JUDICIAL PROCEEDINGS PANEL
REQUEST FOR INFORMATION SET # 1

RESPONSES REQUESTED BY NOVEMBER 6, 2014

I. Article 120 of the UMCJ

Implementation of 2012 Reforms: Assess and make recommendations for improvements in the implementation of the reforms to the offenses relating to rape, sexual assault, and other sexual misconduct under the Uniform Code of Military Justice that were enacted by section 541 of the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112– 81; 125 Stat. 1404) ***(FY13 NDAA)***.

Including Abuse of Power in Definition of Rape: An assessment of the likely consequences of amending the definition of rape and sexual assault under section 920 of title 10, United States Code (article 120 of the Uniform 10 Code of Military Justice), to expressly cover a situation in which a person subject to chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), commits a sexual act upon another person by abusing one's position in the chain of command of the other person to gain access to or coerce the other person. ***(FY14 NDAA)***.

Separating Penetrative from Non-penetrative Offenses Under UCMJ: Consider whether to recommend legislation that would either split sexual assault offenses under Article 120 into different articles that separate penetrative and contact offenses from other offenses or narrow the breadth of conduct currently criminalized under Article 120. ***(RSP Recommendation 113)***.

2012 Article 120 Reform Implementation

1. DoD and Services: Since its enactment, have you identified problems, issues, or concerns regarding the statutory language of Article 120 (2012) or application of the amended statute to the prosecution of sexual assault offenses? If so, how have you addressed the issue or how can/should it be resolved (i.e., statutory change or amendment, changes to the Rules of Courts-Martial through a Presidential Executive Order, case law development, judges instructions, etc.)?

DoD	The version of Article 120 that Congress enacted in the National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 541, 125 Stat. 1298, 1404 (2011), has withstood an initial constitutional challenge. *See United States v. Torres*, No. NMCCA 201300396, 2014 WL 4348266, at *8-*9 (N-M. Ct. Crim. App. Aug. 28, 2014) (rejecting as-applied vagueness challenge to Article 120(b)(3)), *petition filed*, __ M.J. __ (C.A.A.F. Oct. 27, 2014) (mem.). We understand from military justice practitioners that two issues have arisen concerning Article 120's application. First, in at least one instance, a military judge interpreted Article 120's sexual contact language (which applies only in non-penetrative contexts) to exclude instances where the accused uses an object to touch

	another individual, rather than touching that individual with some part of the accused's body. (The penetrative offenses of rape and sexual assault can be accomplished by penetration "by any part of the body or by any object." *See* Uniform Code of Military Justice (UCMJ) art. 120(g)(1)(B), 10 U.S.C. § 920(g)(1)(B).) The Joint Service Committee on Military Justice is considering whether to recommend an amendment to Article 120's definition of sexual contact to expressly include touching accomplished by an object. If it is determined that the sexual contact offenses should include use of an object to touch another, the change should be made by statutory amendment. Article 120(g)(1)(B)'s application to touching by an object has not yet been addressed by the military's appellate courts, which are charged with interpreting Article 120's scope. Neither an explanation in the Manual for Courts-Martial nor an instruction in the Military Judges' Benchbook would control those appellate courts' interpretation of Article 120(g)(1)(B). *See, e.g., United States v. Mitchell*, 66 M.J. 176, 179 (C.A.A.F. 2008) ("The interpretation of substantive offenses in Part IV of the Manual is not binding on the judiciary, which has the ultimate responsibility of interpreting substantive offenses under the UCMJ."); *United States v. Riley*, 72 M.J. 115, 122 (C.A.A.F. 2013) ("the Benchbook is not binding as it is not a primary source of law"). Accordingly, the only means to ensure that the sexual contact offenses are interpreted to include touching with an object is a statutory amendment. Second, practitioners indicate a need for further clarity regarding when a person is "incapable of consenting to [a] sexual act due to . . . impairment by any drug, intoxicant, or other similar substance" for purposes of the Article 120(b) offense of sexual assault. UCMJ art. 120(b)(3), 10 U.S.C. § 920(b)(3). Unlike the issue discussed above, such further guidance could be provided in the explanation of the offense in Part IV of the Manual for Courts-Martial, in the Military Judges' Benchbook, or both. In this instance, a statutory revision is not necessary to establish criminality; rather, guidance is sought to aid in and standardize the interpretation of statutory language that is already sufficient to establish criminality. This explanatory function has been successfully performed in the past by both provisions in Part IV of the MCM and Military Judges' Benchbook guidance. *See, e.g., United States v. Guess*, 48 M.J. 69, 71 (C.A.A.F. 1998) (noting that the military appellate courts will generally defer to the President's interpretation of the elements of an offense in Part IV of the MCM absent any conflict with the Constitution or statute); *United States v. Medina*, 69 M.J. 462, 465 (C.A.A.F. 2011) (noting that the Military Judges' Benchbook instruction concerning consent under the 2006 version of Article 120 "was clear and correctly conveyed to the members the Government's burden," thus avoiding prejudice to the accused from the statute's unconstitutionality). DoD recommends clarifying Article 120(b)(3)'s "incapable of consenting" standard through MCM and Benchbook revisions, rather than via a statutory amendment. An Article 120(b) amendment would create an obligation for the prosecution to prove beyond a reasonable doubt whether a particular alleged sexual assault occurred before or after that statutory amendment. In some cases, it is difficult for the prosecution to

