

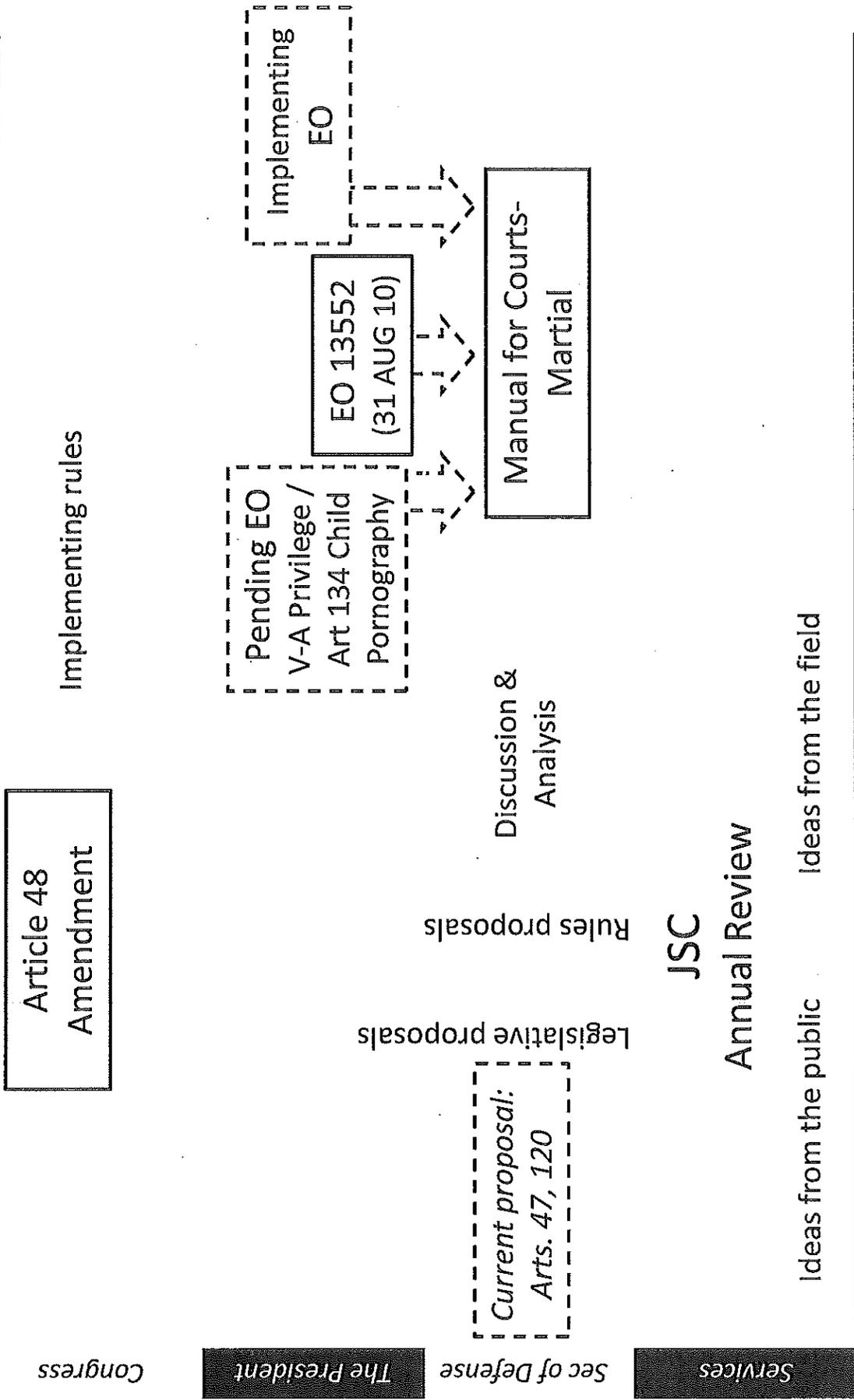
Department of Defense  
Joint Service Committee on Military Justice

## House Armed Services Committee Brief

12 July 2011

# The Military Justice Legislative and Rule-Making Process

## EXAMPLES



### Issues in UCMJ sex offense prosecution:

- Court rulings affecting constitutionality of Articles 120 + 125
  - Double burden shift on consent found unconstitutional
  - Courts have limited the legal prohibition of sodomy (consensual)
- Format of the 2007 statute—
  - Cross reference of offenses and definitions leads to confusion amongst jury - instructions were complicated
  - Child offenses within adult statute

