴ *Transcript of JPP Subcommittee Meeting* 104–14 (May 7, 2015) (testimony of Lieutenant Colonel Chris Thielemann, U.S. Marine Corps).

⁵ *Transcript of JPP Subcommittee Meeting* 114–24 (May 7, 2015) (testimony of Lieutenant Colonel Alex Pickands, U.S. Army).

⁶ *Transcript of JPP Subcommittee Meeting* 114–24 (May 7, 2015) (testimony of Lieutenant Colonel Alex Pickands, U.S. Army).

⁷ *Transcript of JPP Subcommittee Meeting* 218–33 (May 7, 2015) (testimony of Colonel Terri Zimmermann, U.S. Marine Corps Reserve).

⁸ *Transcript of JPP Subcommittee Meeting* 233–45 (May 7, 2015) (testimony of Lieutenant Colonel Julie Pitvorec, U.S. Air Force).

⁹ *Transcript of JPP Subcommittee Meeting* 351–64 (May 7, 2015) (testimony of Captain Jihan Walker, U.S. Army).

¹⁰ *Transcript of JPP Subcommittee Meeting* 386–97 (May 7, 2015) (testimony of Mr. Zachary Spilman, Attorney at Law).

¹¹ *Transcript of JPP Subcommittee Meeting* 124–35 (May 7, 2015) (testimony of Major Mark Rosenow, U.S. Air Force); *see also Written Statement of Major Mark Rosenow* (May 20, 2015).

¹² *Transcript of JPP Subcommittee Meeting* 378–86 (May 7, 2015) (testimony of Mr. John Wilkinson, *Æquitas—The Prosecutors’ Resource on Violence Against Women*).

¹³ *See generally Transcript of JPP Subcommittee Meeting* 229 (June 25, 2015).

a judge or panel can find that the victim did not consent to the sexual act or sexual contact alleged. For instance, the Subcommittee noted that the language in 120(g)(8)(A), which in part states that a “lack of verbal or physical resistance” “resulting from the use of force” does not constitute consent, could actually imply that a lack of verbal or physical resistance not resulting from the use of force could constitute consent.

Moreover, the Subcommittee also noted that 120(g)(8)(C) on one hand advises the fact-finder to consider “all the surrounding circumstances” of the offense, yet on the other hand advises the fact-finder to consider whether and why the victim did or did not resist the attack. Grouping the question of resistance with all the other circumstances surrounding the offense places too much weight—perhaps inadvertently—on the issue of resistance.¹⁴ Although the Subcommittee believes evidence of resistance or the lack thereof to be relevant and admissible evidence for a fact-finder to consider, it is just one of the circumstances surrounding the offense and should be given no greater or lesser emphasis than any other circumstance in the text of the statute or elsewhere.

Regarding the definition of “consent,” the Subcommittee decided to recommend that the statutory definition of “consent” be modified in order to address concerns that the definition is unclear, is confusing, and contains language seeming to require resistance by a victim in order for a fact-finder to find that a victim did not consent.

To avoid placing too much emphasis on evidence of resistance or the lack thereof, the Subcommittee’s proposal would break out in one subsection of the definition the concept of resistance and the other issues currently listed in the statute for determining whether there was consent, and would place the general concept of the circumstances surrounding the offense in a separate subsection of the definition.

D. Recommendation: The Subcommittee recommends that the text of Article 120(g)(8)(A) be amended by deleting the words “or submission resulting from the use of force, threat of force, or placing another in fear” and by adding the words “Submission resulting from the use of force, threat of force, or placing another in fear also does not constitute consent.” The Subcommittee recommends that the text of Article 120(g)(8)(C) be amended by deleting the words “Lack of consent may be inferred based on the circumstances of the offense” and by deleting the words “or whether a person did not resist or ceased to resist only because of another person’s actions.” See Enclosure 1, Proposed Modified Article 120 of the UCMJ.

The new definition of consent in the Subcommittee’s proposed redraft would appear at Article 120(g)(7) and would read as follows:

(7) 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 does not constitute consent. Submission resulting from the use of force, threat of force, or placing another person in fear also does not constitute consent. A current or previous dating or social or sexual

¹⁴ See generally *Transcript of JPP Subcommittee Meeting* 233–34, 242–43 (June 25, 2015).

relationship by itself or the manner of dress of the person involved in the conduct at issue does 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) All the surrounding circumstances are to be considered in determining whether a person gave consent.¹⁵

¹⁵ See Enclosure 1.

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. JPP Rationale for Referring This Issue to the Subcommittee. Several witnesses before the JPP testified that the availability of the defenses of consent and mistake of fact as to consent under the current statute is unclear, because such defenses were explicitly included in the 2007 version of Article 120 but are not specifically included in the 2012 version. Other witnesses said that the mistake of fact defense still clearly applied, but contended that it should be reintroduced into the statute to expressly limit its applicability and make clear any limitations on its scope.

During deliberations, members of the JPP agreed that the statute's lack of clarity in its definition of consent contributes to confusion about the role of consent in determining knowledge or intent in Article 120 offenses. The JPP also agreed that consent and mistake of fact as to consent are important defenses and that the statute should clearly indicate what constitutes a mistake of fact and whether the defense applies to rape and sexual assault offenses. Given the opposing views of presenters before the JPP and the JPP's own concerns regarding this issue, the JPP referred this issue to the Subcommittee for further analysis.¹⁶

B. Testimony and Information Received by the Subcommittee. A majority of presenters recommended clarification that these two defenses are available and may be raised by an accused. A retired Army trial judge opined that the statute should clearly state that, if raised, consent to the sexual conduct at issue is a defense to all of the offenses in Article 120.¹⁷ He also stated that mistake of fact as to consent in any Article 120 case where it is relevant should be clearly listed as a defense in the statute or in Rule for Courts-Martial (R.C.M.) 916.¹⁸ A retired Marine Corps trial judge agreed that mistake of fact as to consent should be clearly stated to be an available defense.¹⁹ A retired Air Force trial judge also recommended that it be clearly stated that consent and mistake of fact as to consent are available defenses to an accused in sexual assault cases.²⁰

A senior Army supervisory prosecutor testified that listing the defenses available to an accused in a prosecution under Article 120 would be helpful to practitioners.²¹ The reserve Chief of the Marine Corps Defense Services Organization testified that both consent and mistake of fact as to consent should be clearly stated in both the statute and R.C.M. 916.²² A senior Army Defense Counsel recommended that both consent and mistake of fact as to consent be put back into the statute to remove any confusion as to their availability to an accused.²³ A civilian military court-martial practitioner and current reservist who formerly served on active duty as both a military prosecutor

¹⁶ JPP INITIAL REPORT 27–29.

¹⁷ *Written Statement of Colonel Timothy Grammel, U.S. Army (Ret.)* (Apr. 10, 2015).

¹⁸ *Written Statement of Colonel Timothy Grammel, U.S. Army (Ret.)* (Apr. 10, 2015).

¹⁹ *Transcript of JPP Subcommittee Meeting 249* (Apr. 9, 2015) (testimony of Lieutenant Colonel Quincy Ward, U.S. Marine Corps (Ret)).

²⁰ *Transcript of JPP Subcommittee Meeting 190–91* (Apr. 9, 2015) (testimony of Colonel William Orr, U.S. Air Force (Ret.)).

²¹ *Written Statement of Lieutenant Colonel Alexander Pickands, U.S. Army* (May 8, 2015).

²² *Transcript of JPP Subcommittee Meeting 230* (May 7, 2015) (testimony of Colonel Terri Zimmermann, U.S. Marine Corps Reserve).

²³ *Transcript of JPP Subcommittee Meeting 245–53* (May 7, 2015) (testimony of Major Frank Kostik, U.S. Army); *see also Written Statement of Major Kostik* (May 26, 2015).

and a defense counsel opined that both consent and mistake of fact as to consent are always available to an accused as a matter of constitutional due process.²⁴

A smaller number of military prosecutors opined that regardless of whether it is expressly stated in the statute or elsewhere, an accused may always raise consent and mistake of fact as to consent because Article 120(f) states “an accused may raise any applicable defenses available under this chapter or the Rules for Courts-Martial.” In light of this, they testified that amendment to Article 120 is unnecessary.²⁵

C. Conclusion: With respect to the defenses of “consent” and “mistake of fact as to consent,” at its June meeting the Subcommittee decided to recommend that “consent” be left the way it is now treated, as a defense attack on the government’s proof regarding which the judge instructs the court-martial panel members, and that “mistake of fact as to consent” be clearly listed as a defense and added back into the statute or in the Rules for Courts-Martial.

D. Recommendation: Owing to some question by practitioners regarding the availability of these defenses, the Subcommittee recommends clarification, in the *Manual for Courts-Martial*, that an accused may raise both “consent” and “mistake of fact as to consent” in appropriate cases. Presenters told the Subcommittee that these defenses have always been available to an accused, in statute, in the *Manual for Courts-Martial*, or as a matter of the common law as developed by the appellate courts. Presenters told the Subcommittee that mistake of fact has traditionally been listed as a defense in the *Manual for Courts-Martial* and “consent” has been viewed as an attack on the government’s proof which an accused may make during trial and on which, if raised by the evidence, requires a judicial instruction by the military judge. Accordingly, the availability of “consent” as an attack on proof and “mistake of fact as to consent” as a defense should be clearly stated in the *Manual for Courts-Martial*. The Subcommittee does not recommend that these defenses be listed in the text of the statute.

²⁴ *Transcript of JPP Subcommittee Meeting* 392 (May 7, 2015) (testimony of Mr. Zachary Spilman, Attorney at Law).

²⁵ *Written Statement of Major Mark Rosenow, U.S. Air Force* (May 20, 2015); see also *Transcript of JPP Subcommittee Meeting* 358 (May 7, 2015) (testimony of Captain Jihan Walker, U.S. Army).

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

A. JPP Rationale for Referring This Issue to the Subcommittee. Numerous witnesses told the JPP that the interpretation of “incapable of consenting” and of “impairment” under the 2012 version of Article 120 raised just as many problems as had language in the 2007 version of the statute. Noting that the statute includes no definitions or further guidance regarding the term “incapable of consenting,” witnesses provided anecdotes of military judges using their “common sense and the knowledge of human nature to the ways of the world” to determine the meaning of “incapable of consent.” These witnesses recommended amending the statute to provide either a definition or a statutory test to determine when an individual is incapable of consenting.

During deliberations, the JPP determined that additional review was required. In particular, it noted the interrelationship between incapacity and consent and the importance of providing clear definitions of these terms to judges, practitioners, and court-martial panel members. And because sexual assault prevention training for all Service members uses language from Article 120, vague terms may leave them confused about standards of behavior and expectations, raising an important policy interest. Given the views of presenters before the JPP and the JPP’s own concerns regarding this issue, the JPP referred this issue to the Subcommittee for further analysis.²⁶

B. Testimony and Information Received by the Subcommittee. A majority of the presenters before the Subcommittee recommended that a definition be adopted of this important term that is often relevant in sexual assault cases. This term appears in the statute at Article 120(b)(3), but unlike most other terms or definitions referred to the Subcommittee, there is no explanation or definition of the term under Article 120(g). Perhaps as a result, this issue generated the greatest number of recommendations for change from the presenters before the Subcommittee.

One retired Navy military judge testified that the lack of a definition for “incapable of consenting” is “a big anemia in the statute, and we have to go in and fill it.”²⁷ A retired Army military judge recommended adoption of a definition that would state, “The term ‘incapable of consenting’ means unable to appraise the nature of the sexual conduct at issue, physically decline participation in the sexual conduct at issue, or physically communicate unwillingness to engage in the sexual conduct at issue.”²⁸ A senior Army prosecutor stated that the current Article 120 is devoid of any definition for “incapable of consenting,” and this lack of definition renders an already challenging theory of culpability almost useless.²⁹ By removing the 2007 definition of “substantially incapacitated,” in his view, Congress left practitioners adrift without a standard by which to teach Service members how to behave, provide notice of criminal behavior, make appropriate charging decisions, and effectively prosecute those who exploit impaired or intoxicated individuals.³⁰ A senior Air Force prosecutor testified that a definition is needed, and he suggested the following: “The term ‘incapable of consenting’ means unable to appraise the nature of the sexual conduct at issue, decline participation in the sexual conduct at issue, or communicate unwillingness to engage in the sexual conduct at issue.”³¹

²⁶ JPP INITIAL REPORT 29–30.

²⁷ *Transcript of JPP Subcommittee Meeting 200* (Apr. 9, 2015) (testimony of Commander John Maksym, U.S. Navy (Ret.)).

²⁸ *Written Statement of Colonel Timothy Grammel, U.S. Army (Ret.)* (Apr. 10, 2015).

²⁹ *Written Statement of Lieutenant Colonel Alexander Pickands, U.S. Army* (May 8, 2015).

³⁰ *Written Statement of Lieutenant Colonel Alexander Pickands, U.S. Army* (May 8, 2015).

³¹ *Transcript of JPP Subcommittee Meeting 121* (May 7, 2015) (testimony of Major Mark Rosenow, U.S. Air Force).

An Air Force appellate government counsel stated that the lack of a definition leads to defense counsel's arguing that any condition short of a victim being asleep or unconscious amounts to the victim being capable of consenting to sexual activity.³² She suggested that a definition contain the following language: "A person does not need to be unconscious or asleep in order to be incapable of consenting to a sexual act due to impairment by a drug, intoxicant or other similar substance," or "a person's level of impairment does not need to rise to the level of unconsciousness or sleep in order for that person to be incapable of consenting to a sexual act due to impairment by a drug, intoxicant or other similar substance."³³ An Army appellate government counsel agreed that this term needs to be clarified.³⁴

Defense counsel also agreed that there should be a definition of "incapable of consenting." The reserve Chief of the Marine Corps Defense Services Organization testified that the statute should define "incapable of consenting."³⁵ A senior Air Force defense counsel testified that a definition is needed, and she agreed with the definition recommended by the retired Army military judge quoted above: "The term 'incapable of consenting' means unable to appraise the nature of the sexual conduct at issue, physically decline participation in the sexual conduct at issue, or physically communicate unwillingness to engage in the sexual conduct at issue."³⁶ A senior Army defense counsel agreed that a definition is needed, and likewise agreed with the one recommended by the retired Army military judge.³⁷ A senior Navy defense counsel also testified that practitioners absolutely need the statute to define this term; consent becomes an issue as early as the investigative stage, and without an adequate definition cases end up devolving into a battle of experts giving opinions on the level of intoxication.³⁸ He told the Subcommittee that the concept of "incapable of consenting" also comes into conflict with the training received by court-martial panels on alcohol intoxication as it relates to the ability to consent, and without a legal definition military judges cannot assist the panel members on this often pivotal issue.³⁹

One civilian attorney and former prosecutor testified that a victim's capacity to consent is always a fact question, but it helps to give examples in a definition, such as "less than 16 years old, mentally defective, mentally incapacitated, too intoxicated to appreciate the nature of the act, physically helpless, or unconscious."⁴⁰

³² *Transcript of JPP Subcommittee Meeting* 336–47 (May 7, 2015) (testimony of Major Mary Ellen Payne, U.S. Air Force).

³³ *Transcript of JPP Subcommittee Meeting* 336–47 (May 7, 2015) (testimony of Major Mary Ellen Payne, U.S. Air Force).

³⁴ *Transcript of JPP Subcommittee Meeting* 351–64 (May 7, 2015) (testimony of Captain Jihan Walker, U.S. Army).

³⁵ *Transcript of JPP Subcommittee Meeting* 231 (May 7, 2015) (testimony of Colonel Terri Zimmermann, U.S. Marine Corps Reserve).

³⁶ *Transcript of JPP Subcommittee Meeting* 242–44 (May 7, 2015) (testimony of Lieutenant Colonel Julie Pitvorec, U.S. Air Force).

³⁷ *Written Statement of Major Frank Kostik* (May 26, 2015).

³⁸ *Transcript of JPP Subcommittee Meeting* 253–68 (May 7, 2015) (testimony of Lieutenant Commander Richard Federico, U.S. Navy).

³⁹ *Transcript of JPP Subcommittee Meeting* 253–68 (May 7, 2015) (testimony of Lieutenant Commander Richard Federico, U.S. Navy).

⁴⁰ *Transcript of JPP Subcommittee Meeting* 382–84 (May 7, 2015) (testimony of Mr. John Wilkinson, *Æquitas - The Prosecutors' Resource on Violence Against Women*).

One Subcommittee member, in presenting before the Judicial Proceedings Panel, noted that the phrase “incapable of consenting” is “conclusory and meaningless.” For instance, when is a person incapable? What is the test? Civilian courts have worked with similar language and managed convictions from time to time, he pointed out, but the ambiguity impedes the law’s ability to communicate a normative message and may inhibit prosecution of deserving cases. He stated that the criteria of incapacity must be defined.⁴¹

C. Conclusion: The vast majority of presenters before the Subcommittee who practice under the UCMJ requested a definition of “incapable of consenting,” as this issue is present in most cases prosecuted at trial. The Subcommittee concluded that a definition is necessary and should be initiated through statutory amendment, an executive order, or in the *Military Judges’ Benchbook* instructions.

The Subcommittee first looked to 18 U.S.C. § 2242 (Sexual abuse) for possible guidance regarding what factors should be considered when adopting a definition of “incapable of consenting.”⁴² That code section criminalizes knowingly engaging in a sexual act with another person if that other person 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.⁴³

However, the Subcommittee believed that this language, although helpful, could be seen as too narrow. The Subcommittee found the Navy-Marine Court of Criminal Appeals opinion in *United States v. Pease*⁴⁴ to be more useful. The *Pease* court stated:

An “incompetent” person is a person who lacks either the mental or physical ability to consent due to a cause enumerated in the statute. To be able to freely give an agreement, a person must first possess the cognitive ability to appreciate the nature of the conduct in question, then possess the mental and physical ability to make and to communicate a decision regarding that conduct to the other person.⁴⁵

The court further stated that to be incapable of consenting means a person “lacked the cognitive ability to appreciate the sexual conduct in question or the physical or mental ability to make and to communicate a decision about whether they agreed to the conduct.”⁴⁶

Accordingly the Subcommittee recommends a new definition of “incapable of consenting,” based in part on the *Pease* case.

The Subcommittee also believes that additional guidance should be provided regarding the factors that should be considered by a fact-finder when resolving the question of whether the alleged

⁴¹ *Written Comments of Professor Stephen Schulhofer* (Aug. 8, 2014).

⁴² *See generally Transcript of JPP Subcommittee Meeting* 114–15 (Oct. 22, 2015).

⁴³ 18 U.S.C. § 2242 (Sexual Abuse).

⁴⁴ *United States v. Pease*, 74 M.J. 763 (N-M. Ct. Crim. App. 2015).

⁴⁵ *Pease*, 74 M.J. at 770.

⁴⁶ *Id.*

victim was incapable of consenting, including a totality of the circumstances analysis that sets forth a non-exhaustive list of example factors.⁴⁷ This proposed definition is set forth in the Subcommittee’s recommendation.

D. Recommendation: The Subcommittee recommends that the following definition of “incapable of consenting” be adopted as part of the Subcommittee’s redraft of Article 120, which would appear at Article 120(g)(8):

Incapable of consenting. A person is ‘incapable of consenting’ if that person does not possess the mental ability to appreciate the nature of the conduct or does not possess the physical or mental ability to make or communicate a decision regarding such conduct.