	establish with precision when an offense occurred. Accordingly, there is a risk that for incidents near an amendment date, a court-martial may decline to convict or an appellate court may reverse a conviction not due to doubt as to whether a sexual assault occurred, but rather due to doubt as to precisely when the act occurred. For this reason, alternative means to provide clarity, when possible, should be used in lieu of statutory amendments. Here, such alternatives are available.
USA	At the September 19, 2014 Judicial Proceedings Panel hearing, the Services identified two problems arising from Article 120 (2012): (1) The lack of specificity concerning the definition of "impairment by any drug, intoxicant, or other similar substance"; and (2) the failure to expressly include touching by an object in the definition of sexual contact. Impairment is not defined in Article 120, nor is it defined through judicial instructions. Draft Executive Orders (EO) have also failed to further define impairment. The most common question received at The Judge Advocate General's Legal Center and School (TJAGLCS) regarding the statutory construction of Article 120 (2012) has been, "What does impairment mean?" Although, as detailed below, the law specifically describes how and when impairment is relevant, further clarity through explanation of the law by the President may be helpful. There are two parallel references to "impairment," one in the description of the circumstances that might constitute a rape or aggravated sexual contact, and the other in the legal description of sexual assault or abusive sexual contact. In the context of rape, the theory of criminal liability involving impairment can be found in Article 120(a)(5) and uses the phrase "substantial impairment." This might be the theory used if the accused commits a sex act upon a person after, for example, putting a "date rape" drug in their drink without the victim's knowledge or consent. Per the statute, such a drugging must result in "substantially impairing the ability of [the victim] to appraise or control conduct" (*see* Art. 120(a)(5)). However, in the context of sexual assault, the term "impairment" is used as opposed to "substantial impairment." Additionally, impairment in the context of sexual assault is specific to the victim being "incapable of consenting to the sexual act" (*see* Art. 120(b)(3)) rather than having the ability to appraise or control conduct. Therefore, this requires an understanding of the definition of "consent" under Article 120, which is defined as "a freely given agreement to the conduct at issue by a competent person" (*see* Art. 120(g)(8)). While the law is clear regarding the different types of "impairment" as it is relevant to the different crimes under Article 120, a helpful distinction (through explanation via Executive Order) might be that impairment is not equivalent to "intoxicated" and it is instead "related to the cognitive ability to offer consent and the physical and cognitive ability to control conduct". "Sexual contact" is defined in Article 120(g)(2)(A) and (B). The last line of Article 120(g)(2)(B) states, "[t]ouching may be accomplished by any part of the body." By

