

**JUDICIAL PROCEEDINGS PANEL  
REQUEST FOR INFORMATION SET # 1**

**5. Services: For military judge instructions on Article 120 (2012) offenses:**

**a. Provide copies (or hyperlinks to) standard Benchbook instructions used by each Service’s trial judges for Article 120 offenses.**

<b>USA</b>	The Army uses DA PAM 27-9, Military Judges’ Benchbook, recently republished with updates current as of 10 September 2014. <i>See</i> <a href="http://armypubs.army.mil/epubs/pdf/p27_9.pdf">http://armypubs.army.mil/epubs/pdf/p27_9.pdf</a> or <a href="http://www.apd.army.mil/pdffiles/p27_9.pdf">http://www.apd.army.mil/pdffiles/p27_9.pdf</a> .
<b>USAF</b>	The standard Benchbook instructions for Article 120 can be found in the 10 September 2014 version of DA-PAM 27-9, <a href="#">Military Judges’ Benchbook</a> published by the Army. Air Force judges generally use the Benchbook as their standard starting point for instructions.  Reference:  - Department of the Army Pamphlet 27-9, Military Judges’ Benchbook <a href="http://www.apd.army.mil/pdffiles/p27_9.pdf">http://www.apd.army.mil/pdffiles/p27_9.pdf</a>
<b>USN</b>	Navy-Marine Corps Trial Judiciary (NMCTJ) uses the Standard Benchbook instructions maintained by the Army as Army Pamphlet 27-9 which can be found at: <a href="http://www.apd.army.mil/pdffiles/p27_9.pdf">http://www.apd.army.mil/pdffiles/p27_9.pdf</a>
<b>USMC</b>	The services all use a common Benchbook maintained by the Army. <a href="http://www.apd.army.mil/pdffiles/p27_9.pdf">http://www.apd.army.mil/pdffiles/p27_9.pdf</a> .
<b>USCG</b>	The Coast Guard uses the U.S. Army’s Military Judge’s Benchbook, DA Pam 27-9. The current version can be found at: <a href="http://www.apd.army.mil/pdffiles/p27_9.pdf">http://www.apd.army.mil/pdffiles/p27_9.pdf</a> . The relevant pages for Article 120 adult offenses are 474-610.

**b. Provide judge’s instructions that have deviated from the standard Benchbook instructions. At a minimum, responses should identify instructions used to inform members on the following:**

- **Elements;**
- **Specifications; and**
- **Applicable definitions, including those used to instruct military panels on constructive force, coercion, or use of rank/authority in sex offenses.**

<b>USA</b>	The Army does not track deviations from the standard Benchbook instructions. The Army uses DA PAM 27-9, Military Judges’ Benchbook, recently republished with updates current as of 10 September 2014. <i>See</i> <a href="http://armypubs.army.mil/epubs/pdf/p27_9.pdf">http://armypubs.army.mil/epubs/pdf/p27_9.pdf</a> or <a href="http://www.apd.army.mil/pdffiles/p27_9.pdf">http://www.apd.army.mil/pdffiles/p27_9.pdf</a> .
<b>USAF</b>	Air Force Trial Judges do not generally deviate from the standard instructions; however, the parties may offer a tailored instruction on a particular term and judges do instruct <i>sua sponte</i> when the judge believes it is required by law. There were circumstances under the 2007 version of Article 120 where Air Force military judges deviated from the Benchbook instructions as appellate decisions were issued. Under

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	<p>the 2012 version, as described in RFI #1, we are aware that military judges have defined or chosen not to define terminology. Our trial and appellate government practitioners did not identify other significant deviations.</p> <p>Redacted versions of the military judge’s instructions in several Air Force Military Training Instructor cases using a theory of fear will be provided when available.</p> <p><u>Reference:</u></p> <ul style="list-style-type: none"> <li>- Department of the Army Pamphlet 27-9, Military Judges’ Benchbook <a href="http://www.apd.army.mil/pdffiles/p27_9.pdf">http://www.apd.army.mil/pdffiles/p27_9.pdf</a></li> </ul>
<p><b>USN</b></p>	<p>Copies of Responsive Documents are attached in Enclosure (2)</p> <p><b>ENCLOSURE 2:</b></p> <ul style="list-style-type: none"> <li>- <i>U.S. v. Sager</i> – Instructions on Incapacity</li> <li>- <i>U.S. v. Sager</i> – Member's Question – Capacity (AE 124)</li> <li>- <i>U.S. v. Sager</i> – Member's Question – Capacity (AE 126)</li> <li>- <i>U.S. v. Smith</i> – Members Findings Instructions</li> <li>- <i>U.S. v. Welch</i> – Members Findings Instructions</li> <li>- Members findings Instructions</li> <li>- <i>U.S. v. Nelms</i> – Excerpt from Record of Trial</li> </ul>
<p><b>USMC</b></p>	<p>The Marine Corps does not track deviations from the standard Benchbook; however, below are some examples:</p> <p>1) <i>U.S. v. Entralgo</i> - the military judge used the Black’s Law definition of the term “incapacitation” when requested by the members: “Impairment” means the state of being diminished, weakened, or damaged, especially mentally or physically. <i>See</i> enclosure (1.m).</p> <p>2) <i>U.S. v. Ahn</i>, - a military judge instructed on the term “black out” versus “pass out” <i>See</i> enclosure (1.n),</p> <p>“I have instructed you that there is a difference between passing out and blacking out. In this court the term blacking-out is used in the form of someone not being able to remember what they did while drinking alcohol. A person could blackout the events they engaged in while drinking, but still be responsible for their actions while intoxicated. In other words, a blacked out state is one of the facts and circumstances that must be considered when determining whether a person was capable or incapable of consenting to the sexual act. The term passed-out means to lose consciousness.”</p> <p>3) <i>U.S. v. Newlan</i>: the MJ defined “impaired” by utilizing the definition provided in Article 111 (driving while under the influence); specifically, “. . . [i]mpaired means any intoxication which is sufficient to impair the rationale and full exercise of the</p>