The Subcommittee further recommends that the following language be promulgated in an executive order to be published in the *Manual for Courts-Martial* and the *Military Judges’ Benchbook* instructions:

A totality of circumstances standard applies when assessing whether a person was incapable of consenting. In deciding whether a person was incapable of consenting, many factors should be considered and weighed, to the extent they are known, including, but not limited to, that person’s:

- Decision-making ability;
- Ability to foresee and understand consequences;
- Awareness of the identity of the person with whom they are engaging in the conduct;
- Level of consciousness;
- Amount of alcohol or other intoxicants ingested;
- Tolerance to the ingestion of alcohol or other intoxicants; and/or
- Ability to walk, talk, and engage in other purposeful physical movements.

⁴⁷ See generally *Transcript of JPP Subcommittee Meeting* 117–19 (Oct. 22, 2015).

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

Current text of Article 120(a)(5) of the UCMJ:

Any person subject to this chapter who commits a sexual act upon another person by—

(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.

A. JPP Rationale for Referring This Issue to the Subcommittee. According to JPP witness and Subcommittee member Professor Schulhofer, the statute should be narrowly tailored to criminalize only the intentional administration of an intoxicant for the purpose of committing a sexual act, not actions that are accidental or negligent. No military practitioners raised concerns regarding this issue with the JPP or related any criticisms arising from problems with this definition that have occurred at the trial level.

During deliberations, JPP members noted that only one presenter highlighted the issue of intent with regard to the administration of a drug or intoxicant. It was not clear to the JPP if a conviction would be possible in cases in which the substance was administered by accident or without proof of intent. Given these questions, the JPP referred this issue to the Subcommittee for further analysis.⁴⁸

B. Testimony and Information Received by the Subcommittee. A majority of presenters before the Subcommittee recommended no changes to the definition of an accused’s administering a drug or intoxicant to a victim under Article 120(a)(5). For instance, according to a senior Army prosecutor there is no indication from the field that, as worded, this provision is capturing conduct that is not exploitative or assaultive.⁴⁹ He urged the Subcommittee not to add a specific intent requirement to this offense. He offered the hypothetical that if a person spiked a punch bowl at a party and then performed a sexual act on someone who had consumed that intoxicant and become impaired, that behavior should be criminal. Adding a specific intent that the intoxicant be administered with the purpose of rendering people impaired and vulnerable to sexual acts would render this theory unprovable. Doing so would also require the offender to have specifically chosen the victim at the time of administering the substance, when it is just as likely that he or she is targeting a pool of individuals (e.g., anyone who partakes in the punch). Similarly, a senior Air Force prosecutor stated that recommendations to include a specific intent requirement (e.g., that administration of the drug or intoxicant be for the purpose of impairing a victim’s capacity to consent) are misplaced.⁵⁰ The discretion of commanders throughout the processing of a case and the consistent safety check provided by judge advocates, including their Article 34, UCMJ, pretrial advice, make it unlikely this subsection will be applied to situations where the administration is disconnected from the sexual act or sexual contact. Adding a specific intent requirement would,

⁴⁸ JPP INITIAL REPORT 30.

⁴⁹ *Written Statement of Lieutenant Colonel Alexander Pickands, U.S. Army* (May 8, 2015).

⁵⁰ *Written Statement of Major Mark Rosenow, U.S. Air Force* (May 20, 2015).

however, undermine prosecutions through this subsection in two obvious circumstances: (1) where the accused formed the intent to commit the offense only after recognizing how intoxicated the victim became and (2) where the accused ingests drugs or intoxicants at the same time and thereby raises the issue of voluntary intoxication. See R.C.M. 916(1)(2). And one civilian practitioner who formerly served as a Marine Corps prosecutor and defense counsel observed that this issue appears to be concerned with an incredibly narrow set of hypothetical facts that do not require preemptive congressional action.⁵¹

A contrary view was offered by a retired Army military judge, who suggested amending the definition by adding the requirement that the administration of a drug or intoxicant be done for the purpose of impairing the victim's capacity to express a lack of consent to the sexual act.⁵²

C. Conclusion: With respect to the definition concerning the accused's "administration of a drug or intoxicant," as stated in Article 120(a)(5), the Subcommittee determined that no change should be made to this definition.⁵³ The Subcommittee concluded that adding an element to this provision would unnecessarily complicate charging certain offenses under the statute.

D. Recommendation: No change.

⁵¹ *Transcript of JPP Subcommittee Meeting* 387–88 (May 7, 2015) (testimony of Mr. Zachary Spilman, Attorney at Law).

⁵² *Written Statement of Colonel Timothy Grammel, U.S. Army (Ret.)* (Apr. 10, 2015).

⁵³ *See generally Transcript of JPP Subcommittee Meeting* 227–28 (Oct. 22, 2015).

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

Current definition of “bodily harm” in Article 120(g)(3) of the UCMJ:

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

A. JPP Rationale for Referring This Issue to the Subcommittee. The 2012 version of Article 120 expanded the offense of sexual assault to include sexual acts by causing bodily harm. Under the current statute, bodily harm is defined as “any offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact.” Thus, in cases in which the bodily harm alleged is the sexual act (or contact) itself, lack of consent can effectively become an element of the offense.

The issue raised to the JPP is whether sexual assault based on bodily harm under Article 120(b)(1)(B) includes only offenses that involved bodily harm in addition to the sexual act or if the statute also includes offenses that involved only a nonconsensual sexual act. According to several current practitioners, the definition of bodily harm, as well as the statutory scheme surrounding the bodily harm offense, is ambiguous and creates confusion at trial. One solution recommended to the JPP was to amend the definition of bodily harm to include “physical pain, illness, or any impairment” while establishing a separate and distinct offense under Article 120 for sexual intercourse without consent. However, another witness before the JPP argued that the bodily harm definition should not be altered and that Congress’s intention to include sex without consent as an offense was clear.

During deliberations, the JPP members found the definition of bodily harm confusing. Given the opposing views of presenters and the JPP’s own concerns over the term “bodily harm,” the JPP referred this issue to the Subcommittee for further analysis.⁵⁴

B. Testimony and Information Received by the Subcommittee. A majority of the presenters before the Subcommittee recommended that no changes be made to the concept of bodily harm in Article 120(b)(1)(B) or the definition of bodily harm in Article 120(g)(3). Several experienced prosecutors stated that they would charge Article 120(b)(1)(B) in cases in which the victim has little or no recollection of the incident but can affirmatively state that a perpetrator engaged in a sexual act or sexual contact with the victim without consent. For instance, one senior Army prosecutor stated that he has had cases in which the victim was positioned, unclothed, in such a manner that the offender penetrated her without having to adjust clothing, bedding, or her body, and without having to use force.⁵⁵ If the sexual act could not be used as the bodily harm, this would not be prosecutable as a sexual assault. He testified that this definition also helps in cases of poor or old memory, and he has prosecuted numerous cases in which the victim remembered being penetrated, but not the details of any physical contact before the penetration.⁵⁶ A senior Marine prosecutor recommended leaving this definition unchanged because it allows the government to capture acts that are nonconsensual and also addresses the scenario where consent is withdrawn.⁵⁷ A senior Air Force

⁵⁴ JPP INITIAL REPORT 30–31.

⁵⁵ *Written Statement of LTC Alexander Pickands, U.S. Army* (May 8, 2015).

⁵⁶ *Written Statement of LTC Alexander Pickands, U.S. Army* (May 8, 2015).

⁵⁷ *Transcript of JPP Subcommittee Meeting* 111–13 (May 7, 2015) (testimony of Lieutenant Colonel Chris Thielemann, U.S. Marine Corps).

prosecutor recommended that no changes be made because the definition accurately captures the legal term and allows prosecutors to criminalize nonconsensual sexual acts and sexual contacts even in situations where the act or contact constitutes the offensive touching.⁵⁸

An Army appellate government counsel asked that no changes be made because this subsection allows the government to charge the bodily harm as the act, and this tactic is useful in cases in which the victim does not have a clear memory of what happened owing to impairment by drugs or alcohol.⁵⁹ One civilian practitioner testified that the statute is clear that Congress intended to define nonconsensual sexual activity as bodily harm, and this definition is uncontroversial.⁶⁰

On the other hand, a retired Army trial judge opined that the definition was confusing and in need of change, and he suggested creating a new offense under Article 120 of “wrongful sexual contact,” which would criminalize any sexual contact on another person without that other person’s permission.⁶¹ And a senior Air Force defense counsel stated that there is “just no real definition” of “bodily harm” that actually lends itself to be easily defended when it is used in the context of incapacitation or alcohol. It is used in various different ways. And for that reason, it is hard to articulate what exactly “bodily harm” means. She suggested that the term “bodily harm” needs to have a definition that is actually workable.⁶²

Testifying before the JPP in August 2014, Subcommittee member Professor Stephen Schulhofer opined that the concept of “bodily harm” is confusing as used in several places in Article 120 and should be more clearly defined. He stated that it should serve to differentiate more serious cases from those in which there is no injury or threat of injury beyond the harm of unwanted penetration itself. Bodily harm as currently defined in the UCMJ (“any offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact”) conflicts with the Model Penal Code’s definition, which specifies “physical pain, illness or any impairment of physical condition.”⁶³

C. Conclusion: According to military practitioners who testified before the Subcommittee, the concept of “bodily harm” is useful for cases in which a sexual act or contact has been committed without the victim’s consent and a victim has little or no recollection of the event beyond the nonconsensual act or contact. But despite many practitioners’ testimony that the concept of bodily harm as used under Article 120(b)(1)(B), Article 120(d), and the definition in Article 120(g)(3) is workable, the Subcommittee nevertheless finds the term and its present definition confusing for two reasons.

First, the statute currently defines bodily harm as “any offensive touching of another, however slight,” meaning a nonconsensual touching and nothing more. Although that concept of bodily harm has a well-developed history in military law under Article 128, UCMJ (Assault)—a history that judges and legal practitioners are well-versed in—non-lawyers who sit on military

⁵⁸ *Written Statement of Major Mark Rosenow, U.S. Air Force* (May 20, 2015).

⁵⁹ *Transcript of JPP Subcommittee Meeting* 359 (May 7, 2015) (testimony of Captain Jihan Walker, U.S. Army).

⁶⁰ *Transcript of JPP Subcommittee Meeting* 388 (May 7, 2015) (testimony of Mr. Zachary Spilman).

⁶¹ *Written Statement of Colonel Timothy Grammel, U.S. Army (Ret.)* (April 10, 2015).

⁶² *Transcript of JPP Subcommittee Meeting* 121–23 (May 7, 2015) (testimony of Lieutenant Colonel Julie Pitvorec, U.S. Air Force).

⁶³ *Written Comments of Professor Stephen Schulhofer* (Aug. 8, 2014).

courts-martial panels are not typically familiar with this legal concept. “Bodily harm” in lay terms often means the presence of physical injuries, and the Subcommittee is concerned that a panel could interpret “bodily harm” to require some physical injury in addition to the unwanted sexual penetration or contact. Because rape and sexual assault may not result in physical injuries, these differing concepts could be confusing to a panel and result in inappropriate acquittals.⁶⁴ Second, the current text regarding this theory of liability in Article 120(b)(1)(B) is tautological. For these reasons, the Subcommittee recommends it be amended.

The Subcommittee’s recommended changes would clarify what the presenters told the Subcommittee: that “bodily harm” in Article 120(g)(3), as applied under Article 120 (b)(1)(B) and Article 120(d), is defined as a sexual act or sexual contact done without the consent of the victim, but no further “bodily harm” must be shown.

D. Recommendation: Change the language of 120(b)(1)(B) and replace it with “without the consent of the other person.”⁶⁵ This would remove any confusion over the term “bodily harm” and would create a baseline offense for any sexual act or sexual contact committed without a victim’s consent. The removal of the definition of bodily harm set forth in Article 120(g)(3) will require that each successive subparagraph be renumbered. This renumbering is set forth in the Subcommittee’s proposed redraft in Enclosure 1 to this report.

The new Article 120(b)(1)(B) would read as follows:

(b) Sexual assault. Any person subject to this chapter who—

(1) commits a sexual act upon another person

(B) without the consent of the other person;

is guilty of sexual assault and shall be punished as a court-martial may direct.⁶⁶

⁶⁴ See generally *Transcript of JPP Subcommittee Meeting* 332–39 (June 25, 2015).

⁶⁵ See Enclosure 1.

⁶⁶ See Enclosure 1.

6. Is the definition of “threatening wrongful action” ambiguous or too narrow?

Current definition of “threatening or placing that other person in fear” in Article 120(g)(7) of the UCMJ:

(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.

A. JPP Rationale for Referring This Issue to the Subcommittee. The *Manual for Courts-Martial* does not define the term “wrongful action” and provides no guidance on whether Congress intended this provision to cover the inherently coercive senior–subordinate relationships unique to the military. Significantly, the 2007 version of Article 120 specifically articulated and provided a theory of liability for placing a victim in fear “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 another.” However, this language was removed from the current version of Article 120.

Some witnesses contended that the current provision is too narrow and ambiguous, because it does not encompass sexual acts or contacts that are induced through promises of career advancement or undeserved favorable treatment. Others testified to the contrary that the current language is adequate to charge sexual assaults resulting from inherently coercive relationships and that the “threat of . . . wrongful action” language is appropriately broad and can encompass senior–subordinate relationships.

During deliberations, the JPP agreed that additional review was necessary to determine whether the current statutory language is intended to cover relationships unique to the military and, if so, whether the statute is sufficiently broad. Given the opposing views offered by practitioners, the JPP referred this issue to the Subcommittee for further analysis.⁶⁷

B. Testimony and Information Received by the Subcommittee. A majority of presenters before the Subcommittee recommended some change in the definition of “threatening wrongful action.” This group testified that the term is unclear and ambiguous in cases in which an accused is charged with violating Article 120(b)(1)(A) or 120(d) by using his or her position of authority or rank to coerce a victim into a sexual act or sexual contact. For instance, a senior Air Force appellate government counsel stated that the definition should be made more explicit.⁶⁸ To her, it is not obvious at first glance that the definition is meant to encompass situations where a superior is using his or her rank or authority to coerce sexual acts or contacts.⁶⁹ Military court-martial panels are used to following orders, she noted, and thus it is important for those selected to sit as panel members to receive explicit instructions. Otherwise, defense counsel could certainly successfully argue that since neither “use of rank” or “abuse of authority” is expressly included in the definition of “threatening or placing in fear,” the court members cannot find the accused guilty. She suggested incorporating the language of the 2007 version of Article 120 into the definition of “threatening or placing in fear”—

⁶⁷ JPP INITIAL REPORT 31–32.

⁶⁸ *Written Statement of Major Mary Ellen Payne, U.S. Air Force* (September 1, 2015).

⁶⁹ *Written Statement of Major Mary Ellen Payne, U.S. Air Force* (September 1, 2015).

with the caveat that offering to affect a subordinate’s career positively should not be a criminal act. A senior Marine Corps prosecutor at an entry-level training command testified that the bench book instructions for this definition are inadequate.⁷⁰ He suggested “reaching back” to the previous version of Article 120 for guidance. The prior version of Article 120 provided some specific examples of what could constitute the threatened harm targeted, one of which was threatening or placing the victim in fear “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.”⁷¹ He suggested also explaining that threats may be either express or implied.⁷² A senior Coast Guard prosecutor and former military judge testified that the definition “falls short.”⁷³ He stated that a military judge needs to be able to provide court-martial panels with specific instructions, and he suggested a modification to the bench instructions in accord with his fellow prosecutors’ suggestions based on the prior version of Article 120.⁷⁴

A senior Air Force appellate defense counsel agreed that the definition needs modification. Like some of the prosecutors, she suggested looking back to the 2007 version of Article 120 and modifying the bench instructions to address this issue.⁷⁵ A senior Air Force staff judge advocate and legal adviser to a training commanding general testified that this definition is too narrow and should include any offers of favorable action by the accused.⁷⁶ A Marine Corps staff judge advocate and legal adviser to the commanding general of an entry-level training facility testified that he believes the definition should be modified in accord with the 2007 version of article to include the specific example of abusing military position, rank, or authority.⁷⁷

A minority of presenters suggested that the definition does not need change. A retired Army military judge believes that the current definition is sufficient because it addresses “wrongful” conduct.⁷⁸ And a senior Air Force prosecutor noted that the current definition is sufficiently broad to cover the types of sexual assaults and abusive sexual contacts falling outside of the other theories contained in Article 120(b)(1).⁷⁹ That said, he recommended consideration of a new sexual offense specifically targeting the inherently coercive senior–subordinate relationships unique to the military.⁸⁰

One Subcommittee member, in presenting before the Judicial Proceedings Panel, noted that the definition is either too ambiguous or too narrow in its application to an officer or NCO who seeks

⁷⁰ *Transcript of JPP Subcommittee Meeting 14* (Aug. 27, 2015) (testimony of Major Adam King, U.S. Marine Corps).

⁷¹ 10 U.S.C. § 920(t)(7)(B) (This version of Article 120 was in effect for offenses committed during the period from Oct. 1, 2007 through June 27, 2012).

⁷² *Transcript of JPP Subcommittee Meeting 16* (Aug. 27, 2015) (testimony of Major Adam King, U.S. Marine Corps).

⁷³ *Transcript of JPP Subcommittee Meeting 31* (Aug. 27, 2015) (testimony of Lieutenant Commander Ben Gullo, U.S. Coast Guard).

⁷⁴ *Transcript of JPP Subcommittee Meeting 32* (Aug. 27, 2015) (testimony of Lieutenant Commander Ben Gullo, U.S. Coast Guard).

⁷⁵ *Transcript of JPP Subcommittee Meeting 123* (Aug. 27, 2015) (testimony Captain Lauren Shure, U.S. Air Force).

⁷⁶ *Transcript of JPP Subcommittee Meeting 190* (Aug. 27, 2015) (testimony of Colonel Brynn Morgan, U.S. Air Force).

⁷⁷ *Transcript of JPP Subcommittee Meeting 194–95* (Aug. 27, 2015) (testimony of Lieutenant Colonel Brett Wilson, U.S. Marine Corps).

⁷⁸ *Written Statement of Colonel Timothy Grammel, U.S. Army (Ret.)* (Apr. 10, 2015).

⁷⁹ *Written Statement of Major Mark Rosenow, U.S. Air Force* (May 20, 2015).

⁸⁰ *Written Statement of Major Mark Rosenow, U.S. Air Force* (May 20, 2015).