	explicitly defining the contact in this way, it appears to exclude touching of a sexual nature that might be done by an object. Examples of this might be a doctor making a fraudulent representation that a breast exam is necessary (*see* Art. 120(b)(1)(C)), but only touching the breasts with a stethoscope. Therefore, this is not a "sexual contact" because it was not accomplished by "any body part," and not a crime under Article 120. Even in the most egregious, clearly sexual situations, such as tying someone down, and touching that person's breasts with a sex toy while masturbating, the only theory of criminal liability available might be under Article 128 (Assault). Without the infliction of physical injury, the crime is "Assault Consummated by a Battery," which has a maximum punishment of 6 months confinement as provided in the Manual for Courts-Martial (MCM). If it is clear through the congressional intent of Article 120 (2012) that "by any body part" may also mean "by any object," it might be possible to clarify this gap in the law similar to the explanation accompanying Article 128 (*see, e.g.*, MCM para. 54.c.(2)(c)). However, the text of Article 128 does not have an explicit statement in the text of the law like Article 120(g) does, specifically referencing a part of the body. Article 120(g)(8)(B) states, "[a] person cannot consent to force causing or likely to cause death or grievous bodily harm[.]" However, this clause may be without legal consequence when applied to certain allegations of rape or sexual assault. For example, Article 120(a)(2) states, "…a sexual act upon another person ***by*** using force likely to cause death or grievous bodily harm to any person; is guilty of rape[.]" (emphasis added). If the sexual act does not occur "***by***" the use of force, but rather because the person consented to the entire event, the prohibition against consenting to force likely to cause death is irrelevant. Therefore, even if the offense is charged under the theory of criminal liability in Article 120(a)(2), the accused is still permitted to offer evidence to say, "Yes, I used force likely to cause grievous bodily harm [holding a loaded gun to the head of the alleged victim]. However, she consented and, in fact, requested that we have sex with the loaded gun pointed to her head. Therefore, the sex act did not occur ***by*** the use of force, it occurred ***by*** consent." This interpretation of the law makes the second sentence of Article 120(g)(8)(B) legally ineffective in the situation stated above. This "causal connection of the elements" interpretation is applied by the Trial Judiciary. Therefore, notwithstanding the apparent congressional intent to prohibit certain types of risky sexual behavior, the following instruction would be given in the case of an accused who asserts facts as stated above: The evidence has raised the issue of whether (state the alleged victim's name) consented to the sexual conduct listed in (The) Specification(s) (_____) of (The) (Additional) Charge (___). All of the evidence concerning consent to the sexual conduct is relevant and must be considered in determining whether the government has proven (the elements of the offense) (that the sexual conduct was done by

> _____) (state the element(s) to which the evidence concerning consent relates) beyond a reasonable doubt. Stated another way, evidence the alleged victim consented to the sexual conduct, either alone or in conjunction with the other evidence in this case, may cause you to have a reasonable doubt as to whether the government has proven (every element of the offense) (that the sexual conduct was done by _____) (state the element(s) to which the evidence concerning consent relates).

The following administrative note (that precedes the instruction given above) clearly states the opinion of the Trial Judiciary in this regard:

> NOTE 8: Evidence of consent. Generally, the elements of an Article 120(a) offense require the accused to have committed sexual conduct "by" a certain method. Stated another way, "by" means the sexual conduct occurred because of that method. Consent to the sexual conduct logically precludes that causal link; when the alleged victim consented, the sexual conduct occurred because of the consent, not because of the charged method. Accordingly, evidence that the alleged victim consented to the sexual conduct may be relevant to negate an element, even though lack of consent may not be a separate element. In such situations the following instruction, properly tailored, would be appropriate. (Note that even for offenses under Article 120(a)(2), 120(a)(3) and 120(a)(4), evidence of consent to the sexual conduct may preclude the causal link between the sexual conduct and the charged method. The judge must carefully evaluate the evidence presented by both sides in such cases to determine the applicability of the following instruction.)

(*See* Para. 3-45-13 of DA PAM 27-9, Military Judges' Benchbook).

The Joint Service Committee on Military Justice (JSC) is reviewing these concerns and will determine if recommending statutory modifications to Article 120(a)(3)(A) and Article 120(g)(2) is necessary. In addition, the JSC has two pending executive orders implementing Article 120 and amending the Military Rules of Evidence (Mil.R.Evid.) and Rules for Courts-Martial (R.C.M.). The first EO, currently working its way through the Office of Management and Budget, contains elements, explanation, lesser included offenses, maximum punishments, and sample specifications for Articles 120. The executive order was published in the Federal Register (Vol. 77, No. 205) on October 23, 2012 for public comment. *See* http://www.gpo.gov/fdsys/pkg/FR-2012-10-23/pdf/2012-26044.pdf
The second EO implementing provisions of the FY14 NDAA was published in the Federal Register (Vol. 79, No. 192) on October 3, 2014 for public comment. *See* http://www.gpo.gov/fdsys/pkg/FR-2014-10-03/pdf/2014-23546.pdf.