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	<p>mental or physical faculties.” See enclosure (1.i).</p> <p>4) <i>U.S. v. Bates</i>, the first (initial) MJ also adopted the definition from Article 111. However, the MJ detailed to the trial reconsidered and reversed the initial ruling. He rejected Article 111’s definition and instead utilized Dictionary.com to define the term “impaired”:</p> <p style="padding-left: 40px;">I agree with the defense's argument that it's inappropriate to use the impairment definition from Article 111, UCMJ, since it's not specifically referenced in the statute and because it's illogical when you look at the wording of it. So, as a default, as we customarily do, we are going to give impairment the plain meaning of the word. According to Dictionary.com the word "impairment" means the state of being diminished, weakened, or damaged, especially mentally or physically. And, that is the definition that I intend to use in applying – or in defining – the word "impairment." See enclosure (1.d).</p> <p><b>ENCLOSURE (1) Representative Sample of Court Documents Related to the 2012 Amendment to Article 120:</b></p> <p>Enclosure 1.m. - <i>U.S. v. Entralgo</i> – Findings Instructions Enclosure 1.n. - <i>U.S. v. Ahn</i> – Findings Instructions Enclosure 1.i. - <i>U.S. v. Newlan</i> – MJ Ruling on Motion to Dismiss for Vagueness Enclosure 1.d. - <i>U.S. v. Bates</i> – MJ Ruling on Motion to Dismiss for Vagueness</p>
USCG	<p>The Coast Guard primarily uses the U.S. Army’s Military Judges’ Benchbook, DA Pam 27-9, for instructions on all offenses, including those under Article 120. In practice, the starting point for the development of instructions by Coast Guard military judges is the electronic version of the Benchbook. With respect to Article 120 offenses, the Coast Guard trial judiciary has not used instructions that deviate in any significant way from the Benchbook instructions.</p>

**c. If not addressed in question 4 above, have statutory deficiencies been identified at trial or on appeal regarding judges’ instructions for offenses charged according to the 2012 version of Article 120?**

USA	<p>The Army does not track this data. However, anecdotal reports indicate that the most frequently identified deficiency is the lack of definitions for the terms “impairment” and “incapable of consent.” The only typographical deficiency noted in Army panel instructions has been with regard to the model specification 3-45-16 (Abusive Sexual Contact), which may mislead a trial counsel into charging a specification that does not identify the modality of the sexual contact (i.e., whether it was upon an unconscious person, an incapacitated person, whether done by force or accomplished by inflicting bodily harm, etc.). However, it is important to note that Benchbook instructions do not constitute statutory authority and merely represent the Army Trial Judiciary’s opinion of the current state of statutory and case law.</p>
USAF	<p>There are no additional issues we are aware of being raised in court beyond the items</p>

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	discussed above.
<b>USN</b>	For the 2007-2012 and Post-2012 Article 120, "Sexual Assault" and "Aggravated Sexual Assault" are not enumerated Lesser Included Offenses (LIOs). We believe this is a statutory deficiency. In a recent case, the government argued that "bodily harm" is requisite for Force and thus Sexual Assault and Aggravated Sexual Assault should have been instructed as LIOs. The Military Judge found the statutory omission persuasive and did not instruct on LIOs for Forcible Rape.
<b>USMC</b>	See response to Question 1, additionally, both U.S. v. Newlan and U.S. v. Bates are at NMCCA on appeal.
<b>USCG</b>	No statutory deficiencies have been identified at trial or on appeal regarding the military judges' instructions for Article 120 offenses under the 2012 version.