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.⁸¹ He recommends that the definition be clarified and that these types of scenarios be treated as a coercive sexual crime.⁸²

Two other presenters held that the definition is actually too broad and encompasses conduct that should not be criminal. For instance, a senior Army prosecutor suggested the words "physical or violent" be inserted to qualify "action contemplated by the communication or action."⁸³ The effect would be to strip nonviolent threats out of the sexual assault arena, reserving the most severe offenses and punishments for those who (a) violate a person's physical integrity (their body) and (b) render ineffective a person's personal autonomy (their ability to decide what happens to their body).⁸⁴ Force, violence, threatening coercion, and incompetence—all of these have violence at their core; the victim is compelled to participate, actively or passively, in the sexual conduct. They cannot, or reasonably do not, have the opportunity to escape or avoid the conduct. He suggested that economic harms should be addressed outside of Article 120, if at all.⁸⁵ And a civilian practitioner and former Marine Corps prosecutor and defense counsel declared that "the definition is incredibly broad and presents a uniquely factual question: Was the contemplated action wrongful?"⁸⁶ In his view, this is a question of fact to be determined according to the evidence, and he believes that the current definition of wrongful action is adequate to address the issues of coercive sexual relationships and abuses of military rank or authority.⁸⁷

C. Conclusion: Although concerns were expressed to the Subcommittee regarding the definition being unclear and perhaps too narrow, the Subcommittee nevertheless concluded that adding a new subsection (E) to Article 120(b)(1) addressing abuse of position, rank, or authority would satisfy those worried about potential narrowness in the definition of threatening wrongful action in Article 120(g)(7).⁸⁸ Accordingly, the Subcommittee recommended no change to the definition of "threatening or placing that other person in fear" under Article 120(g)(7).

D. Recommendation: No change.

⁸¹ *Written Comments of Professor Stephen Schulhofer* (Aug. 8, 2014).

⁸² *Written Comments of Professor Stephen Schulhofer* (Aug. 8, 2014).

⁸³ *Written Statement of LTC Alexander Pickands, U.S. Army* (May 8, 2015).

⁸⁴ *Written Statement of LTC Alexander Pickands, U.S. Army* (May 8, 2015).

⁸⁵ *Written Statement of LTC Alexander Pickands, U.S. Army* (May 8, 2015).

⁸⁶ *Transcript of JPP Subcommittee Meeting 389* (May 7, 2015) (testimony of Mr. Zachary Spilman, Attorney at Law).

⁸⁷ *Transcript of JPP Subcommittee Meeting 389* (May 7, 2015) (testimony of Mr. Zachary Spilman, Attorney at Law).

⁸⁸ *See generally Transcript of JPP Subcommittee Meeting 382–86* (Oct. 22, 2015).

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

A. JPP Rationale for Referring This Issue to the Subcommittee. Because the definition of “threatening or placing that other person in fear” hinges on “caus[ing] a reasonable fear,”⁸⁹ it is clear that for offenses under Article 120 involving threats or placing a victim in fear, an objective “reasonable person” standard must be met rather than a subjective standard that takes into account the victim’s actual and individual mind-set. The JPP received some testimony that the “reasonable” test should be amended to recognize a victim’s subjective, actual fears.

During deliberations, the JPP agreed that additional review was necessary to determine whether a different test should replace the current objective test and to evaluate the most effective and efficient means of implementing such a change. In addition, the definition of “threatening or placing that other person in fear” in the 2012 version of the statute was substantially narrowed from the definition used in the 2007 version. This change raises questions as to whether the current version of Article 120 sufficiently criminalizes certain types of sexual misconduct, particularly those that involve abuse of authority. Given the opposing views among presenters and the JPP’s own concerns about this issue, the JPP referred it to the Subcommittee for further analysis.⁹⁰

B. Testimony and Information Received by the Subcommittee. A majority of presenters before the Subcommittee recommended no changes to Article 120(g)(7), at least in the context of prosecutions under Article 120(a)(3), 120(b)(1)(A), 120(c), or 120(d), when the accused has been charged with placing the victim in “fear” of the threatened act alleged. The majority of presenters stated the government is—and should be—required to prove both (1) the victim’s subjective, personal fear, and (2) that the victim’s subjective fear was also objectively reasonable under the circumstances.

A senior Army prosecutor stated that fear is defined adequately as written: a victim’s actual, subjective fear could indicate that the victim’s fear is also objectively reasonable in response to a particular threat.⁹¹ He believes these forms of proof to be sufficient; there is no need for further adjustment.⁹² Likewise, a senior Air Force prosecutor found the requirement that a victim’s fear be “objectively reasonable under the circumstances” to be proper: a subjective but objectively unreasonable fear in a victim would, in cases in which the defense was raised, make it impossible for the prosecution to prove beyond a reasonable doubt that the accused did not have an honest and reasonable mistake of fact as to consent.⁹³ He noted that in the marginal case in which the accused has knowledge of the victim’s objectively unreasonable but subjective fear, the prosecution is free to allege sexual assault or abusive sexual contact by bodily harm, as the sexual act or sexual contact would be nonconsensual.⁹⁴

A retired Army military judge stated that “fear” does not need to be defined to acknowledge subjective fear, because subjective fear is already relevant and admissible and would also be relevant

⁸⁹ 10 U.S.C. § 920(g)(7).

⁹⁰ JPP INITIAL REPORT 32 (Feb. 2015).

⁹¹ *Written Statement of LTC Alexander Pickands, U.S. Army* (May 8, 2015).

⁹² *Id.*

⁹³ *Written Statement of Major Mark Rosenow, U.S. Air Force* (May 20, 2015).

⁹⁴ *Written Statement of Major Mark Rosenow, U.S. Air Force* (May 20, 2015).

to show objective fear.⁹⁵ He believes that removing the requirement that the fear be objectively reasonable would result in confusion and cause practical problems in litigating sexual assault trials.⁹⁶ And a civilian practitioner who was formerly a Marine Corps prosecutor and defense counsel stated that requiring an objectively reasonable fear is “appropriate because it incorporates the defense of mistake of fact regarding whether the other person was actually in fear” and also “avoids prosecuting someone for instilling a fear that is objectively unreasonable.”⁹⁷

One retired Air Force military judge offered a different view, testifying that if the focus is on protecting the victim, the court-martial panel members “should not be permitted to superimpose their own judgment upon the victim, as long as they believe the victim believed he or she was in fear.”⁹⁸ He suggested that in such cases, the accused should be responsible for the victim as he or she “finds” the victim.⁹⁹

One Subcommittee member who submitted written material to the Judicial Proceedings Panel recommended modifying the definition from a narrower reasonable person standard to a more subjective one that allows a more vulnerable victim’s fear to be sufficient to satisfy the fear element.¹⁰⁰

C. Conclusion: The Subcommittee concluded that no change was needed to the requirements that a victim’s subjective and personal fear be also objectively reasonable under the circumstances, as currently specified by Article 120(g)(7).¹⁰¹

D. Recommendation: No change.

⁹⁵ *Written Statement of Colonel Timothy Grammel, U.S. Army (Ret.)* (Apr. 10, 2015).

⁹⁶ *Id.*

⁹⁷ *Transcript of JPP Subcommittee Meeting* 390 (May 7, 2015) (testimony of Mr. Zachary Spilman, Attorney at Law).

⁹⁸ *Transcript of JPP Subcommittee Meeting* 192 (April 9, 2015) (testimony of Colonel William Orr, U.S. Air Force (Ret.)).

⁹⁹ *Transcript of JPP Subcommittee Meeting* 192 (April 9, 2015) (testimony of Colonel William Orr, U.S. Air Force (Ret.)).

¹⁰⁰ Dean Lisa M. Schenck, *Sex Offenses Under Military Law: Will the Recent Changes in the Uniform Code of Military Justice (UCMJ) Re-traumatize Sexual Assault Survivors in the Courtroom?*, 11 OHIO ST. J. CRIM. L. 439, 452–53 (2014).

¹⁰¹ *See generally Transcript of JPP Subcommittee Meeting* 284 (Oct. 22, 2015).

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

Current definition of force in Article 120(g)(5) of the UCMJ:

(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.

A. JPP Rationale for Referring This Issue to the Subcommittee. Under the 2007 version of Article 120, force was defined as an “action to compel submission of another or to overcome or prevent another’s resistance” by use or suggestion of a dangerous weapon, or by “physical violence, strength, power, or restraint . . . sufficient that the other person could not avoid or escape the sexual conduct.” According to one expert, this phrasing required the victim to resist the assault.¹⁰² The 2012 revision to Article 120 amended the definition of force to focus objectively on the offender’s conduct rather than subjectively on the victim’s behavior. Force is now defined as “(A) the use of a weapon; (B) the use of such physical strength or violence sufficient to overcome, restrain, or injure a person; or (C) inflicting physical harm sufficient to coerce or compel submission by the victim.” Subsection (B) measures the offender’s use of physical strength or violence by an objective reasonable person standard rather than by the actions of the particular victim in a case. While subsection (C) does look at the particular victim, it does not place the burden of resistance on that person.

Two witnesses before the JPP advocated for a broader definition of force. JPP Subcommittee member Dean Lisa Schenck noted that the 2012 version of Article 120 restricts “force” to a situation in which a weapon is used, rather than simply displayed or suggested. The degree of force to compel the victim’s submission is more subjective than in the 2007 version and places less emphasis on whether the victim could escape the assault. One other JPP witness recommended that Article 120(g)(5) should include “the use, the display, or the suggestion of the use of a weapon.” Professor Schulhofer argued that there should be two categories of forcible rape—one encompassing unlawful force applied against a person; the other, escalated use of force that could cause death or grievous bodily harm. During deliberations, the JPP decided that additional review was warranted to determine if the definition of force should be broadened and referred this issue to the Subcommittee for further analysis.¹⁰³

B. Testimony and Information Received by the Subcommittee. A majority of presenters before the Subcommittee recommended no change to the definition of force under Article 120(g)(5). A senior Air Force prosecutor stated that in his experience, offenses falling under the statute’s definitions of rape and aggravated sexual contact are much less common than those qualifying as sexual assault and abusive sexual contact.¹⁰⁴ He noted that in cases in which “force” is used, it is

¹⁰² Jim Clark, *Analysis of Crimes and Defenses 2012 UCMJ Article 120, Effective 28 June 2012*, Emerging Issues 7 (2012), available at http://jpp.whs.mil/Public/docs/03_Topic-Areas/02-Article_120/20140807/07_Art120_UCMJ_Crimes_Defenses_Analysis_Clark_2012.pdf, at 2

¹⁰³ JPP INITIAL REPORT 32–33 (Feb. 2015).

¹⁰⁴ *Written Statement of Major Mark Rosenow, U.S. Air Force* (May 20, 2015).

normally apparent, and the language included within Article 120(g)(5) is adequate.¹⁰⁵ Similarly, a senior Army prosecutor opined that the definition is sufficient, and he suggested adding the words “using or brandishing a weapon” to the first prong under Article 120(g)(5)(A).¹⁰⁶ He provided the example of an accused brandishing a Taser, a weapon that would not be likely to cause grievous bodily harm or death, but would serve to compel submission even without completing the act of using it.¹⁰⁷ A retired Army military judge opined that the definition of “force” is not too narrow.¹⁰⁸ In his view, some of the concerns about situations that are arguably not covered could be addressed by other theories of liability, such as “threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping.”¹⁰⁹ And a civilian practitioner and former Marine Corps prosecutor and defense counsel testified that the statutory definition of force is narrow, which in his opinion is sensible when considered in the context of the broader statutory definitions of bodily harm and of threatening or placing in fear.¹¹⁰

One senior Air Force appellate government counsel offered an opposing view, suggesting that the current definition of force should clarify that a victim is not required to exert any particular level of resistance in order for the accused to be found to have used unlawful force.¹¹¹ She relied on an appellate case in which the Service court overturned a rape conviction because the government did not admit sufficient evidence to prove force: specifically, “trial counsel did not elicit sufficient evidence to indicate that the Appellant used force to overcome the pushing.”¹¹² The court appears to have focused on what it perceived was a lack of resistance by the victim, and although the case was prosecuted under the 2007 version of Article 120, she believes that the same result could occur under the present version of the statute.¹¹³

One Subcommittee member, in written material presented to the Judicial Proceedings Panel, recommended modifying the definition of force to include situations in which the accused suggests that he or she has possession of a weapon; at this time the definition covers only situations in which a weapon is actually used.¹¹⁴

C. Conclusion: The Subcommittee concluded that in light of the amendments to the statutory definition of consent recommended in the discussion of issue 1, no modification to the Article 120(g)(5) definition of force should be recommended.¹¹⁵

D. Recommendation: No change.

¹⁰⁵ *Written Statement of Major Mark Rosenow, U.S. Air Force* (May 20, 2015).

¹⁰⁶ *Written Statement of LTC Alexander Pickands, U.S. Army* (May 8, 2015).

¹⁰⁷ *Written Statement of LTC Alexander Pickands, U.S. Army* (May 8, 2015).

¹⁰⁸ *Written Statement of Colonel Timothy Grammel, U.S. Army (Ret.)* (Apr. 10, 2015).

¹⁰⁹ *Written Statement of Colonel Timothy Grammel, U.S. Army (Ret.)* (Apr. 10, 2015).

¹¹⁰ *Transcript of JPP Subcommittee Meeting 390* (May 7, 2015) (testimony of Mr. Zachary Spilman, Attorney at Law).

¹¹¹ *Written Statement of Major Mary Ellen Payne, U.S. Air Force* (May 15, 2015).

¹¹² *Id.*, citing *U.S. v. Soto*, ACM 38422 (A.F. Ct. Crim. App., Sept. 16, 2014)(unpub. op.).

¹¹³ *Id.*

¹¹⁴ Dean Lisa M. Schenck, *Sex Offenses Under Military Law: Will the Recent Changes in the Uniform Code of Military Justice (UCMJ) Re-traumatize Sexual Assault Survivors in the Courtroom?*, 11 OHIO ST. J. CRIM. L. 439, 451–52 (2014).

¹¹⁵ *See generally Transcript of JPP Subcommittee Meeting 285* (Oct. 22, 2015).

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

Current definitions of sexual act and sexual contact in Article 120(g)(1) and (2) of the UCMJ:

(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.

A. JPP Rationale for Referring This Issue to the Subcommittee. The JPP heard testimony that the statute’s definition of sexual act may be overbroad. One JPP witness observed that a military member who put his or her finger in the mouth of another to abuse or harass that person could be charged with committing a sexual act under the current definition. A military defense counsel recommended amending the definition to eliminate the potential of a sexual assault conviction in cases in which objects or “any body part” are inserted into another’s mouth for a purpose that is not sexual. The JPP also heard testimony that the statute’s definition of sexual contact may be either too narrow or overbroad. Witnesses before the JPP were split on that issue. Those who criticized the definition as too narrow contended that the statute does not include a sexual touching of another person through the use of an object. Conversely, those who viewed the definition as overly broad reasoned that the definition allows for possible inclusion of “hypotheticals [that are] absurd;” one observed that “if the absurdity can be removed from the definition, then I think it adds respect to the law.”¹¹⁶ Another presenter agreed, noting that the definition could be used to impose unnecessary or inappropriate collateral consequences, such as sex offender registration for acts of touching that are not necessarily sexual. During deliberations, members of the JPP agreed that additional review of these definitions was warranted, and referred this issue to the Subcommittee for further analysis.¹¹⁷

B. Testimony and Information Received by the Subcommittee. A majority of presenters before the Subcommittee recommended some modification of the definitions of “sexual act” and

¹¹⁶ *Transcript of JPP Public Meeting* 302–03 (Aug. 7, 2014) (testimony of COL Timothy Grammel, U.S. Army (Retired)).

¹¹⁷ JPP INITIAL REPORT 33–35 (Feb. 2015).

“sexual contact” under Article 120(g)(1)–(2). A retired Army military judge stated that the definitions of “sexual act” and “sexual contact” are too broad.¹¹⁸ The term “sexual act,” he suggested, could be fixed by deleting two words—“or mouth”—from subparagraph (B). The term “sexual contact,” he suggested, should be corrected by deleting most of subparagraph (B), which criminalizes touching any body part with any body part, including through the clothing, if it is accompanied by the intent to arouse or gratify the sexual desire of any person. He suggested that statutory language requiring specific intent should be added to subparagraph (A). In addition, with this change, an ambiguity in the last sentence can be corrected, and “or by any object” can be added after “by any body part.” A senior Air Force prosecutor testified that “sexual act” is too broad and “sexual contact” is too narrow.¹¹⁹ He recommended removing “or mouth” from the definition of “sexual act,” and adding “or any object” to the definition of “sexual contact.”

A senior Army defense counsel recommended modifying the definition of “sexual contact” to state, “Touching may be accomplished by any part of the body or by any object when the object is used to arouse or gratify the sexual desire of any person.”¹²⁰ A senior Navy defense counsel agreed with the retired Army trial judge that “or mouth” should be deleted from the definition of sexual act.¹²¹ He also agreed with the suggested change to the definition of sexual contact to include the use of an object. An Army appellate government counsel agreed that the use of an object should be added to the definition of sexual contact.¹²² One senior Marine Corps appellate defense counsel testified that the second parts of the definitions of sexual act and sexual contact in Article 120(g)(1)(B) and 120(g)(2)(B) are overly broad and should be removed.¹²³

On the other hand, one senior Army prosecutor recommended no changes to the definition of sexual act because in his view it is correctly defined.¹²⁴ He stated that the definition of “sexual contact” is adequate, although he agreed that the words “or an object” should be added.¹²⁵

On July 15, 2015, in the midst of the Subcommittee’s meetings, the Court of Appeals for the Armed Forces issued its opinion in *United States v. Schloff*,¹²⁶ holding that “sexual contact” may include those instances when an accused touches a victim with an object. In a 3–2 decision, the Court ruled that a specification alleging abusive sexual contact by pressing a stethoscope to the breasts of a noncommissioned officer in violation of Article 120 of the UCMJ appropriately stated an offense, because the act of pressing a stethoscope to the victim’s breasts (object-to-body contact) constituted sexual contact as defined by Article 120(g)(2).

¹¹⁸ *Written Statement of Colonel Timothy Grammel, U.S. Army (Ret.)* (Apr. 10, 2015).

¹¹⁹ *Transcript of JPP Subcommittee Meeting* 131 (May 7, 2015) (testimony of Major Mark Rosenow, U.S. Air Force).

¹²⁰ *Written Statement of Major Frank Kostik U.S. Army* (May 26, 2015).

¹²¹ *Transcript of JPP Subcommittee Meeting* 264 (May 7, 2015) (testimony of Lieutenant Commander Richard Federico, U.S. Navy).

¹²² *Transcript of JPP Subcommittee Meeting* 361 (May 7, 2015) (testimony of Captain Jihan Walker, U.S. Army).

¹²³ *Transcript of JPP Subcommittee Meeting* 332–36 (May 7, 2015) (testimony of Major John Stephens, U.S. Marine Corps).

¹²⁴ *Written Statement of LTC Alexander Pickands, U.S. Army* (May 8, 2015).

¹²⁵ *Id.*

¹²⁶ *United States v. Schloff* 74 M.J. 312 (2015).

C. Conclusion: The Subcommittee concluded that the definitions for “sexual act” and “sexual contact” should be amended to clarify the bounds of prohibited conduct and address concerns regarding overbreadth in some places and narrowness in other parts of these definitions.¹²⁷

Numerous presenters testified that the definition of sexual act in Article 120(g)(1)(B) may be too broad because it could include placing an object like a toothbrush into someone’s mouth with the intent to abuse, humiliate, or degrade any person, regardless of whether there was any specific sexual intent.¹²⁸ The Subcommittee believes that this definition could convert into a sex crime acts that might constitute hazing or battery-types of offenses—offensive touchings—but are not sex offenses.¹²⁹

Moreover, to address concerns regarding the narrowness of the definition of sexual contact in Article 120(g)(2), and following the recommendations of several presenters, the Subcommittee believes the statutory definition of sexual contact should clearly state that contact can be accomplished not only with any part of the body but also with an object.