Until the President signs the EO prescribing rules pursuant to Article 36, the Judiciary has created sample specifications. The sample specification for Article 120 can be found in Department of the Army Pamphlet (DA PAM) 27-9, Military Judge's

	Benchbook**.** *See* http://armypubs.army.mil/epubs/pdf/p27_9.pdf or http://www.apd.army.mil/pdffiles/p27_9.pdf.
USAF	Definitional concerns are the single greatest issue identified by Air Force practitioners. There is no underlying definition to the term "impairment." Article 120(b)(3)(A) provides, "Any person subject to this chapter who commits a sexual assault on 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…" Air Force military judges have resolved this issue in multiple ways. Some judges have provided no specific definition of impaired. One judge used the definition of "impaired" under Article 111. Other judges have defined the term consistent with "substantial impairment" under the 2007-2012 version of Article 120. Our defense counsel also report concern over the 2012 version of Article 120 when the government alleges a theory of bodily harm, for example, sexual assault under Article 120(b)(1)(B). The 2012 version of Article 120 defined bodily harm as "any offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact." As a consensual touching would normally not be offensive, Air Force defenders note that this appears to recognize that consent plays a role in bodily harm cases. While this issue was resolved under the 2007 version of Article 120 by *United States v. Neal*, 68 M.J. 289 (C.A.A.F. 2010) that consent was not an element but was relevant to force, case law has not resolved this issue for the 2012 version of the statute. Article 120(g)(8) defines consent as "a freely given agreement to the conduct at issue by a competent person." There is no further definition of "competent person" which has led some to question whether this is competency to stand trial, to enter into a contract, or some other legal capacity. Others argue that it is the same as incapable of consent due to impairment. Definitions can be enacted via Congressional action through statute, through Presidential Executive Order amending Part IV of the Manual for Courts-Martial, or through appellate case law development. The Air Force is reviewing whether any consensus exists on definitions with our trial and defense counsel. To date, no consensus has been reached. During cases, requests for tailored judge instructions can always be made by the parties. There are Art 120 cases undergoing appellate review where judges have provided instructions that can be reviewed for error. Once that case law develops, it would be appropriate for changes to be made to the current version of DA-PAM 27-9, Military Judges' Benchbook.
USN	Navy identified various items within the statutory language of Article 120 (2012) that require specific resolution: 1) "Incapable of consent" is not clearly defined. Some additional guidance in the Discussion as to "capacity" and "competency" would ensure consistency in the application of the law. The additional guidance, however, can be promulgated either through explanation of Article 120 in Part IV of the Manual for Courts-Martial or through the Military Judge's Benchbook.

	2) Article 120c - Indecent viewing, recording or broadcasting, fails to address a subset of behavior that should be criminalized, recording another person engaged in sexual activity under circumstances in which the other person's private area is not exposed. This appears to be an inadvertent omission in the law that can be remedied with a statutory change that would not cause further uncertainty in the statute. 3) Last year one Region (Northwest) litigated the issue of maximum punishments under the 2012 amendment. The Military Judge ruled that, in the absence of an Executive Order defining the maximum punishments, the Government was limited by the punishments at a Summary Court-Martial. This was appealed through an extraordinary writ and NMCCA overruled the Military Judge. Two pending executive orders implementing Article 120 and amending the Military Rules of Evidence and Rules for Courts-Martial drafted by the Joint Service Committee on Military Justice (JSC) are currently at different levels of review. The first, in interagency review, contains elements, explanation, lesser included offenses and sample specifications for Articles 120. The second, published in the federal register for public comment, implements portions of the NDAA for FY14.
USMC	The definitions, or lack thereof, of several terms within Article 120 have created consistent argument and confusion at the trial level. First, the definition of sexual contact requires "touching, or causing another person to touch" a specified body part or "touching" with a specified intent. "Touching" is not defined in the statute; however, it does specify that "[t]ouching may be accomplished by any part of the body." This sentence excludes situations where an accused "touches" a victim with an object, such as a sex toy, or touches the victim with bodily fluids, such as through masturbation. Both of these scenarios should be included within the broader category of "sexual contact." Second, the lack of a regulatory or statutory definition of "impairment" or a "competent person" within the definition of "consent" creates consistent argument and confusion at the trial level. A definition of these two terms by executive order would provide much needed clarity on the scope of the "incapable of consenting due to impairment by alcohol" theory of sexual assault. In many alcohol facilitated sexual assault cases, the government's theory for charging the case is that the victim was incapable of consenting to the sexual act due to impairment by alcohol. Under this theory of sexual assault, the members usually do not receive a definition for "impairment" and the military judge instructs the members on the definition of "Consent" as a "freely given agreement to the conduct at issue by a competent person." Nowhere in the statute, the proposed executive orders, or in the military judge's benchbook do they define the term "Impairment" or "Competent." Within the Manual for Courts-Martial, the term "impaired" is used and defined within Article 111 as "any intoxication which is sufficient to impair the rational and full exercise of the mental or physical faculties." However, importing the Article 111, drunken or reckless driving definition of impairment into Article 120 seems overbroad and would capture a lot of otherwise consensual sexual conduct. The Marine Corps