D. Recommendation: The Subcommittee recommends that the Article 120(g)(1) definition for “sexual act” be amended as follows:¹³⁰ The words “contact between the” should be deleted, and the words “penetration however slight of the” should be inserted, in Article 120(g)(1)(A). Further, the word “and” preceding the word “vulva” should be deleted and replaced with the word “into” and the words “and for purposes of this subparagraph contact involving the penis occurs upon” “penetration, however slight” should be deleted.

A new subsection (B) should be added to subparagraph (g)(1), consisting of the words “contact between the mouth and the penis, vulva, or scrotum or anus.” The current subsection (B) should be redesignated subsection (C), and the words “or penis” should be added after the word “vulva,” and the words “or mouth” should be deleted.

The Subcommittee recommends that the Article 120(g)(2) definition for “sexual contact” be amended as follows: Article 120(g)(2)(A) and (B) should be merged into one subparagraph. The word “genitalia” should be deleted, and the words “vulva, penis, scrotum” should be added in its place. The words “any touching, or causing another person to touch, either directly or through the clothing, any body part of any person, if done” should be deleted.¹³¹

The new definitions of “sexual act” and “sexual contact” in Article 120(g) would read as follows:

(1) *Sexual act.* The term “sexual act” means—

(A) penetration, however slight, of the penis into the vulva or anus or mouth;

(B) contact between the mouth and the penis, vulva, scrotum, or anus; or

¹²⁷ See generally *Transcript of JPP Subcommittee Meeting* 288–313 (Oct. 22, 2015).

¹²⁸ *Transcript of JPP Subcommittee Meeting* 20, 50 (May 7, 2015) (testimony of Major Amy Bateman, U.S. Army).

¹²⁹ See generally *Transcript of JPP Subcommittee Meeting* 396–97 (June 25, 2015).

¹³⁰ See Enclosure 1.

¹³¹ See Enclosure 1.

(C) the penetration, however slight, of the vulva or penis or anus 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—

touching, or causing another person to touch, either directly or through the clothing, the vulva, penis, scrotum, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, or degrade any person, or with an intent to arouse or gratify the sexual desire of any person.

Touching may be accomplished by any part of the body or an object.

10. Should the accused's knowledge of a victim's capacity to consent be a required element of sexual assault?

A. JPP Rationale for Referring This Issue to the Subcommittee. The requirement of proving that the accused knew or reasonably should have known of the victim's incapacity to consent is not found in the text of the federal sexual abuse statute, 18 U.S.C. § 2242, upon which Article 120(b)(2) and 120(b)(3) were based. Some testimony before the JPP suggested that this additional requirement in Article 120 is essentially an extra mens rea element that the prosecution must prove, which, in turn, affords unnecessary protections to the accused. Critics opined that this extra mens requirement is unnecessary because the statute is aimed at protecting the victim who is mentally or physically unable to consent owing to one of the specifically enumerated conditions, such as being asleep, unconscious, or otherwise unaware that a sexual act is occurring (120(b)(2)); impaired by drugs, intoxicants, or other substances (120(b)(3)(A)); or suffering from a mental disease or defect or physical disability (120(b)(3)(B)). Given these concerns, the JPP referred this issue to the Subcommittee for further analysis.¹³²

B. Testimony and Information Received by the Subcommittee. A majority of presenters before the Subcommittee recommended that no changes be made to Article 120(b)(2) or 120(b)(3), which require the government to prove both (1) the victim's incapacity to consent and (2) that the accused knew or reasonably should have known of that incapacity. A retired Army military judge opined that the requirement that the accused knew or should have known of the victim's incapacity to consent should remain as a required element of sexual assault.¹³³ A senior Army prosecutor testified that this will be a required item of proof whether it is a stated element or it is raised as a defense. In its current form, the statute simply takes the defense of mistake of fact and incorporates it into Article 120(b)(2)–(3) by making it a required element. In other words, an accused cannot be both reasonably aware of the victim's incapacity and reasonably mistaken that the victim consented. If this requirement were removed, an accused could still raise mistake of fact as a defense.¹³⁴ Likewise, a senior Air Force prosecutor stated that the requirement that the accused “knows or reasonably should know” of the victim's incapacity to consent is properly included as part of Article 120(b)(2), (b)(3)(A), and (b)(3)(B), UCMJ. He believes it strikes the proper balance between criminalizing sexual acts (as well as sexual contacts through Art. 120(d), UCMJ) against victims who are in a condition making them incapable of consent and sparing from unfair punishment Service members who were both honestly and reasonably mistaken about that status. In courts-martial involving evidence of such a mistake of fact, the accused will appropriately be held to the standard of a reasonably careful, ordinary, prudent, and sober adult under the circumstances at the time of each offense.¹³⁵ A former Marine prosecutor and defense counsel who is now a civilian counsel stated that the government should have to prove the accused had some knowledge that the victim was incapable of consenting.¹³⁶

¹³² JPP INITIAL REPORT 35 (Feb. 2015).

¹³³ *Written Statement of Colonel Timothy Grammel, U.S. Army (Ret.)* (Apr. 10, 2015).

¹³⁴ *Written Statement of LTC Alexander Pickands, U.S. Army* (May 8, 2015).

¹³⁵ *Written Statement of Major Mark Rosenow, U.S. Air Force* (May 20, 2015).

¹³⁶ *Transcript of JPP Subcommittee Meeting 391* (May 7, 2015) (testimony of Mr. Zachary Spilman, Attorney at Law).

Two federal circuit courts of appeal have held that in prosecutions under 18 U.S.C. § 2242, the government must prove both that the victim was incapacitated and that the accused knew of this incapacity (the scienter requirement).¹³⁷

There were no presenters before the Subcommittee who suggested amending this section of Article 120.

C. Conclusion: Although some testimony was presented to the JPP that these subsections of Article 120 impose an additional mens rea requirement on the government in prosecutions for sexual assault and abusive sexual contact, this scienter element of proof is necessary, and it is also required under the federal criminal code in Title 18, U.S.C. Section 2242 (Sexual abuse). That section of the federal criminal code punishes anyone who knowingly:

(1) causes another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or

(2) engages in a sexual act with another person if that other person 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.

The Subcommittee finds persuasive the federal circuit courts' rationale for requiring that the government prove not just that the accused engaged in a sexual act, but also that the accused knew the victim was incapacitated when doing so.¹³⁸ For instance, the Eighth Circuit in *United States v. Bruguier* reasoned that to do otherwise would, among other things, “disregard the bedrock American tradition” of requiring this scienter element to be proven in rape and sexual assault prosecutions involving an incapacitated victim, and it would make the crime one where strict liability is imposed for the act alone.¹³⁹

The Subcommittee additionally considered the difference in the scienter requirements between Article 120(b)(2)–(3) and 18 U.S.C. § 2242. The federal criminal code requires proof that an accused knew of a victim's incapacity to consent, whereas Article 120(b)(2)–(3) permits conviction when an accused either knew or “reasonably should have known” of the victim's incapacity to consent. The Subcommittee determined that the standard established by Congress in Article 120(b)(2)–(3) is neither unclear nor ambiguous; therefore, the Subcommittee does not recommend changes to the standard.

Two members of the Subcommittee concluded that Service members should not face the severe consequences of conviction under Article 120(b)(2) and (3) in the absence of the same culpability required for convicting a civilian under the same circumstances. Therefore they would

¹³⁷ See, e.g., *U.S. v. Bruguier*, 735 F.3d 754, 774 (8th Cir. 2013); *United States v. Peters*, 277 F.3d 963, 967–68 (7th Cir. 2002). See also *United States v. Aksal*, 2013 U.S. Dist. LEXIS 176947 (D. N.J. Dec. 17, 2013).

¹³⁸ *Bruguier*, 735 F.3d at 774.

¹³⁹ *Id.* at 772–73.

recommend changing Article 120(b)(2) and (3) to require, as under 18 U.S.C. § 2242, that the accused have knowledge of the victim's incapacity to consent. Under federal law, of course, knowledge includes willful blindness, a substantial means for assuring punishment in cases of culpable misconduct.

In sum, the Subcommittee determined that an accused's knowledge of a victim's incapacity to consent should remain a required element of sexual assault under Article 120(b)(2) and 120(b)(3).

D. Recommendation: The Subcommittee does not recommend changing Article 120(b)(2) or Article 120(b)(3).

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

A. JPP Rationale for Referring This Issue to the Subcommittee. The UCMJ offense of “indecent acts with another” traditionally proscribed a variety of sexual misconduct that was not otherwise prohibited, such as consensual sexual intercourse in the presence of others and sex acts with an animal or a corpse. The 2007 amendment to Article 120 moved “indecent acts with another” from Article 134 to Article 120 and eliminated the element of the conduct as prejudicial to good order and discipline or discrediting the Service. The 2012 amendment to Article 120, however, removed the offense entirely. Currently, “indecent act” is not an enumerated offense under the UCMJ.

The JPP received testimony that the statute should be amended to restore indecent acts as an enumerated offense. The prosecution may still charge an indecent act as a general disorder offense under Article 134, but it must prove as an additional element that the conduct was prejudicial to good order and discipline or discredited the Service. In addition, the maximum punishment for a general disorder Article 134 offense is four months’ confinement and forfeiture of two-thirds pay per month for four months, whereas the maximum punishment for an indecent act charged under the 2007 version of Article 120 was up to five years’ confinement, forfeiture of all pay and allowances, and a dishonorable discharge.

During deliberations, members of the JPP agreed that additional review was necessary to consider whether indecent acts should be restored as an enumerated offense, and the JPP referred this issue to the Subcommittee for further analysis.¹⁴⁰

B. Testimony and Information Received by the Subcommittee. A majority of presenters before the Subcommittee recommended that this offense be added back into the Uniform Code of Military Justice. A retired Marine Corps trial and appellate judge testified that this offense should be put back in the UCMJ because, in his experience, “the breadth and amount of [indecent] things that younger generations will do today that are completely incompatible with what the public believes the military culture is needs to be back in there.”¹⁴¹ A senior Army prosecutor stated that this offense should be added back into the code, and suggested that the tougher decision is between putting it into Article 120 versus having the President add it back to Article 134’s enumerated offenses.¹⁴² In his view, putting the offense under Article 120 relieves the government of having to prove that the conduct was Service discrediting or prejudicial to good order and discipline, which is an additional element of proof for an Article 134 offense that is not required under Article 120.¹⁴³ The importance of this, he believes, is not that it saves the government effort; rather, it is that indecent acts could then be a lesser-included offense of other Article 120 crimes.¹⁴⁴ If it is an Article 134 offense, the additional element of proof prevents its use as a lesser offense.¹⁴⁵ And a senior Air Force prosecutor testified that an offense of indecent acts should be added back into the code, although it could be

¹⁴⁰ JPP INITIAL REPORT 36 (Feb. 2015).

¹⁴¹ *Transcript of JPP Subcommittee Meeting 200–01* (Apr. 9, 2015) (testimony of Lieutenant Colonel Quincy Ward, U.S. Marine Corps (Ret.)).

¹⁴² *Written Statement of LTC Alexander Pickands, U.S. Army* (May 8, 2015).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

placed under either Article 120 or Article 134.¹⁴⁶ He believes that nonconsensual sexual encounters regularly include elements of abuse that are not well captured within the present statutory scheme; if this offense is reintroduced into the code, investigators and trial practitioners at all levels could be aware of its availability when faced with fact patterns that appear to fall under the category of sexual assault but do not satisfy the elements of any current offense. In his view, the fair administration of military justice by the consistent charging of these crimes in similar fact patterns would benefit significantly if indecent acts were added back into the UCMJ as an enumerated offense.¹⁴⁷

One Subcommittee member, in material presented to the Judicial Proceedings Panel, recommended adding this offense back into Article 120 in order to avoid the additional element of proof under Article 134.¹⁴⁸

Two presenters recommended no change on this issue. A retired Army military judge stated that the offense of “indecent act,” which existed in the statute between 2007 and 2012, should not be added as an enumerated offense under Article 120.¹⁴⁹ Most of what was in that offense between 2007 and 2012 has been moved to Article 120c(a). The remainder of indecent acts that should be criminalized and are not covered by Articles 120, 120b, 120c, or 125 can fall within Article 134, as does the offense of indecent language. He suggested that if the President thinks it warrants being specifically enumerated as an offense under Article 134 in part IV of the *Manual for Courts-Martial*, then the President can accomplish that enumeration by executive order, which is how indecent acts were handled in the past. And a civilian practitioner and former Marine Corps prosecutor and defense counsel suggested that indecent conduct can currently be prosecuted as a general offense under Article 134.¹⁵⁰

C. Conclusion: The Subcommittee concluded that adding indecent acts to the UCMJ as an enumerated offense (i.e., a statutory offense enumerated in Title 10 of the U.S. Code) is unwarranted. For the great majority of the UCMJ’s history, “indecent acts” were punishable as a specified offense under Article 134, requiring a showing that the conduct was either prejudicial to good order and discipline or of a nature to discredit the Armed Forces. An enumerated offense under Article 120 would require no such showing, which could result in overbroad application of the offense. The Subcommittee is aware that the Department of Defense has proposed an Article 134 offense in a recent draft executive order that addresses “Indecent Conduct,” pursuant to the President’s authority under UCMJ Article 56. The Subcommittee takes no position on the contents of that proposal.

D. Recommendation: The Subcommittee does not recommend adding the offense of “indecent act” to the UCMJ as an enumerated offense under Article 120. The Subcommittee’s recommendation does not extend to offenses specified by the President under Article 134 of the UCMJ.

¹⁴⁶ *Transcript of JPP Subcommittee Meeting* 134–35 (May 7, 2015) (testimony of Major Mark Rosenow, U.S. Air Force).

¹⁴⁷ *Id.*

¹⁴⁸ Dean Lisa M. Schenck, *Sex Offenses Under Military Law: Will the Recent Changes in the Uniform Code of Military Justice (UCMJ) Re-traumatize Sexual Assault Survivors in the Courtroom?*, 11 OHIO ST. J. CRIM. L. 439, 448–51 (2014).

¹⁴⁹ *Written Statement of Colonel Timothy Grammel, U.S. Army (Ret.)* (Apr. 10, 2015).

¹⁵⁰ *Transcript of JPP Subcommittee Meeting* 391–92 (May 7, 2015) (testimony of Mr. Zachary Spilman, Attorney at Law).

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. JPP Rationale for Referring This Issue to the Subcommittee. Inappropriate, consensual sexual relationships between instructors and recruits are currently charged as a violation of Article 92, UCMJ. The maximum punishment that may be imposed at a court-martial for a violation of this provision is a dishonorable discharge (or dismissal for an officer), forfeiture of all pay and allowances, and confinement for two years. Coercive relationships may also be charged, depending on the specific facts of the offense, under Article 93, maltreatment; Article 128, assault; or Article 134, conduct that discredits the Service or is prejudicial to good order and discipline. As further explained with respect to issue 13, sometimes behavior occurring within the context of these prohibited relationships is already chargeable and charged under Article 120 as well.

Those who testified before the JPP against amending Article 120 to cover these types of sexual relationships highlighted the articles and regulations that already prohibit inappropriate sexual relationships. Numerous witnesses, including prosecutors, staff judge advocates, military justice experts, a civilian defense counsel, and the Army's Judge Advocate General, told the JPP that current UCMJ punitive articles and regulations sufficiently criminalize sexual relationships between senior officials and subordinates, trainers and trainees, and recruiters and recruits, contending that the statute does not require further revision.

Several other witnesses, however, told the JPP that prosecuting offenses of senior-subordinate relationships that involve elements of coercion under punitive articles other than Article 120 is not sufficient, because convictions for violating these other punitive articles generally do not require sex offender registration. They contend that such offenses should be charged and viewed as sex offenses, because while a sexual relationship between a senior and a subordinate may appear consensual, the inherently coercive nature of the relationship prevents the subordinate from rendering freely given consent.

Given the opposing views between presenters before the JPP regarding whether the current practice of charging inappropriate relationships or maltreatment under articles of the UCMJ other than Article 120 is appropriate and effective when sexual conduct is involved, the JPP referred this issue to the Subcommittee for further evaluation.¹⁵¹

B. Testimony and Information Received by the Subcommittee. A majority of presenters before the Subcommittee stated that 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. A senior Marine Corps prosecutor testified that the current method of charging inappropriate sexual relationships under Articles 92 or 93 is adequate.¹⁵² A senior Army prosecutor testified that the present framework is workable and suggested adding a new Article 92 offense for any training instructor who has a sexual relationship with a recruit.¹⁵³ A senior Navy prosecutor and former defense counsel testified that the current version of Article 120 is sufficient to

¹⁵¹ JPP INITIAL REPORT 38–43 (Feb. 2015).

¹⁵² *Transcript of JPP Subcommittee Meeting* 12–13 (Aug. 27, 2015) (testimony of Major Adam King, U.S. Marine Corps).

¹⁵³ *Transcript of JPP Subcommittee Meeting* 19–22 (Aug. 27, 2015) (testimony of Major Tyler Heimann, U.S. Army).

prosecute sexual assault and contact crimes.¹⁵⁴ In cases in which Article 120 is charged and the government is arguing that the accused placed the victim in fear, he believes that Article 120 allows a prosecutor to make a fact-specific prosecution and to make an argument as to why the language used by the accused was sufficient to put that person in fear and give them a reasonable belief that “what they said was going to happen, would happen.”¹⁵⁵ And a senior Coast Guard prosecutor who has also served as a staff judge advocate and military judge concurred that the current practice of prosecuting consensual trainer–trainee cases under Article 92 is sufficient.¹⁵⁶

Numerous defense counsel also expressed their belief that the current practice of charging inappropriate relationships or maltreatment under articles of the UCMJ other than Article 120 is appropriate and effective when consensual sexual conduct is involved. A senior Air Force appellate defense counsel testified that the current structures of the UCMJ, specifically Article 120, are fully capable of handling sexual misconduct within the training environment.¹⁵⁷ A Navy defense counsel reiterated that the current practice of charging under Articles 92, 93, or 120 allows prosecutors the flexibility needed when charging these types of cases.¹⁵⁸ And a Marine defense counsel who has previously served as a prosecutor stated that Article 92 is sufficient when charging sexual relationships between trainers and trainees that do not fit under Article 120.¹⁵⁹

C. Conclusion: The current practice of charging inappropriate relationships as a violation of a lawful general order or maltreatment under articles 92 or 93 of the UCMJ can be appropriate and effective when consensual sexual conduct is involved.

D. Recommendation: The Subcommittee does not recommend any changes to the current practice of charging inappropriate sexual relationships that cannot be charged under Article 120 as a violation of Articles 92 and/or 93.

¹⁵⁴ *Transcript of JPP Subcommittee Meeting 25* (Aug. 27, 2015) (testimony of Lieutenant Commander Ben Robertson, U.S. Navy).

¹⁵⁵ *Transcript of JPP Subcommittee Meeting 25* (Aug. 27, 2015) (testimony of Lieutenant Commander Ben Robertson, U.S. Navy).

¹⁵⁶ *Transcript of JPP Subcommittee Meeting 28–30* (Aug. 27, 2015) (testimony of Lieutenant Commander Ben Gullo, U.S. Coast Guard).

¹⁵⁷ *Transcript of JPP Subcommittee Meeting 123* (Aug. 27, 2015) (testimony of Captain Lauren Shure, U.S. Air Force).

¹⁵⁸ *Transcript of JPP Subcommittee Meeting 128* (Aug. 27, 2015) (testimony of Lieutenant Paul Hochmuth, U.S. Navy).

¹⁵⁹ *Transcript of JPP Subcommittee Meeting 121* (Aug. 27, 2015) (testimony of Captain Charles Olson, U.S. Marine Corps).

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. JPP Rationale for Referring This Issue to the Subcommittee. Any case involving overt force or threat of force may be charged as an offense under Article 120. But for cases that involve coercive sexual relationships without overt force, the ability to charge conduct as a criminal offense under Article 120 has been diminished by amendments to the statute. Under the pre-2007 version of Article 120, cases without overt force relied on the doctrine of constructive force—an alternative legal theory that recognizes use of threats and intimidation to gain control or prevent resistance as a type of force. Military courts further developed this theory to address instances of clearly nonconsensual sexual acts—especially between military members with rank disparity—when there was no use of overt physical force. The necessary force was found to be constituted by fear, coercion, or abuse of authority. However, the mere existence of a sexual relationship between individuals of a different rank was not alone enough to sustain a conviction under Article 120 of the UCMJ. Under the constructive force doctrine, military appellate courts determined that the victim’s lack of consent must be manifest and/or the accused must have explicitly used the difference in rank to create a situation of dominance and control.

The 2012 version of Article 120 does not contain language that specifically addresses the use of military rank to threaten or coerce, without force, an individual into a sexual act or sexual contact. Some witnesses told the JPP that the current statutory language in Article 120 does not clearly criminalize sexual relationships between senior personnel and their subordinates resulting from coercion and/or abuse of authority when force and lack of consent are not overtly present. Two witnesses before the JPP described the difficulty of charging coercive sexual relationships as sexual assault offenses under Article 120(b)(1)(A), a sexual act accomplished through fear of wrongful action, noting that the statutory language was ineffective for such cases. The witnesses recommended amending Article 120 to specifically encompass situations in which senior Service members use their position of authority to coerce a subordinate into a sexual act or contact. Given the opposing views of the presenters before the JPP, the JPP referred this issue to the Subcommittee for further evaluation.¹⁶⁰

B. Testimony and Information Received by the Subcommittee. A majority of presenters before the Subcommittee stated that the 2012 version of Article 120 provides military prosecutors the ability to effectively charge coercive sexual acts or contacts involving the abuse of rank or authority. A senior Coast Guard prosecutor testified that the current version of Article 120 is sufficient to effectively charge coercive sexual misconduct involving the abuse of authority.¹⁶¹ A senior Army defense counsel who previously served as a prosecutor at an Army training command testified that in his experience, even consensual sexual acts or contacts between trainers and trainees were prosecuted under an appropriate article and the offenders punished and held publicly accountable.¹⁶² A senior Marine Corps defense counsel and former prosecutor testified that the current version of Article 120 gives prosecutors sufficient ability to charge coercive sexual relationships involving the abuse of authority.¹⁶³ A senior Air Force appellate defense counsel testified that the current version of Article

¹⁶⁰ JPP INITIAL REPORT 38–43 (Feb. 2015).

¹⁶¹ *Transcript of JPP Subcommittee Meeting* 28–31 (Aug. 27, 2015) (testimony of Lieutenant Commander Ben Gullo, U.S. Coast Guard).

¹⁶² *Transcript of JPP Subcommittee Meeting* 112–15 (Aug. 27, 2015) (testimony of Major Ryan Wardle, U.S. Army).

¹⁶³ *Transcript of JPP Subcommittee Meeting* 121 (Aug. 27, 2015) (testimony of Captain Charles Olson, U.S. Marine Corps).

120 is fully capable of handling sexual misconduct cases that arise in the training environment, and no changes are necessary.¹⁶⁴ A senior Navy defense counsel also testified that the current version of Article 120 is both effective and appropriate and provides prosecutors the flexibility they need in charging this type of sexual misconduct.¹⁶⁵

Numerous staff judge advocates who advise commanding officers at entry-level training facilities regarding investigations and prosecution of sexual assault allegations testified in accord with the majority of the presenters before the Subcommittee. For instance, an Air Force staff judge advocate testified that the current versions of Article 92 and Article 120 can be used to effectively prosecute trainer sexual misconduct.¹⁶⁶ She believes that other articles of the UCMJ, such as Article 93 (maltreatment and cruelty), Article 128 (assault, simple assault, and battery), or 134 (general disorders), provide the flexibility to charge appropriately depending on the unique facts of each individual case.¹⁶⁷ A senior Marine Corps staff judge advocate legal advisor for an entry-level training commanding officer testified that the current versions of Articles 92 and 120 are sufficient to hold Marines accountable for sexual misconduct in the entry-level training environment.¹⁶⁸ And a senior Coast Guard staff judge advocate legal advisor to the commanding officer at an entry-level training installation testified that the current practice of charging other articles, primarily Article 92, is sufficient in capturing the criminality of any given fact pattern.¹⁶⁹ He also told the Subcommittee that the current version of Article 120 gives prosecutors the ability to adequately prosecute these types of cases.¹⁷⁰

C. Conclusion: The Subcommittee concluded that in some cases Article 120, as well as other provisions in the UCMJ, provides prosecutors with an effective means of charging coercive sexual misconduct.¹⁷¹ However, because such relationships—especially those that occur in the entry-level training environment—can involve subtle forms of coercion not easily captured under the current structure of Article 120, such misconduct could be better addressed via the proposed Article 120(b)(1)(E).

D. Recommendation: The Subcommittee recommends no changes to Article 120(b)(1)(A), but will recommend that a new subsection be added to better address coercive sexual relationships or those involving abuse of authority. See Issue 15.

¹⁶⁴ *Transcript of JPP Subcommittee Meeting* 123 (Aug. 27, 2015) (testimony of Captain Lauren Shure, U.S. Air Force).

¹⁶⁵ *Transcript of JPP Subcommittee Meeting* 128 (Aug. 27, 2015) (testimony of Lieutenant Paul Hochmuth, U.S. Navy).

¹⁶⁶ *Transcript of JPP Subcommittee Meeting* 189 (Aug. 27, 2015) (testimony of Colonel Brynn Morgan, U.S. Air Force).

¹⁶⁷ *Id.*

¹⁶⁸ *Transcript of JPP Subcommittee Meeting* 194 (Aug. 27, 2015) (testimony of Lieutenant Colonel Brett Wilson, U.S. Marine Corps).

¹⁶⁹ *Transcript of JPP Subcommittee Meeting* 198 (Aug. 27, 2015) (testimony of Lieutenant Commander Paul Casey, U.S. Coast Guard).

¹⁷⁰ *Id.* at 199.

¹⁷¹ See generally *Transcript of JPP Subcommittee Meeting* 385–88 (Oct. 22, 2015).

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?

Current definition of “threatening or placing that other person in fear” in Article 120(g)(7) of the UCMJ:

(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.

A. JPP Rationale for Referring This Issue to the Subcommittee. The definition of “threatening or placing that other person in fear” used in the 2012 version of Article 120 is less encompassing than the 2007 definition. The JPP agrees that as a result, the 2012 version of Article 120 does not sufficiently criminalize sexual relationships between senior and subordinates when force or the threat of force is not overt. Given this concern, the JPP referred this issue to the Subcommittee for further evaluation.¹⁷²

B. Testimony and Information Received by the Subcommittee. A majority of presenters before the Subcommittee recommended amending the definition of “threatening or placing that other person in fear” to ensure that coercive sexual relationships or those involving abuse of authority are better covered under an existing Article 120 provision. A senior Air Force appellate government counsel testified that the current definition is not expansive enough, and she recommended going back to the definition of threatening or placing in fear from the 2007 version of Article 120.¹⁷³ She offered a single caveat: that the definition should not include promises to positively affect a person’s career.¹⁷⁴ A senior Marine Corps prosecutor testified that while it is not necessary to amend the statutory definition of “threatening or placing that other person in fear,” the bench instructions on this definition need to be modified to address the fact scenario in which an accused coerces a victim into a sexual act or contact by abusing his or her military rank or authority.¹⁷⁵ A senior Coast Guard prosecutor testified that this definition “falls short,” simply because “when we define wrongful action—that gets a little gray.”¹⁷⁶ From a prosecutor’s standpoint, he believes that the military judge should be equipped to provide instructions that are definitive on the law and that can be followed by the court-martial panel members. Like several other presenters before the Subcommittee, he suggested looking back to the 2007 version of Article 120 and its definition for guidance.¹⁷⁷ A senior Air Force appellate defense counsel testified that the current definition should be modified along the lines of the definition set forth in the 2007 version of Article 120.¹⁷⁸ And a senior Navy defense counsel recommended that the concerns regarding the definition of “threatening or placing that other

¹⁷² JPP INITIAL REPORT 41–43 (Feb. 2015).

¹⁷³ *Transcript of JPP Subcommittee Meeting 6* (Aug. 27, 2015) (testimony of Major Mary Ellen Payne, U.S. Air Force).

¹⁷⁴ *Id.* at 7–8.

¹⁷⁵ *Transcript of JPP Subcommittee Meeting 14–15* (Aug. 27, 2015) (testimony of Major Adam King, U.S. Marine Corps).

¹⁷⁶ *Transcript of JPP Subcommittee Meeting 31* (Aug. 27, 2015) (testimony of Lieutenant Commander Ben Gullo, U.S. Coast Guard).

¹⁷⁷ *Id.* at 31–32.

¹⁷⁸ *Transcript of JPP Subcommittee Meeting 123* (Aug. 27, 2015) (testimony of Captain Lauren Shure, U.S. Air Force).

person in fear” be addressed by modifying the bench instructions to align more closely with the definition contained in the 2007 version of Article 120.

Staff judge advocate legal advisers to training commanding officers also agreed that the definition needs modification. A senior Air Force staff judge advocate to a training commanding officer testified that the definition is too narrow and should be expanded to include a promise of positive action in return for sexual acts or contact.¹⁷⁹ A Marine Corps staff judge advocate to the commanding officer of entry-level training testified that this definition needs to be improved by referring back to the previous definition in the 2007 version of Article 120, which provided the specific example of an accused who uses or abuses his or her military position, rank, or authority to obtain sexual acts or contact from a victim.¹⁸⁰

Conversely, one senior Navy prosecutor testified that the definition of “threatening or placing that other person in fear” in Article 120(g)(7) is sufficient and allows the prosecutor to make a fact-specific prosecution and an argument as to why the language used by the accused was sufficient to put that person in fear and give them a reasonable belief that “what they said was going to happen, would happen.”¹⁸¹ He testified that in situations in which the accused has not made any express threats or taken any overt actions that would help to corroborate a threat of wrongful action, he can still prosecute that fact pattern under Article 120(b)(1)(B) or 120(d) by alleging that the act or contact was committed without the consent of the victim.¹⁸²

C. Conclusion: The Subcommittee concluded that if the proposed Article 120(b)(1)(E) is adopted (see issue 15), the definition of threatening or placing another person in fear does not need to be amended with respect to coercive sexual acts or coercive sexual contact.¹⁸³

D. Recommendation: No change.

¹⁷⁹ *Transcript of JPP Subcommittee Meeting* 190 (Aug. 27, 2015) (testimony of Colonel Brynn Morgan, U.S. Air Force).

¹⁸⁰ *Transcript of JPP Subcommittee Meeting* 194–95 (Aug. 27, 2015) (testimony of Lieutenant Colonel Brett Wilson, U.S. Marine Corps).

¹⁸¹ *Transcript of JPP Subcommittee Meeting* 25 (Aug. 27, 2015) (testimony of Lieutenant Commander Ben Robertson, U.S. Navy).

¹⁸² *Id.* at 39–40.

¹⁸³ *See generally Transcript of JPP Subcommittee Meeting* 385–88 (Oct. 22, 2015).

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

A. JPP Rationale for Referring This Issue to the Subcommittee. The “Report on Protections for Prospective Members” stated that a new UCMJ article or an additional provision under Article 120 was not required because “statutes and regulations are in place to hold offenders appropriately accountable when prospective and new members of the military are victimized by service members who exercise control over them.”¹⁸⁴ Given the JPP’s concerns regarding whether the current methods of charging coercive sexual misconduct committed by abuse of rank or authority under Article 92, 93, or 120 are effective, the JPP referred this issue to the Subcommittee for further analysis.¹⁸⁵

B. Testimony and Information Received by the Subcommittee. A majority of presenters before the Subcommittee recommended against a new provision under Article 120 to specifically address coercive sexual relationships or those involving abuse of authority. Those presenters noted that when cases arise in which an alleged victim states he or she was coerced into engaging in a sexual act or sexual contact with a superior, this fact pattern is currently charged as a violation of Article 120(b)(1)(A) for threatening or placing the victim in fear of wrongful action.

C. Conclusion: Although most presenters before the Subcommittee recommended against adopting a new provision to specifically address coercive sexual relationships or offenses involving abuse of authority, the Subcommittee is concerned that the present statute removed language from the 2007 version of Article 120 that specifically addressed the abuse of position, rank, or authority. This concern is especially acute when it analyzes offenses that have arisen in the entry-level training environment which have been the subject of so much recent public scrutiny and which often lack overt, direct threats of wrongful action, involving instead more subtle elements of coercion. Accordingly, to address this concern and make it abundantly clear that in cases in which an accused has used his or her position, rank, or authority to coerce a victim into engaging in a sexual act or sexual contact, the Subcommittee believes that a new subsection should be added under Article 120(b)(1).¹⁸⁶

D. Recommendation: Article 120(b)(1) should be amended to include a new subparagraph (E): “by using their position, rank, or authority to secure compliance by the other person.”

The new Article 120(b)(1)(E) would read as follows:

(b) Sexual assault. Any person subject to this chapter who—

(1) commits a sexual act upon another person

¹⁸⁴ U.S. DEPT. OF DEF., REPORT ON PROTECTIONS FOR PROSPECTIVE MEMBERS AND NEW MEMBERS OF THE ARMED FORCES DURING ENTRY-LEVEL PROCESSING AND TRAINING 2 (MAY 2014) [HEREINAFTER U.S. DEPT. OF DEF., REPORT ON PROTECTIONS FOR PROSPECTIVE MEMBERS], available at http://jpp.whs.mil/Public/docs/03_Topic-Areas/02-Article_120/20140919/29_ReportOnProtectionsForProspectiveMembers_DoD_2014.pdf.

¹⁸⁵ JPP INITIAL REPORT 38–43 (Feb. 2015).

¹⁸⁶ See generally *Transcript of JPP Subcommittee Meeting* 385–88 (Oct. 22, 2015).

(E) by using position, rank, or authority to secure compliance by the other person

is guilty of sexual assault and shall be punished as a court-martial shall direct.¹⁸⁷

¹⁸⁷ See Enclosure 1.

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

A. JPP Rationale for Referring This Issue to the Subcommittee. One member of Congress told the JPP that the issue of consent was paramount during recent courts-martial of military training instructors who were accused of sexually assaulting trainees at Lackland Air Force Base, Texas. She noted that many of the instructors acknowledged sexual relationships with the trainees but argued at trial that the relationships were consensual and therefore not criminal. She stated that on the basis of this defense, many of the instructors were found not guilty of sexual offenses but guilty of lesser offenses that did not carry the collateral consequence of having to register as a sex offender. From these outcomes, she concluded that the UCMJ and Article 120 do not properly deal with military training environments, and she declared, “I believe there should be strict liability.” She also told the JPP that current military regulations discourage victims from reporting sexual assaults resulting from abuse of authority, because they leave victims subject to possible UCMJ action for engaging in consensual relationships with instructors.¹⁸⁸

In law, strict liability is liability that does not depend on intent to harm. Instead, it is based on the breach of an absolute duty to make something safe. In this context, strict liability would make the trainer who engages in a sexual act with a trainee guilty of a sexual assault owing solely to his or her position of trust and authority as it relates to the victimized subordinate. The assumption of this legal theory is that trainers of military personnel have an absolute duty to make safe every aspect of the training environment—from equipment integrity to command structure and interpersonal relationships. This point of view holds that any deviation from this standard would be an affront to the authority placed in those leaders and would cause trainees to distrust the immediate chain of command and military leadership as a whole.

The JPP heard from numerous witnesses who recommended against a strict liability or per se illegal standard that would remove any consideration of the trainer’s intent or an alleged victim’s consent. Witnesses contended that such a standard would be overbroad, criminalize truly consensual relationships, and result in unjust outcomes. Other witnesses reasoned that the UCMJ already criminalizes such conduct, that the current charging mechanisms appropriately cover abuses of power in training environments, and that an additional punitive provision is not necessary. Given these opposing views, the JPP referred this issue to the Subcommittee for further evaluation.¹⁸⁹

B. Testimony and Information Received by the Subcommittee. A majority of presenters before the Subcommittee recommended against treating sexual relationships between training instructors and trainees as per se illegal or strict liability offenses under Article 120. The consistent theme sounded by those voicing this position was twofold: (1) the present methods for prosecuting these types of offenses under Article 92 are sufficient to hold military training instructors accountable, and (2) it would be unjust to make consensual sexual relationships between trainers and trainees a registrable sex offense, when no such registration results from similar consensual sexual relationships in the civilian community.

One senior Air Force prosecutor and appellate government counsel stated that she is opposed to making these offenses per se illegal or strict liability because (1) it is overly paternalistic to tell

¹⁸⁸ *Transcript of JPP Public Meeting* 128 (Sept. 19, 2014) (testimony of Rep. Jackie Speier, D-14th CA).

¹⁸⁹ JPP INITIAL REPORT 41–43 (Feb. 2015).

adults they can never consent to sex while simultaneously telling them they must act and be treated like 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.¹⁹⁰ All other senior prosecutors from the Marine Corps,¹⁹¹ Army,¹⁹² Navy,¹⁹³ and Coast Guard¹⁹⁴ who testified at the same Subcommittee meeting agreed with this assessment.

Similarly, the defense counsel who testified before the Subcommittee during its August meeting recommended against treating sexual relationships between training instructors and trainees as per se illegal or strict liability offenses under Article 120. One senior Army defense counsel who has previously served as a senior prosecutor testified that it would be a mistake to adopt a strict liability or per se illegal standard making any sexual relationship between instructors and trainees a violation of Article 120 when the facts reveal consensual conduct. He testified that there have been cases in which an investigation found consensual sexual conduct between a trainer and trainee who both intended to remain in a relationship after the trainee's graduation.¹⁹⁵ A senior Marine defense counsel who also served previously as a prosecutor echoed these sentiments and stated that Article 92 is sufficient to criminalize and hold accountable trainers who have consensual sexual relationships with recruits.¹⁹⁶ An Air Force appellate defense counsel who represented several Air Force military training instructors in cases arising from the Lackland sexual abuse from 2011 to 2013 stated that the current version of Article 120 is sufficient to address nonconsensual sexual assault or contact cases arising in the training environment, and she recommended against adopting a strict liability or per se illegal standard.¹⁹⁷ And a Navy defense counsel and former prosecutor testified that the current version of Article 120 is sufficient to prosecute nonconsensual sexual offenses in the training environment; adopting a strict liability or per se illegal standard is unnecessary and would be inappropriate because in his experience the majority of sexual misconduct committed by instructors is mutual, consensual conduct.¹⁹⁸

Numerous staff judge advocate legal advisers to training commanding officers reiterated the comments of the prosecutors and defense counsel. A senior Air Force staff judge advocate stated that she did not believe the adoption of a strict liability or per se illegal standard under Article 120 would improve prosecutions under Article 120.¹⁹⁹ She viewed the present framework of using Article 92, Article 93, or the general article under Article 134 as sufficient to address trainer sexual misconduct that does not rise to the level of nonconsent.²⁰⁰ A senior Army staff judge advocate legal adviser

¹⁹⁰ *Written Statement of Major Mary Ellen Payne, U.S. Air Force* (September 1, 2015).