	has already seen the judiciary import this definition into at least one case (see Question 5 response and Enclosures.) The term "competent" is used most often in describing whether or not someone has the authority to take an action, such as Article 96, and Article 103. Competence is only used in the sense of mental capacity in RCM 909 and RCM 706 to determine whether the accused is mentally incompetent and cannot stand trial by court-martial, and in determining whether or not a witness is competent to testify under MRE 601. These limited uses of the term "competent" have not proven helpful at the trial level except in closing argument by the trial counsel of whether the victim was competent to consent. In a recent Army case under the 2007 version of Article 120, United States v. Long, 73 M.J. 541, 544-45 (A.C.C.A. 2014) the military judge was asked to define the term "competent" and borrowed language from the definition of "consent" under that statute: "A person cannot consent to sexual activity if that person is substantially incapable of appraising the nature of the sexual conduct at issue, due to mental impairment or unconsciousness resulting from consumption of alcohol, drugs, a similar substance, or otherwise; substantially incapable of appraising the nature of the sexual conduct at issue due to mental disease or defect, which renders the person unable to understand the nature of the sexual conduct at issue; or substantially incapable of physically declining participation in the sexual conduct at issue; or substantially incapable of physically communicating an unwillingness to engage in the sexual conduct at issue. This language is no longer applicable under the 2012 statute and would create a high burden of competence for the government to prove. Using this old language also creates difficulties on appellate factual sufficiency review, where the appellate courts can pick apart all of the victim's actions following the assault to attack the premise that the victim was "incapable of declining participation . . . or incapable of physically communicating an unwillingness." *See* United States v. Lamb, No. 2010044 (NMCCA, June 19, 2009) and United States v. Peterson, No. 200900688 (NMCCA, Sep. 21, 2010). Recommend a statutory amendment to 10 U.S.C. 920(g)(2), UCMJ to make "Touching" more expansive with the language "Touching may be accomplished by any part of the body, ***any object, or any bodily fluids.***" The Marine Corps will continue to work through the Joint Service Committee to develop a definition of "impairment" and "competent".
USCG	The service has identified several issues with the statutory language of the 2012 amendments to Article 120, UCMJ. First, the statutory definition of Article 120(g)(2) limits sexual contact to touching "accomplished by any part of the body." This precludes the government from charging a member who contacts another person with an object, if done to abuse, humiliate, or degrade that person, or to arouse or gratify the sexual desires of any person. The government is forced then to charge a lesser

	crime, such as assault consummated by a battery under Article 128, which may not accurately reflect the sexual nature of the crime. In contrast, the definition of a sexual act in the 2012 statute includes penetration "by any part of the body *or by any object*" (emphasis added). Although less common, crimes involving contact with an object do occur, as demonstrated by the Army's attempted prosecution of a physician's assistant who allegedly used his stethoscope to wrongfully touch the breasts of his patient. Because the definition of sexual contact under Article 120(g)(2) is part of the statutory language, a statutory change is required to resolve this issue. Second, the statute suffers from a lack of a definition of "impairment," which is a key term that appears in Article 120(b)(3). This term is frequently the subject of military judges' instructions to the members, and panels often ask for clarification on this term during their deliberations. While eventually the case law may develop a suitable definition for "impairment," it would be beneficial to have uniform, consistent application across all services and courts-martial as soon as possible. The President can provide an explanation of this term through an Executive Order. Third, the offense of "indecent acts," which appeared in two prior versions of Article 120, has been removed from the UCMJ entirely. For conduct committed before 01 October 2007, "indecent acts with another" was an enumerated crime under Article 134. For conduct committed on or after 01 October 2007 but before 28 June 2012, indecent acts was a specific offense under Article 120(k). In the 2012 version of Article 120, indecent acts is not found in Article 120 or Article 134. It can be charged as a general Article 134 violation if the conduct is service-discrediting or to the prejudice of good order and discipline in the armed forces. The reason for removal of indecent acts entirely from the 2012 version is not apparent. The offense of indecent acts has been used to prosecute consensual, but obscene, behavior by members of the military, including engaging in sexual acts in the presence of a third person and three people engaging in consensual sexual acts together. The services would benefit from once again having this offense expressly listed as an offense under either Article 120 or Article 134, as it provides explicit notice of criminal behavior. A legislative change would be required if the conduct was to be criminalized under Article 120. The President could include indecent acts under Article 134 through an Executive Order.