¹⁹¹ *Transcript of JPP Subcommittee Meeting 11* (Aug. 27, 2015) (testimony of Major Adam King, U.S. Marine Corps).

¹⁹² *Transcript of JPP Subcommittee Meeting 20* (Aug. 27, 2015) (testimony of Major Tyler Heimann, U.S. Army).

¹⁹³ *Transcript of JPP Subcommittee Meeting 24–26* (Aug. 27, 2015) (testimony of Lieutenant Commander Ben Robertson, U.S. Navy).

¹⁹⁴ *Transcript of JPP Subcommittee Meeting 28–30* (Aug. 27, 2015) (testimony of Lieutenant Commander Ben Gullo, U.S. Coast Guard).

¹⁹⁵ *Transcript of JPP Subcommittee Meeting 112–14* (Aug. 27, 2015) (testimony of Major Ryan Wardle, U.S. Army).

¹⁹⁶ *Transcript of JPP Subcommittee Meeting 121* (Aug. 27, 2015) (testimony of Captain Charles Olson, U.S. Marine Corps).

¹⁹⁷ *Transcript of JPP Subcommittee Meeting 122–27* (Aug. 27, 2015) (testimony of Captain Lauren Shure, U.S. Air Force).

¹⁹⁸ *Transcript of JPP Subcommittee Meeting 127–31* (Aug. 27, 2015) (testimony of Lieutenant Paul Hochmuth, U.S. Navy).

¹⁹⁹ *Transcript of JPP Subcommittee Meeting 188–89* (Aug. 27, 2015) (testimony of Colonel Brynn Morgan, U.S. Air Force).

²⁰⁰ *Id.*

recommended against a strict liability or per se illegal standard under Article 120.²⁰¹ A Marine Corps staff judge advocate legal adviser to a training commanding officer stated that the typical method of prosecuting trainer sexual misconduct under Article 92 is sufficient to hold trainers accountable.²⁰² He therefore is not in favor of adopting any strict liability or per se illegal standard under Article 120.²⁰³ And a Coast Guard staff judge advocate testified that the present practice of charging inappropriate sexual relationships between trainers and trainees under Article 92 is sufficient and there is no need to make such relationships a strict liability or per se illegal violation of Article 120.²⁰⁴

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. They added that instructors already express fears in dealing with trainees and that continued over-criminalization would further erode the important mentoring relationship that must be created between instructors and recruits.²⁰⁵

At the July meeting, some former and current training commanders gave views differing from those of the prosecutors and legal advisers. One commanding general for an Army training command opined that making consensual 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.²⁰⁶ An Air Force general officer expressed views similar to those of 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.²⁰⁷ A Coast Guard flag officer commander testified that she supported “an expansion of Article 120 to be able to accommodate for this imbalance of power” between instructors and recruits.²⁰⁸ And a Marine Corps commanding general stated that he is not opposed to strict liability in boot camp (entry-level training) alone, but in other contexts he believes that the present prosecution framework is sufficient.²⁰⁹

C. Conclusion: Consensual sexual relationships that occur between instructors and trainees in the environment of basic training should not be treated as either strict liability or per se illegal under Article 120. Service orders and regulations make these types of relationships per se illegal under Article 92, and they can be prosecuted with a maximum punishment of two years’ confinement and a dishonorable discharge.

²⁰¹ *Transcript of JPP Subcommittee Meeting* 191 (Aug. 27, 2015) (testimony of Colonel David Mendelson, U.S. Army).

²⁰² *Transcript of JPP Subcommittee Meeting* 194 (Aug. 27, 2015) (testimony of LtCol Brett Wilson, U.S. Marine Corps).

²⁰³ *Id.* at 194–95.

²⁰⁴ *Transcript of JPP Subcommittee Meeting* 198–200 (Aug. 27, 2015) (testimony of LCDR Paul Casey, U.S. Coast Guard).

²⁰⁵ *Transcript of JPP Subcommittee Meeting* 233–34 (Aug. 27, 2015) (testimony of Colonel David Mendelson, U.S. Army).

²⁰⁶ *Transcript of JPP Subcommittee Meeting* 271–76, 281 (July 22, 2015) (testimony of Major General Peggy Combs, U.S. Army).

²⁰⁷ *Transcript of JPP Subcommittee Meeting* 291–92 (July 22, 2015) (testimony of Major General Gina Grosso, U.S. Air Force).

²⁰⁸ *Transcript of JPP Subcommittee Meeting* 295 (July 22, 2015) (testimony of Rear Admiral Cari Thomas, U.S. Coast Guard).

²⁰⁹ *Transcript of JPP Subcommittee Meeting* 301–03 (July 22, 2015) (testimony of Brigadier General Austin Renforth, U.S. Marine Corps).

D. Recommendation: The Subcommittee does not recommend that consensual sexual relationships between basic training instructors and trainees be treated as either strict liability or illegal per se under Article 120.

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. JPP Rationale for Referring This Issue to the Subcommittee. In receiving testimony regarding the question of whether sexual relationships between basic training instructors and trainees should be treated as strict liability or per se illegal offenses under Article 120, presenters told the JPP that coercive sexual relationships charged under articles other than Article 120, such as Articles 92 and 93, do not result in an accused being registered as a sex offender after conviction. Accordingly, the JPP referred this issue to the Subcommittee for further analysis.²¹⁰

B. Testimony and Information Received by the Subcommittee. None of the presenters before the Subcommittee recommended adding any offenses charged under articles other than Article 120 to DoD's list of offenses that trigger sex offender registration.

C. Conclusion: The Subcommittee concluded that cases in which sexual relationships are charged and prosecuted under Articles 92 and/or 93 should not be added to the Department of Defense's list of offenses that trigger sex offender registration. Before being reported as a sex offender, a military accused should be convicted of a qualifying sex offense involving lack of consent. Articles 92 and 93 do not involve sex crimes in which a sexual act or sexual contact has been committed without a victim's consent.

D. Recommendation: 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.

²¹⁰ JPP INITIAL REPORT 39–43 (Feb. 2015).

ENCLOSURE 1

Subcommittee's Proposed Revisions to Article 120

45. Article 120—Rape and sexual assault generally

a. *Text of statute.*

(a) Rape. Any person subject to this chapter 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 who—

- (1) commits a sexual act upon another person ~~by~~

- (A) ~~by~~ threatening or placing that other person in fear;
- (B) ~~without the consent of the other person;~~
~~causing bodily harm to that other person;~~
- (C) ~~by~~ making a fraudulent representation that the sexual act serves a professional purpose; ~~or~~
- (D) ~~by~~ inducing a belief by any artifice, pretense or concealment that the person is another person; ~~or~~
- (E) ~~by using position, rank, or authority to secure compliance by the other 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 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 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 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 penetration however slight of the penis and into the vulva or anus or mouth, and for purposes of this subparagraph, contact involving the penis occurs upon penetration, however slight; or~~

(B) contact between the mouth and the penis, vulva, or scrotum or anus; or

~~(C) the penetration, however slight, of the vulva or penis 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 vulva, penis, scrotum, 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 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 or an object.

~~(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.~~

~~(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. Submission resulting from the use of force, threat of force, or placing another person in fear also 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 in the conduct at issue ~~does 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 und

er 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.~~

(8) Incapable of consenting. A person is "incapable of consenting" if that person does not possess the mental ability to appreciate the nature of the conduct or does not possess the physical or mental ability to make or communicate a decision regarding such conduct.

ENCLOSURE 2

**Supplemental and Dissenting Commentary Concerning
Subcommittee Recommendations, with
Proposed New Article 120 Statute**

by Laurie Rose Kepros

SUPPLEMENTAL AND DISSENTING COMMENTARY CONCERNING SUBCOMMITTEE RECOMMENDATIONS

by Laurie Rose Kepros

The JPP Subcommittee has reached consensus on several important improvements to Article 120 of the Uniform Code of Military Justice (UCMJ), the *Manual for Courts-Martial* (MCM), and *Military Judges' Benchbook* (*Benchbook*) which are set forth in its report. I write separately to identify ongoing problems with Article 120 that remain either unaddressed or inadequately addressed by the Subcommittee's recommendations and to urge further modifications. My comments discuss the following issues:

A. REMAINING CONFUSION IN ARTICLE 120

- 1. THE ARTICLE 120 AUDIENCE**
- 2. ADDITIONAL CHANGES TO ARTICLE 120 REQUIRED DESPITE RECENT AMENDMENTS TO THE STATUTE**
- 3. THE KEPROS PROPOSAL IN ATTACHMENT A**

B. JPP ISSUE 1: IS THE CURRENT DEFINITION OF "CONSENT" UNCLEAR OR AMBIGUOUS?

C. MENS REA ISSUES

- 1. JPP ISSUE 4: IS THE DEFINITION CONCERNING THE ACCUSED'S "ADMINISTRATION OF A DRUG OR INTOXICANT" OVERBROAD?**
- 2. JPP ISSUE 3: SHOULD THE STATUTE DEFINE "INCAPABLE OF CONSENTING"?**

D. JPP ISSUE 11: SHOULD THE OFFENSE OF "INDECENT ACT" BE ADDED TO THE UCMJ AS AN ENUMERATED OFFENSE?

INTRODUCTION

It is undisputed that the just resolution of sexual offense allegations is a matter of utmost importance to those accused, to victims, and to the friends and family who care for them, as well as to the broader military community and society. Perhaps more than ever before, conviction of a sex crime is a wholly life-altering event. A Service member convicted of an offense under Article 120 may face not only the end of his or her military career but also potential terms of imprisonment up to and including a life sentence. Even if he or she is allowed to return to life in a civilian community, a sex offense adjudication will still have lifelong effects. In addition to requirements to comply with varied and complex state sex offender registration laws (or face additional criminal prosecutions and punishments), sex offense convictions trigger an ever-expanding list of punitive consequences in the community that affect both the offender and his or her family (whether or not the restriction is relevant to the facts of the underlying offense). Currently these collateral sanctions include housing and residency restrictions (which even keep people out of homeless shelters); GPS monitoring; employment, educational, and professional licensing prohibitions; bans on access to religious institutions; parental rights consequences (and sometimes a ban from entering a child's school); restrictions on food stamp benefits; anti-loitering provisions to discourage offenders from certain

locations; denial of housing and educational financial aid assistance; restrictions on library and computer/Internet usage (as well as on the use of private websites such as Facebook and dating websites such as Match.com); trick-or-treating prohibitions; special drivers' licenses and license plates; limitations on international travel; and even civil commitment.¹ With so much at stake, the military justice system must take great care to ensure that these internal and external consequences are not arbitrarily or unfairly imposed and that when Service members are accused of such offenses, they are afforded the full array of constitutional protections that they have spent their military careers defending.

A. REMAINING CONFUSION IN ARTICLE 120

At its June 25, 2015, meeting, the Subcommittee commenced a debate that was central to its overall deliberative process. At that time, the positions of the Subcommittee members as to whether to recommend statutory changes to Article 120, and whether to limit any recommendations to the seventeen issues identified by the JPP, ran the gamut. Some members invoked the position of witnesses who voiced objections to further amendments, noting that Article 120 had been revised three times already in recent years history and that the result has sometimes been complex prosecutions under multiple versions of the statute. Often, these witnesses advocated instead for changes in the *Benchbook* or MCM rather than Article 120, or suggested that if any statutory changes were absolutely necessary, they be as narrow as possible. For example, Subcommittee member Brigadier General James Schwenk stated: "I'll be the no-change person, and put the burden on everybody who believes change . . . needs to be made in the near-term to justify what's broken—if it ain't broke, don't fix it."² At the other end of the spectrum, I supported a rewrite of the statute. Yet General Schwenk also acknowledged: "I did hear there is a lot of confusion. I did hear that it would be a lot better if things were clarified."³ As General Schwenk noted, the need for clarity arose repeatedly during testimony before the Subcommittee, with almost all witnesses ultimately recommending at least some minor change and with some witnesses urging larger-scale revisions.⁴

Notably, among the witnesses open to a broader reorganization of the statute was Major Aimee Bateman, an associate professor of criminal law at the Army's Judge Advocate General's (JAG) School.⁵ Major Bateman estimated that in the past three years, she has taught a block of instruction on Article 120 about 50 times to almost 3,000 students, including reservists and those receiving her training through recorded classes.⁶ Her trainees at the Army's JAG School include "brand-new newly commissioned, minted judge advocates," and her course is "one of the very first classes of instruction they get. They have been in the Army for about six weeks. They have been judge advocates for about six weeks."⁷ She also trains judicial candidates from across all the Services, as well as

¹ Notably, empirical research into many of policies has shown they do nothing to reduce sexual recidivism. In the case of the sex offender registry, some studies have even demonstrated that it *increases* sexual recidivism by socially isolating individuals and thus stripping away some of the most robust factors shown to protect against sexual re-offense. See, e.g., J. J. Prescott & J. E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, J. OF LAW & ECONOMICS 54.1 (2011): 161–206, 161.

² *Transcript of JPP Subcommittee Meeting 224* (June 25, 2015).

³ *Id.* at 226.

⁴ For instance, on April 10, 2015, Colonel Timothy Grammel, U.S. Army (Ret.), provided the Subcommittee with his extensive written *Suggested Amendments to Article 120*.

⁵ *Transcript of JPP Subcommittee Meeting 4* (May 7, 2015).

⁶ *Id.* at 99.

⁷ *Id.* at 6–7.

a lot of judge advocates who are not in any way, shape, or form going to practice . . . criminal law . . . but they are staff judge advocates, they are leaders, they are managers, and teaching them and familiarizing them with the law, so that they can answer those questions [for] our very junior, inexperienced judge advocates. . . . I'll teach a lieutenant—again, they have been in the Army six weeks. I give them their hour of block instruction on Article 120. They go out to Fort Bragg, Fort Drum . . . and now they are the subject matter expert on Article 120 for anybody who crosses their path out in the field, which is a little . . . scary.⁸

According to Major Bateman, about half of the lawyers she teaches “are in very early stages of their [legal] career[s]” and, at the time of their introduction to Article 120, lack other professional experience navigating complex statutory schemes.⁹

Major Bateman provided numerous examples of sources of confusion to practitioners concerning Article 120. Hopefully, some of these concerns would be mitigated by adoption of the Subcommittee’s recommendations. Yet she also pointed to structural problems in Article 120. For instance, she described difficulties that have arisen in understanding the role of consent in Article 120. Even judicial candidates have found the law to be unclear with respect to whether to instruct on consent-related defenses: “[I]f we are having trouble explaining this to 50 very smart prescreened—we want these people to sit on the bench and be trial judges and appellate judges, and they are having trouble kind of conceptualizing and capturing this and feel[ing] comfortable.”¹⁰

It is unnecessary to wade deeply into Article 120 to find other examples, unaddressed by the Subcommittee’s recommendations, of how unhelpful this statute can be in describing the parameters of criminal sexual behavior. Among them is the first offense described in Article 120(a)(1): “Any person subject to this chapter who commits a sexual act upon another person by using unlawful force against that other person is guilty of rape and shall be punished as court-martial may direct.” “Unlawful force” is further defined in Article 120(g)(6) as “an act of force done without legal justification or excuse.” Moreover, “Force” is specified as “(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.”

In light of these definitions, how is the reader to assess when or whether in the course of a sexual act an act of force may be done *with* legal justification? What is a legal justification or excuse for force in this context? What if the “force” is incidental to the “sexual act” itself? Is consent a legal justification for a forceful sexual act? If so, does it negate the element of “unlawful force” or is it an affirmative defense? In either event, what if there was consent to the sexual act but not the forceful act? Has the crime of rape been committed? It is unsurprising that experienced lawyers like the judicial candidates in Major Bateman’s class struggled with these types of questions.

Helpfully, with respect to JPP issue 2, the Subcommittee has recommended that the MCM be amended to clarify the availability of the defenses of “consent” and “mistake of fact as to consent” for offenses under Article 120. Hence, it is reasonable to ask whether adoption of this Subcommittee recommendation alone would be sufficient to fix the problem identified in Major Bateman’s testimony—that her class of judicial candidates was confused about the availability of consent

⁸ *Id.* at 7–8.

⁹ *Id.* at 80.

¹⁰ *Id.* at 37.

defenses. In fact, for that group of jurists or other military lawyers, an amendment to the MCM is a tangible improvement and will clarify the availability of those defenses. For non-attorney readers of Article 120, however, this clarification may remain invisible.

In contrast, in its recommendation concerning JPP issue 5, the Subcommittee wisely has rewritten the statutory language concerning the counterintuitive term of art “bodily harm” (which, as defined, requires no physical injury to the body). In pertinent part, the Subcommittee’s recommendation on JPP issue 5 eliminates the term “bodily harm” and instead describes a new offense that is significantly more understandable on its face. The new Article 120(b)(1)(B) would read as follows:

(b) Sexual assault. Any person subject to this chapter who—

(1) commits a sexual act upon another person

(B) without the consent of the other person;

is guilty of sexual assault and shall be punished as a court-martial may direct.¹¹

The Subcommittee’s JPP issue 5 proposal, therefore, makes it clear to any reader that it is criminal to commit a sexual act upon another person without the consent of that person. The reader need not engage in a searching review of the MCM, *Benchbook*, or case law to have a basic understanding of the statutory language and what it forbids.

Fair notice is among the constitutional protections to be guaranteed in all criminal prosecutions. It must be clear what conduct is prohibited, and the forbidden behavior must be described with sufficient clarity that its alleged violation cannot be capriciously enforced. Due process requires that criminal statutes be defined “in a manner that does not encourage arbitrary and discriminatory enforcement.”¹² This “more important aspect of vagueness doctrine” requires that the statute “establish minimal guidelines to govern law enforcement” rather than “a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.”¹³ Therefore, every effort should be made to make all of the sexual crimes described in Article 120 as clear and comprehensible as possible—and not just to lawyers, judges, or court-martial panel members but to everyone subject to prosecution under the UCMJ.

1. THE ARTICLE 120 AUDIENCE

Major Bateman’s testimony revealed how, ultimately, all Service members look to Article 120 for guidance on how to appropriately conform behavior to the UCMJ. Major Bateman explained how her charge in teaching Article 120 reaches far beyond training lawyers to apply the statute to cases they are litigating. Rather, she must

try to equip [her students] with kind of a baseline understanding of the law, so that they may be able to practice in a courtroom properly, but also be conversant on the law, because this isn’t just talked about within our judge advocate community. As we all know, this is the topic of the day in command huddles . . . at the Chief of Staff of

¹¹ JPP SUBCOMMITTEE REPORT at 21.

¹² *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

¹³ *Id.* at 358 (quoting *Smith v. Goguen*, 415 U.S. 566, 574–75 (1974)).

the Army level, and all the way down, preventing sexual assault is the number one priority of the Army. So . . . it is talked about in all sorts of contexts and all sorts of forums outside the courtroom.¹⁴

Consequently, although the Subcommittee heard testimony from numerous military practitioners with prosecutorial, defense, and judicial experience, these lawyers are not the only Service members who are expected to take direction from Article 120. As noted by the Subcommittee, “because sexual assault prevention training for all Service members uses language from Article 120, vague terms may leave them confused about standards of behavior and expectations, raising an important policy interest.”¹⁵ Furthermore, it is unfair to expect Service members to suss out on their own counterintuitive interpretations of terminology that may lurk in the case law, *Benchbook*, MCM, or other legal references. Troublingly, Major Bateman was one of many military witnesses¹⁶ who described a serious problem with how Article 120, unclear on its face, is being taught to Service members in the course of sexual assault prevention trainings:

[T]he priority for the Chief of Staff of the Army and the Secretary of the Army is [to] prevent sexual assault, not [just to] prosecute it properly. Right? I mean, we want to prevent it on the front end. So the conversations are toward that end of this. So when can I have sex with someone then, or when can I approach somebody else to have sex and not be charged with a crime for it? So how do we explain that? And this is where I have heard people say everything from, well, you know, could you buy a car, or were you with [it] enough to get a tattoo, or, you know, even to the extent of the way they like to teach it in the field, the way commanders like to teach it, if you have one drink, you can’t do anything, don’t touch anybody. Right? That’s clearly not a legal definition in any sense. Even lawyers, though, I have heard teach this as if you’re too drunk to drive, you are too drunk to consent. [But] . . . we are not [in Article 120] imparting any sort of definitions from [DUI law].¹⁷

The problem is when the law is articulated incorrectly in the prevention training, . . . we run into the problem of degrading the legitimacy of the law.¹⁸

2. ADDITIONAL CHANGES TO ARTICLE 120 REQUIRED DESPITE RECENT AMENDMENTS TO THE STATUTE

Major Bateman explained that currently three versions of Article 120 “are still in some respects active and still on the books . . . in that there is an unlimited statute of limitations.”¹⁹ Nevertheless,

¹⁴ *Transcript of JPP Subcommittee Meeting 8* (May 7, 2015).

¹⁵ JPP SUBCOMMITTEE REPORT at 13.

¹⁶ *See, e.g., id.* at 212 (“Ma’am, we’ve seen that a couple of times where they’ve been told in SAPR training, you know, one drink means you can’t consent.”), 260 (“During *voir dire*, the members were asked this question, how many of you believe that if a person has one drink of alcohol, they cannot legally consent to any sexual activity? Out of the 12 panel members, nine raised their hand in the affirmative.”), 349 (“I’ve sat through training where I’ve heard the ‘one drink and you can’t consent’ line. When I was in processing at Joint Base Andrews, . . . one of the things I heard from a representative from the Sexual Assault Prevention Office was someone might not be able to consent after having one drink.”), and 415 (“[I] heard ‘after one drink you can’t consent.’”); *see also Transcript of JPP Subcommittee Meeting 271–72* (April 9, 2015)(“[Y]ou get the takeaway being, stay so far away, one drink equals no consent. And then you get members sitting in the panel box that refuse to yield from that. And unfortunately you get trial judges that . . . try to drag them over . . . to get them rehabilitated. . . . The issue of consent [is big], how it’s addressed during the training, and when it’s at odds with . . . the definition of consent . . . in the Manual.”).

¹⁷ *Transcript of JPP Subcommittee Meeting 40–41* (May 7, 2015).

¹⁸ *Id.* at 102.

when questioned by JPP Chair and Subcommittee member Elizabeth Holtzman about whether the numerous recent statutory changes meant further substantial change should be avoided, Major Bateman shared her insights into why this was *not* a reason to avoid more statutory changes at this time:

[A]n evolution of my perspective . . . is from what I have seen—whether it’s formally changed by Congress or not—it is still changing and evolving. So we can’t avoid the fact that—the way the instructions are changing. . . . [W]hen facts applie[d] to law make it into a courtroom, it is changing. So . . . I think appropriate measured changes would be good at this point because it is already—there is a level of confusion. There is a level of inconsistency potentially because of the way that people have adjusted to their understanding of the law through . . . pleading decisions and evidentiary instructions. In that regard, I don’t think we should be scared of changing it because it is going to cause all sorts of . . . unrest in the force. It is already unrestful. So I think changes are okay and not to be strictly avoided at this point.²⁰

Hence, in Major Bateman’s view, because the decisions of appellate courts in actual cases will continue to interpret and reinterpret the statutory language, fear of change should not be a reason to refrain from making intentional clarifications to the law.

Similarly, the Subcommittee heard testimony from Colonel Terri Zimmermann on behalf of the Marine Corps Defense Services Organization.²¹ Colonel Zimmermann is the reserve counterpart to the active duty Chief Defense Counsel in the Marine Corps and has been a Marine Corps judge advocate since 1993, litigating sexual assault cases as a prosecutor, an appellate military judge, and a defense counsel.²² She also has a civilian criminal defense practice that is about 75% military, and she does both trial and appellate work.²³ In light of her experience with all versions of Article 120 as well as with civilian criminal statutes, Colonel Zimmermann urged the Subcommittee to consider the following in its deliberations:

What is the purpose of the military justice system? . . . [O]ne of those purposes is to achieve justice. . . . It’s to punish people who intentionally or with some culpable mental state take an action that we, as a society, deem as inappropriate and unlawful. It’s not to punish people who do things, for the most part, by accident or mistake. . . . [O]ur criminal justice system is intended to identify people who break the law, punish them and deter other people from committing the same type of conduct. And so, I think it’s really important to keep that in mind when we’re talking about whether we tweak a statute, whether we rewrite a statute, what is the purpose of the statute? What kind of due process concerns do we have? What kind of notice concerns do we have? All of those factors, in my opinion, militate towards completely rewriting [Article 120].²⁴

¹⁹ *Id.* at 5–6.

²⁰ *Id.* at 93–94.

²¹ *Id.* at 219.

²² *Id.*

²³ *Id.* at 219–20.

²⁴ *Id.* at 220–21.

Colonel Zimmermann further explained, consistent with Major Bateman’s testimony, that changes to Article 120 are inevitable and thus should take the form of a complete statutory rewrite and not just “tweaks”:

This statute is a mess. It is just unworkable. It’s too complicated. It’s unwieldy and it’s not fair. So, there is going to be some change. . . . And . . . people in the field are going to have to adjust. . . . In my view, it’s appropriate for us to rewrite [Article 120] and get it correct, as correct as we can get it. Nothing’s ever going to be perfect, I know that. But I think we ought to start from scratch and get it right and then people can adjust to that. I’m not too concerned about people saying, well, there are going to be four statutes in effect. Well, there’s going to be four statutes in effect no matter what change is enacted. So, as opposed to tweaking, my recommendation is that we start from scratch.²⁵

3. THE KEPROS PROPOSAL IN ATTACHMENT A

In the context of this confusion and need for clarification, I advocate for broader changes to Article 120 than the Subcommittee has endorsed, including a wholesale reorganization of the statute. To that end, in anticipation of the June 25, 2015, Subcommittee meeting, I drafted a new proposed Article 120 statute. My proposal is attached as Attachment A. The Subcommittee, persuaded by the concerns about more dramatic changes to Article 120, elected to approach any revisions more conservatively and not to undertake work on my proposal in its deliberative process. Consequently, Attachment A does not reflect the work of the Subcommittee in its June 25, 2015, or subsequent meetings and remains only a rough draft. I have nonetheless included it because it illustrates some of the current shortcomings within Article 120 that remain unaddressed and provides one suggestion as to how Article 120 may be made more coherent.

Although my proposal recommends numerous modifications to Article 120, the biggest change is conceptual. Notions of “consent” and “force” in Article 120 have become complicated through both military jurisprudence and statutory changes. As Ms. Holtzman commented during the Subcommittee’s May 7, 2015, meeting,

This is one of the worst statutes I have read in terms of drafting. . . . And so we have complicated issues. . . . [T]he fact that this statute tried to take consent out of the picture, and now consent has come back in, has created a kind of a pretzel approach. Everybody is twisting things around to kind of figure out how to get the language of the statute and the concept of consent in and how we do that.²⁶

Ms. Holtzman further suggested to Major Bateman that for “some of the bigger issues, like dealing with consent, you can’t just make an itty-bitty statutory change,” and Major Bateman agreed.²⁷

Hence, my proposal seeks to realign the terms “consent” and “force” with their commonly understood meanings; and rather than trying to pretend that consent is not relevant, I aim instead to create a statute in which, as many laypeople would intuitively assume, the baseline criminal behavior is a nonconsensual sexual touching. Then, that notion of “nonconsent” can also encompass a person

²⁵ *Id.* at 222.

²⁶ *Id.* at 84.

²⁷ *Id.* at 85.

who is incapable of consenting for various reasons. Further, and consistent with most American criminal statutory schemes, this type of organization would permit the level of offense and potential penalties to increase to account for more aggravated conduct, such as the use of extreme violence or the deliberate introduction of intoxicants.

During her testimony, I asked Major Bateman if reorganizing Article 120 to make nonconsensual sexual touching the baseline crime would make sense. She confirmed that notwithstanding the 2007 and 2012 changes to Article 120,

[W]hat we have ended up discovering over the last three years is consent is always relevant, it's always instructed on, and it always comes up. [N]ow that we have actually seen it play out, . . . I think it would make it cleaner to just affirmatively bring it back in the law explicitly. So I think that is, fundamentally, why I do agree with your proposal.²⁸

Colonel Zimmermann concurred, noting that “the issue of consent is really the pivotal issue”²⁹ and expressing her agreement with the notion of creating a scheme in which a nonconsensual sexual touching was the baseline offense with “aggravating circumstances that can be added onto that” with “a graduated series of penalties for the conduct.”³⁰

Finally, reorganizing Article 120 so that principles of “consent” are central to criminality could eliminate the need for the continual creation of additional new subsections in the statute to try to describe every conceivable type of coercion, such as the Subcommittee’s recommendation in response to JPP issue 15 to create a new Article 120(b)(1)(E) that would read as follows:

(b) Sexual assault. Any person subject to this chapter who—

(1) commits a sexual act upon another person

(E) by using position, rank, or authority to secure compliance by the other person

is guilty of sexual assault and shall be punished as a court-martial shall direct.³¹

If consent is defined so that it is valid only where it is “freely given” (as in the current definition) or “voluntary” (as suggested in Attachment A, following the recommendation of a witness³²), consent cannot exist when rank or other authority is deployed to compel the other person into sexual activity. Consequently, such sexual abuse would be prosecutable as a nonconsensual act.

²⁸ *Id.* at 83.

²⁹ *Id.* at 222–23.

³⁰ *Id.* at 229.

³¹ JPP SUBCOMMITTEE REPORT at 44–45.

³² *Transcript of JPP Subcommittee Meeting* 418 (May 7, 2015) (testimony of Mr. John Wilkinson, Æquitas—The Prosecutors’ Resource on Violence Against Women).

B. JPP ISSUE 1: IS THE CURRENT DEFINITION OF “CONSENT” UNCLEAR OR AMBIGUOUS?

In responding to its mandate to consider this issue, the Subcommittee, in pertinent part, urges that the following language be used within the definition of “consent”: “(A) . . . Lack of verbal or physical resistance does not constitute consent.”³³ Simultaneously, the Subcommittee endorses retaining the following language from subsection (C) of the definition of “consent”: “All the surrounding circumstances are to be considered in determining whether a person gave consent.”³⁴

Moreover, in its summary recommendation concerning issue 1, the Subcommittee states, “A lack of resistance would still be relevant for the fact-finder to consider along with all the surrounding circumstances, but the proposed change clarifies that a lack of resistance alone does not constitute consent.”³⁵ In its complete recommendation, the Subcommittee further explains that “Although the Subcommittee believes evidence of resistance or the lack thereof to be relevant and admissible evidence for a fact-finder to consider, it is just one of the circumstances surrounding the offense and should be given no greater or lesser emphasis than any other circumstance in the text of the statute or elsewhere.”³⁶

Cooperative and voluntary sexual activity usually will involve a *lack* of resistance by the participating parties. Therefore, these sentences from the Subcommittee’s Report accurately convey the intentions of the Subcommittee that court-martial panel members incorporate considerations of a “lack of resistance” in their overall consideration of “[a]ll the surrounding circumstances.” Problematically, the recommended statutory change itself does not adequately communicate the Subcommittee’s intentions and may result in misadvice by courts and misinterpretation by fact-finders. For example, the Subcommittee declined to recommend that the statute read “Lack of verbal or physical resistance *alone* does not constitute consent *but shall be considered among the surrounding circumstances*” (emphasis added).³⁷

Imagine a scenario in which a couple is in a long-term relationship and engages in routine patterns of sexual behavior. The partners generally experience cooperation with each other upon initiating the sexual activity and are alerted that one person is not consenting to the sexual behavior only *if* that person objects or otherwise indicates a disinclination to engage in some or all sexual activity at that time. Within “all the surrounding circumstances” of this relationship, the habits and expectations of the partners certainly inform their beliefs about whether there is consent to sexual activity, including whether one of the parties is objecting or otherwise resisting. Although, as the Subcommittee notes, a lack of resistance alone would not constitute consent in this situation, it would certainly be relevant to a fact-finder assessing whether an accused reasonably believed an alleged victim had consented to sexual activity.

Similarly, the Subcommittee recommends that the definition of “consent” retain the current language that “(A) . . . An expression of lack of consent through words or conduct means there is no consent.”

³³ JPP SUBCOMMITTEE REPORT at 9-10.

³⁴ *Id.*

³⁵ *Id.* at 2.

³⁶ *Id.* at 9.

³⁷ An alternate clarification of the Subcommittee’s recommendation for the definition of “consent” could state at subsection (A): “Lack of verbal or physical resistance *alone* does not constitute consent” and at subsection (C): “All the surrounding circumstances *including lack of resistance (if applicable)* are to be considered in determining whether a person gave consent.”

Yet a fact-finder attempting to apply the definition’s mandate that this “means there is no consent” may be confused in a situation in which there is credible evidence of an alleged victim initially and clearly verbally declining to engage in sexual activity but then later cooperating in, and possibly even initiating, sexual acts. In her testimony, Major Bateman described such a scenario presented to her JAG students:

[T]he day before [sexual activity occurred,] the accused approached me and said, “Would you like to have sex with me?” I said, “No, I hate you. I will never have sex with you.” Is that even relevant? . . . [T]hat caused . . . the most recent time teaching this to a senior audience [of judicial candidates], a huge problem. Of course it’s relevant. [Yet they said:] Well, show me to what . . . element of the crime that is relevant to.³⁸

Concerningly, this debate ensued among judicial candidates despite the fact that the “all the surrounding circumstances” language is already present in the definition. So, once again, this aspect of the statutory definition of “consent” in subsection (A) suggests inflexibility and potential confusion in how evidence is to be evaluated by the fact-finder. Even as amended, the definition leaves it unclear that “[a]n expression of lack of consent through words or conduct” is *also* among the evidence that is to be evaluated in light of “[a]ll the surrounding circumstances.”

Finally, the Subcommittee’s recommendation largely retains the following language from current subsection (A): “A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved in the conduct at issue shall not constitute consent,” except that the Subcommittee has recommended substituting the word “does” in place of “shall.” While the language concerning dating / social / sexual relationships is appropriately contextualized by the phrase “by itself,” the statute does not reflect the same nuance concerning “manner of dress.” Of course, it is again true that “manner of dress” *by itself* does not constitute consent but it certainly would be relevant to an assessment of “[a]ll the surrounding circumstances.” It is easy to imagine a scenario in the context of an ongoing relationship, for example, in which dress is a mechanism used to convey to one’s partner an interest in and desire to participate in sexual activity. And, yet again, the definition fails to make it explicit that evidence concerning dress comes within “[a]ll the surrounding circumstances.”³⁹

An alternate definition of “consent” is set forth in Attachment A’s draft iteration of Article 120(g)(6). Among other things, the Attachment A proposal avoids the problem described above with respect to “manner of dress” evidence by simply reordering the sentence to read: “A current or previous dating or social or sexual relationship or the manner of dress of the person involved in the conduct at issue *by themselves* shall not constitute consent.”⁴⁰ The Attachment A⁴¹ definition therefore avoids the confusion present in both the current statute and the Subcommittee’s recommendation.

³⁸ Transcript of JPP Subcommittee Meeting 39 (May 7, 2015).

³⁹ Building on the alternate proposal set forth in n.27, subsection (C) could be more explicit in including the scenarios which are defined in subsection (A) as “nonconsensual,” e.g., “All the surrounding circumstances, **including (if applicable) manner of dress, and any expressions of lack of consent or lack of resistance**, are to be considered in determining whether a person gave consent.”

⁴⁰ Attachment A at Article 120(g)(6)(D)(emphasis added).

⁴¹ Unlike the current statute, the framework of the Attachment A proposal organizes the Article 120 crimes of rape, sexual assault, aggravated sexual contact, and abusive sexual contact around the principle that these crimes have at their core a victim who does not or cannot give consent to sexual activity. Consequently, the Attachment A definition of “consent” addresses a

C. MENS REA ISSUES

Several of the issues referred to the Subcommittee by the JPP involved the role of mens rea in Article 120. Despite their severe consequences, Article 120 does not articulate specific intent requirements for the crimes it describes. In fact, in some contexts, Article 120 creates criminal liability not only for an actor who commits the actus reus with actual knowledge of the relevant circumstances but also for an actor who, under a mere negligence standard, “reasonably should know” of such a circumstance.

Interestingly, the topic of mens rea has received renewed attention in multiple national forums during the Subcommittee’s work on these issues. On November 16, 2015, bipartisan leadership from the House Judiciary Committee and House Crime Subcommittee introduced legislation titled the “Criminal Code Improvement Act of 2015”⁴² to address the erosion in the mens rea requirement in federal criminal law. On November 18, 2015, the legislation passed out of the House Judiciary Committee by a unanimous voice vote. That same day, a group of senators introduced even stronger legislation called the “Mens Rea Reform Act of 2015,”⁴³ aimed at ensuring that only those who are truly culpable of criminal conduct committed with criminal intent are ensnared by federal criminal laws. Sponsored by Senators Orrin Hatch, Ted Cruz, Mike Lee, Rand Paul, and David Perdue, the mens rea reform would generally establish a default criminal intent requirement that the government prove beyond a reasonable doubt that the defendant acted “willfully, with respect to any element for which the text of the covered offense does not specify a state of mind.”

Earlier in 2015, the United States Supreme Court decided a case in which it considered the sufficiency of a merely negligent mens rea, similar to the “should have known” language recurring throughout Article 120. In *Elonis v. United States*,⁴⁴ the Supreme Court considered the federal law making “it a crime to transmit in interstate commerce ‘any communication containing any threat . . . to injure the person of another.’” In Mr. Elonis’s case the jury was instructed that to render a verdict of “guilty,” they must find that Mr. Elonis communicated *what a reasonable person* would regard as a threat but not that Mr. Elonis *himself* be aware of the threatening nature of the communication.⁴⁵ In finding these instructions insufficient to sustain Mr. Elonis’s conviction, the Supreme Court reviewed the important role of mens rea in defining criminal conduct and provided several examples of cases in which convictions were vacated as a consequence of inadequate proof of a culpable mental state:

“[W]rongdoing must be conscious to be criminal.” *Id.*, at 252, 72 S.Ct. 240. As Justice Jackson explained, this principle is “as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.” *Id.*, at 250, 72 S.Ct. 240. The “central thought” is that a defendant must be “blameworthy in mind” before he can be found guilty, a concept courts have expressed over time through various terms such as *mens rea*, scienter, malice aforethought, guilty knowledge, and the like. *Id.*, at 252, 72 S.Ct. 240; 1 W. LaFare, *Substantive Criminal Law* § 5.1, pp. 332–333 (2d ed. 2003). . . .

broader array of scenarios than either the current statutory definition of “consent” or the definition proposed by the Subcommittee.

⁴² See http://judiciary.house.gov/_cache/files/75116271-c347-4589-9c47-4fe06859c638/criminal-code-improvement-act-rp-003-xml.pdf.

⁴³ See http://www.hatch.senate.gov/public/_cache/files/56edc2e6-c658-4a2a-bdb5-e259819c48a4/HEN15E40.pdf.

⁴⁴ *Elonis v. United States*, 135 S. Ct. 2001, 2004, 192 L. Ed. 2d 1 (2015).

⁴⁵ *Id.*

Morissette, for example, involved an individual who had taken spent shell casings from a Government bombing range, believing them to have been abandoned. During his trial for “knowingly convert[ing]” property of the United States, the judge instructed the jury that the only question was whether the defendant had knowingly taken the property without authorization. 342 U.S., at 248–249, 72 S.Ct. 240. This Court reversed the defendant’s conviction, ruling that he had to know not only that he was taking the casings, but also that someone else still had property rights in them. He could not be found liable “if he truly believed [the casings] to be abandoned.” *Id.*, at 271, 72 S.Ct. 240; see *id.*, at 276, 72 S.Ct. 240.

By the same token, in *Liparota v. United States*, we considered a statute making it a crime to knowingly possess or use food stamps in an unauthorized manner. 471 U.S. 419, 420, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985). The Government’s argument, similar to its position in this case, was that a defendant’s conviction could be upheld if he knowingly possessed or used the food stamps, and in fact his possession or use was unauthorized. *Id.*, at 423, 105 S.Ct. 2084. But this Court rejected that interpretation of the statute, because it would have criminalized “a broad range of apparently innocent conduct” and swept in individuals who had no knowledge of the facts that made their conduct blameworthy. *Id.*, at 426, 105 S.Ct. 2084. . . . [2010] . . .

To take another example, in *Posters ’N’ Things, Ltd. v. United States*, this Court interpreted a federal statute prohibiting the sale of drug paraphernalia. 511 U.S. 513, 114 S.Ct. 1747, 128 L.Ed.2d 539 (1994). Whether the items in question qualified as drug paraphernalia was an objective question that did not depend on the defendant’s state of mind. *Id.*, at 517–522, 114 S.Ct. 1747. But, we held, an individual could not be convicted of selling such paraphernalia unless he “knew that the items at issue [were] likely to be used with illegal drugs.” *Id.*, at 524, 114 S.Ct. 1747. Such a showing was necessary to establish the defendant’s culpable state of mind.

And again, in *X-Citement Video*, we considered a statute criminalizing the distribution of visual depictions of minors engaged in sexually explicit conduct. 513 U.S., at 68, 115 S.Ct. 464. We rejected a reading of the statute which would have required only that a defendant knowingly send the prohibited materials, regardless of whether he knew the age of the performers. *Id.*, at 68–69, 115 S.Ct. 464. We held instead that a defendant must also know that those depicted were minors, because that was “the crucial element separating legal innocence from wrongful conduct.” *Id.*, at 73, 115 S.Ct. 464. . . .⁴⁶

In light of these trends, and for the sake of fundamental fairness, the mens rea issues referred by the JPP should be resolved with recommendations that ensure a sufficient mental culpability element separating “legal innocence from wrongful conduct.” Beyond the issues referred by the JPP, and as illustrated in Attachment A, Article 120 should require that an accused act with actual knowledge and not attach the serious criminal liability that flows from a sexual offense conviction to merely negligent conduct.

⁴⁶ *Id.* at 2009–10.

**1. JPP ISSUE 4: IS THE DEFINITION CONCERNING THE ACCUSED’S
“ADMINISTRATION OF A DRUG OR INTOXICANT” OVERBROAD?**

In its recommendation concerning Issue 4, the Subcommittee concludes that “the definition concerning the accused’s ‘administration of a drug or intoxicant’ under Article 120(a)(5) is not overbroad. The Subcommittee therefore recommends no changes on this issue.”⁴⁷ Article 120(a)(5) states that

Any person subject to this chapter who commits a sexual act upon another person by 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.

As suggested by a retired Army military judge, the definition should be amended by adding a requirement that the administration of a drug or intoxicant be done *for the purpose of* impairing the victim’s capacity to express a lack of consent to the sexual act.⁴⁸ In the Subcommittee’s deliberations, a fair argument was made that the word “by” in the statute means that it already requires such intent, since the use of the drug or intoxicant is to be the mechanism for effectuating the rape. But if that is the intent of the statute, there is no harm in making this specific intent requirement more explicit.

Hypothetically, a person may spike the punch or serve marijuana-laced brownies for the purpose of surreptitiously introducing alcohol or drugs into a social setting with no preexisting plan to create a sexual offense victim. The person may even administer such intoxicants because of socially informed expectations that other guests already voluntarily ingest such substances and would not object to them. If that individual commits a sexual offense after *later* discovering that someone has become substantially impaired as a result of the intoxicants, reasonable distinctions can and should be drawn concerning his or her level of culpability compared to that of a person whose prior intent was to use the substances as a vehicle for sexual offending.

A different subsection, Article 120(b)(1)(3)(A) defines as guilty of sexual assault

Any person subject to this chapter who commits a sexual act upon another person when the other person is incapable of consenting to the sexual act due to impairment by any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known by the person.

Hence, the opportunist who sexually abuses an impaired victim (regardless of how that victim became intoxicated) is guilty of Article 120(b)(1)(3)(A) and already faces up to thirty years’ imprisonment. The sanction of a potential sentence of life imprisonment as provided for in Article 120(a)(5), however, should be reserved for a premeditated actor who administered intoxicants as the means to facilitate sexual abuse. Such distinctions (and sanctions) based on specific intent are routinely and appropriately drawn in law. For example, a homicide committed with premeditation or after deliberation is routinely punished much more severely than a murder committed in the “heat of passion.” In addition, requiring a specific intent in Article 120(a)(5) would better distinguish it from

⁴⁷ JPP SUBCOMMITTEE REPORT at 4.

⁴⁸ *Written Statement of Colonel Timothy Grammel, U.S. Army (Ret.)* (Apr. 10, 2015).

cases more appropriately prosecuted under Article 120(b)(3)(A) and reduce the risk of arbitrariness or otherwise inadequately constrained prosecutorial discretion.

Further, this issue should be considered with reference to Rule for Courts-Martial 916(1)(2) concerning the relevance of voluntary intoxication evidence. Witnesses testified to the frequent scenario in military sexual assault prosecutions of undisputed evidence being present that both the alleged victim and the accused were intoxicated. The rule states:

Voluntary intoxication, whether caused by alcohol or drugs, is not a defense. However, evidence of any degree of voluntary intoxication may be introduced for the purpose of raising a reasonable doubt as to the existence of actual knowledge, specific intent, willfulness, or a premeditated design to kill, if actual knowledge, specific intent, willfulness, or premeditated design to kill is an element of the offense.

Thus, although the rule makes it clear that voluntary intoxication never provides a defense to criminal behavior, it may be considered in evidence whenever “actual knowledge” or “specific intent” are elements. Given the vague drafting of Article 120(a)(5), it is unclear on its face whether it contains a mens rea sufficient to make evidence of the accused’s perhaps extreme voluntary intoxication relevant even in a case in which he or she is facing the possibility of lifetime imprisonment. In assessing culpability, the fact-finder should consider the voluntary intoxication of a drunken and unplanned effort to subject another to intoxicants in order to effect the person’s submission to sexual activity. Clarifying the mens rea in Article 120(a)(5) would therefore assist in delineating the relevance of such evidence. In addition, as further discussed below, in light of the Supreme Court’s antipathy in *Elonis* toward the use of a negligence standard in a criminal statute, the “reasonably should be known” language in Article 120(b)(3)(A) should be removed. Removing the “reasonably should be known” provision would also serve the purpose of clarifying in Article 120(b)(3)(A) that the accused’s voluntary intoxication is relevant as well to his or her assessment of the level of impairment in his or her sexual partner.

2. JPP ISSUE 3: SHOULD THE STATUTE DEFINE “INCAPABLE OF CONSENTING”?

In crafting a proposed definition of “incapable of consenting,” the Subcommittee initially looked to 18 U.S.C. § 2242 (Sexual abuse). Section 2242 criminalizes knowingly engaging in a sexual act with another person if that other person 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.

Its final proposal differs from the federal statute, however, as the Subcommittee recommends that the following definition be part of its redraft of Article 120(g)(8): “A person is ‘incapable of consenting’ if that person does not possess the mental ability to appreciate the nature of the conduct or does not possess the physical or mental ability to make or communicate a decision regarding such conduct.”⁴⁹

⁴⁹ JPP SUBCOMMITTEE REPORT at 16.

Notably, § 2242 requires a defendant to have *actual knowledge*⁵⁰ of the alleged victim’s incapability before suffering criminal liability. Article 120(b)(3), however, also criminalizes the sexual behavior if an accused only “reasonably should have known” that the other person was incapable of consenting.

The lack of criminal culpability for an actor in the federal criminal justice system who merely “reasonably should have known,” unlike the liability flowing under the UCMJ, becomes particularly important in the context of the Subcommittee’s proposal. The Subcommittee has done its best to draft a new definition of “incapable of consenting.” But its proposed definition—unlike the federal definition—is completely new, novel, and untested by practice or application. Hence, a wiser course would be to adopt the rule that limits criminal culpability to an actor with *actual knowledge*, since doing so would protect both the unjustly accused and the constitutionality of the statutory language from any areas of inadvertently overbroad application in the untested proposed definition of “incapable of consenting.”

Severe prison sentencing and other punishing lifetime consequences flow from a conviction under Article 120(b)(3). Yet the Subcommittee heard testimony that these cases frequently involve situations in which both parties are intoxicated.⁵¹ This “reasonably should have known” standard of mere negligence is inadequate to fairly assess and assign culpability under such circumstances. If both parties were so intoxicated as to be “incapable of consenting,” how could identical behavior render one party criminally culpable and the other a “victim”? Or is charging to be impermissibly driven by arbitrariness, sexism,⁵² or the vagaries of the reporting process?

And, once again, with an intoxicated accused, the relevance of voluntary intoxication evidence under Rule for Courts-Martial 916(1)(2) becomes important. For example, what if two intoxicated people commenced voluntary acts of sexual intimacy but, in the course of that activity, one of them fell asleep or passed while the other continued to engage in the sexual contact with the unconscious party? If these sexual acts were complained of later, fairness would dictate consideration of the actor’s level of intoxication in assessing whether he or she had recognized that the situation had changed before continuing with the sexual acts and, thus, whether he or she had the necessary culpable mental state. Removing the “reasonably should be known” provision would clarify that, for purposes of Article 120(b)(3)(A), the accused’s voluntary intoxication is also relevant to his or her assessment of the level of impairment in his or her sexual partner.

Moreover, the *Elonis* decision seriously calls into question the continued viability of a criminal statute that attaches culpability based on proof of mere negligence alone:

Elonis’s conviction . . . was premised solely on how his posts would be understood by a reasonable person. Such a “reasonable person” standard is a familiar feature of civil liability in tort law, but is inconsistent with “the conventional requirement for criminal conduct—*awareness* of some wrongdoing.” *Staples*, 511 U.S., at 606–607, 114 S.Ct. 1793 (quoting *United States v. Dotterweich*, 320 U.S. 277, 281, 64 S.Ct.

⁵⁰ Like the federal government, numerous states (*e.g.*, Colorado, Texas) limit liability for sexual assault crimes to cases in which the government has proven beyond a reasonable doubt that the accused had actual knowledge of the circumstances giving rise to the sexual contact.

⁵¹ *Transcript of JPP Subcommittee Meeting* 269 (May 7, 2015) (testimony of Colonel Terri Zimmermann, U.S. Marine Corps Reserve).

⁵² *See generally id.* at 271–72 (observing that under such circumstances it is usually a male who is prosecuted).

134, 88 L.Ed. 48 (1943); emphasis added). Having liability turn on whether a “reasonable person” regards the communication as a threat—regardless of what the defendant thinks—“reduces culpability on the all-important element of the crime to negligence,” *Jeffries*, 692 F.3d, at 484 (Sutton, J., *dubitante*), and we “have long been reluctant to infer that a negligence standard was intended in criminal statutes,” *Rogers v. United States*, 422 U.S. 35, 47, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975) (Marshall, J., concurring) (citing *Morissette*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288). See 1 C. Torcia, Wharton’s Criminal Law § 27, pp. 171–172 (15th ed. 1993); *Cochran v. United States*, 157 U.S. 286, 294, 15 S.Ct. 628, 39 L.Ed. 704 (1895) (defendant could face “liability in a civil action for negligence, but he could only be held criminally for an evil intent actually existing in his mind”). Under these principles, “what [Elonis] thinks” does matter[.]⁵³

Before criminal culpability as a sex offender should attach for sexual activity with a person incapable of consenting, the government, consistent with the federal statute, should be required to establish through direct or circumstantial evidence that an actor actually knew that a victim was incapable of giving consent yet engaged in sexual behavior with that victim anyway.

D. JPP ISSUE 11: SHOULD THE OFFENSE OF “INDECENT ACT” BE ADDED TO THE UCMJ AS AN ENUMERATED OFFENSE?

I join the Subcommittee’s recommendation that the former offense of indecent acts should not be restored as an enumerated offense. The Subcommittee has been notified that the Department of Defense proposed an Article 134 offense called “Indecent Conduct” in a recent draft executive order. I write separately to identify a few unresolved concerns that prevent me, without further study, from taking a position on whether the current proposal to create this Article 134 offense should go forward.

Past applications of the indecent act law have punished sexual behaviors that are normative and noncriminal within a civilian context: for example, consensual sexual activity occurring in the presence of a consenting third party or known recording device. The breadth (and potential overbreadth) of criminalizing such behavior is concerning on both vagueness and free speech grounds. It also raises questions about whether such a law’s reach could be meaningfully narrowed with additional or different elements (including but not limited to requiring proof that the behavior was prejudicial to good order and discipline or Service discrediting).

Furthermore, it appears that satisfactory, alternate mechanisms within military discipline channels to address such behavior may already exist. Although the Subcommittee heard from witnesses who endorsed returning indecent acts provisions to the UCMJ, the justifications were sometimes vague and included that there had been such provisions in the past as well as some witnesses’ general disapproval of indecent behavior. A need for this particular tool was not clearly articulated. In addition, although some requested the reenactment of indecent act provisions, others testified that prosecutions addressing such behavior had been brought through alternate mechanisms and upheld on appeal, thereby again raising the question of why advocates feel there would be value in reenacting these provisions. Issue 11 further raises the question of what policy reasons led to the removal of these provisions in the 2012 version of Article 120.

⁵³ *Elonis*, 135 S. Ct. at 2011.

Another specific apprehension with respect to the indecent conduct proposal that arises for me as a civilian practitioner concerns the sex offender registry. As I understand it, the current proposal would enumerate indecent conduct provisions within Article 134 with the intention not to trigger sex offender registration requirements. Problematically, however, sex offender registry provisions vary greatly among the states. States routinely use their own criteria for who must register and may decline to defer to the policies of the jurisdiction of conviction.⁵⁴ Therefore, it is a matter of genuine concern that state law enforcement agencies or courts may see the word “indecent” on a rap sheet revealing a military adjudication and wrongly and harmfully mandate that that party register as a sex offender.

⁵⁴ For example, in Colorado, any person who was ever required to register in another jurisdiction, must register anew upon entering Colorado even if s/he was previously released from the registry in the state of conviction or another state. Colorado also has required individuals without criminal sex offense convictions to register based on civil proceedings in other states and conducts its own analysis of whether another jurisdiction’s offense is sufficiently “equivalent” to Colorado sex crimes to require registration without regard for whether registration was ordered in that state.

REDRAFT OF ARTICLE 120 (NONCONSENT PROPOSAL) BY LAURIE ROSE KEPROS

45. Article 120—Rape and sexual assault generally

a. *Text of statute.*

(a) Rape. Any person subject to this chapter who knowingly commits a sexual act upon another person without that person’s consent by using—

- (1) unlawful force in addition to the force incidental to the sexual act against that other person;
- (2) threats or otherwise placing the other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping;
- (3) means to render the other person unconscious; or
- (4) the administration of a drug, intoxicant, or other similar substance by force or threat of force, or without the knowledge or consent of that person, to substantially impair 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 who knowingly commits a sexual act upon another person without that person’s consent 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 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 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 or the Rules for Court-Martial including but not limited to consent and mistake of fact. 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 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 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, if done with an intent to abuse, humiliate or degrade any person or to arouse or gratify the sexual desire of any person. The touching may be accomplished by any part of the body or any object.

(3) 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.

(4) Unlawful Force.—The term “unlawful force” means an act of force done without consent or any other legal justification or excuse.

(5) 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.

(6) Consent.

(A) The term “consent” means a voluntary agreement to the conduct at issue.

(B) Consent may be conveyed through words or actions. An expression of lack of consent through words or conduct means there is no consent. All the surrounding circumstances are to be considered in determining whether a person gave consent or not, including whether a person did not resist or ceased to resist only because of another person’s actions. Lack of verbal or physical resistance alone does not constitute consent.

(C) Submission resulting from the use of force, threat of force, or placing another person in fear is involuntary and does not constitute consent.

(D) A current or previous dating or social or sexual relationship or the manner of dress of the person involved in the conduct at issue by themselves shall not constitute consent.

(E) A sleeping or unconscious person cannot consent. A person cannot consent if s/he is unaware that the sexual act is occurring.

(F) A person does not consent if s/he agrees to the sexual act(s) only because the perpetrator has made a fraudulent representation that the sexual act serves a professional purpose.

(G) A person does not consent if s/he agrees to the sexual act(s) only because the perpetrator has induced a belief by artifice, pretense or concealment of the fact that the person is another person;

(H) Any alleged consent is not valid if the person was incapable of consenting at the time of the sexual act or sexual contact.

(7) Incapable of consenting.— The term “incapable of consenting” means that as a result of impairment by any drug, intoxicant, or other similar substance, physical disability, or mental disease or defect, a person is unable to appraise the nature of the sexual conduct at issue, physically decline participation in the sexual conduct at issue, or physically communicate unwillingness to engage in the sexual conduct at issue.