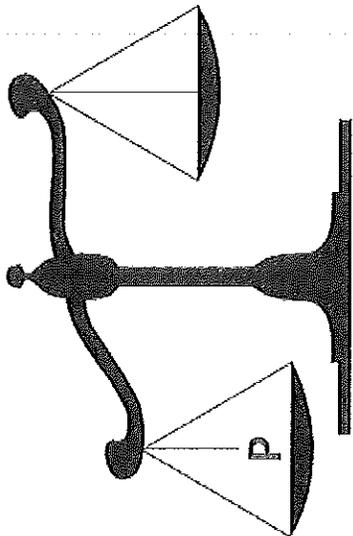
### Recommended responsive refinements:

- For adults, focus remains on offender's force, but consent is a defense
- Forcible sodomy incorporated into Article 120/120b offenses
- Separate Articles 120 (adults), 120b (children), and 120c (lesser)
- Child sexual penetration offenses clarified, combine lesser offenses into one offense - sexual abuse of child

**Mechanics of Proof at Trial**

Pre-2007

By force and without consent?



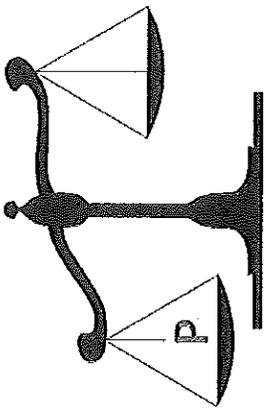
*Beyond a reasonable doubt*

**Force:** focus on the mind and actions of the **Accused**  
**Consent:** focus on the mind and actions of the **Victim**

Simultaneous  
**Force and Consent?**  
No, consent displaces force.

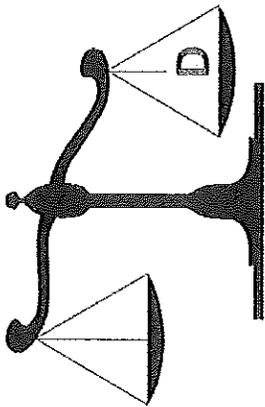
Current Art. 120

Force?



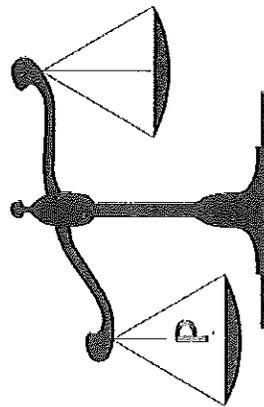
*Beyond a reasonable doubt*

Consent?



*By a preponderance*

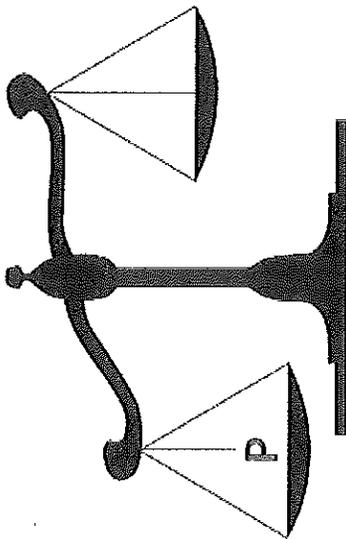
No consent?



*Beyond a reasonable doubt*

Draft Art. 120

By force ?



*Beyond a reasonable doubt*

If relevant, Accused can argue consent as a way to contradict force.

Retains focus on **force** used by offender, but removes the unconstitutional burden shift to the accused.

Current Article 120:

8 Adult Sex Crimes  
6 Child Sex Crimes

Degree  
of Force

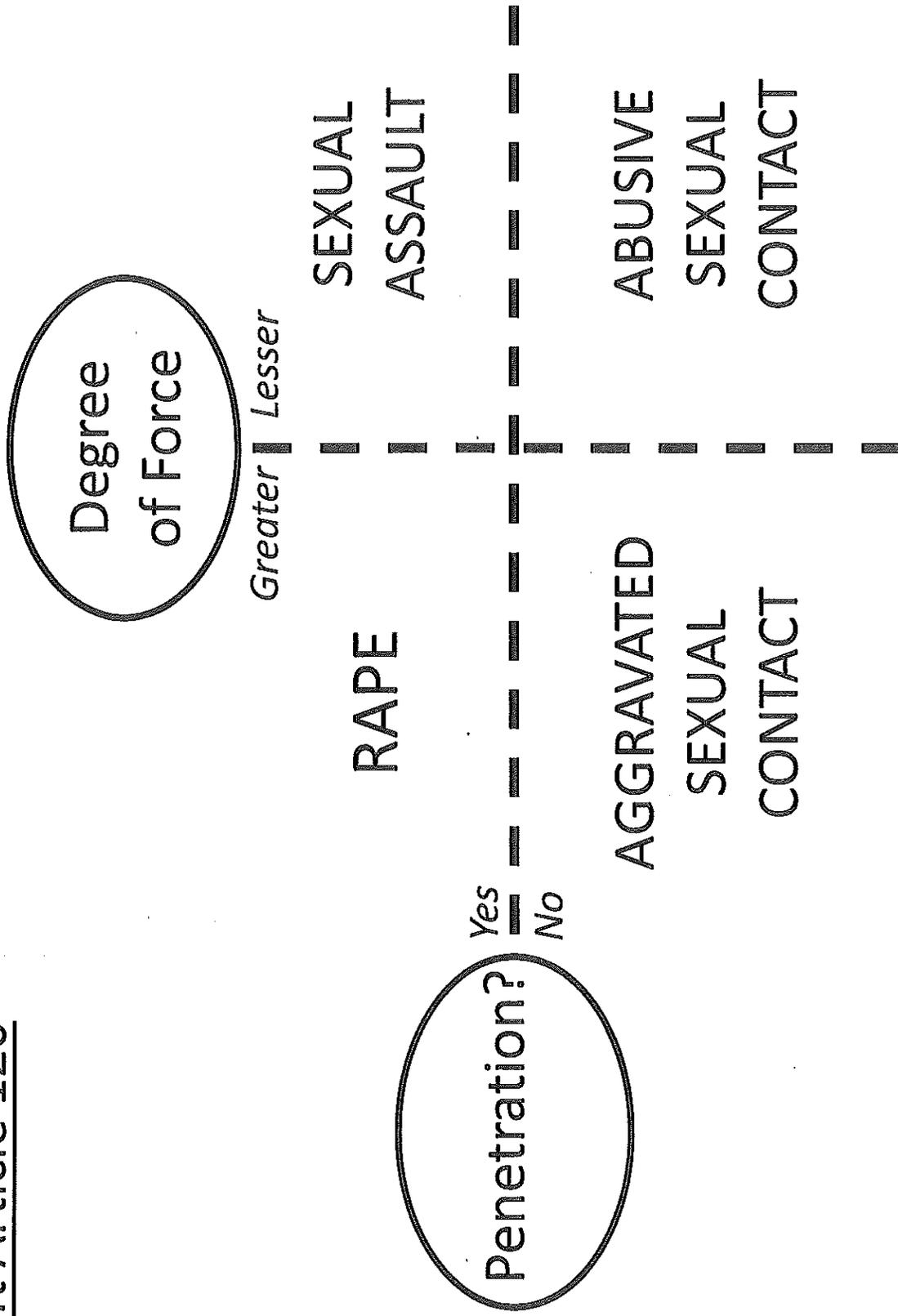


Plus FORCIBLE PANDERING, WRONGFUL SEXUAL CONTACT, INDECENT ACT, & INDECENT EXPOSURE\*

\* Includes non-registerable sex offences

Forcible Sodomy is under Article 125

Draft Article 120

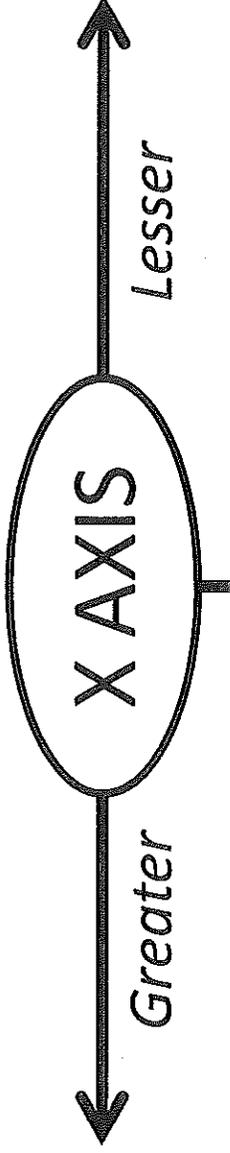


Article 120 – Includes sodomy

Article 120b – Child sex offenses

Article 120c - Forcible pandering, indecent exposure, and indecent viewing/recording/broadcasting

## Draft Article 120:



### Degree of force:

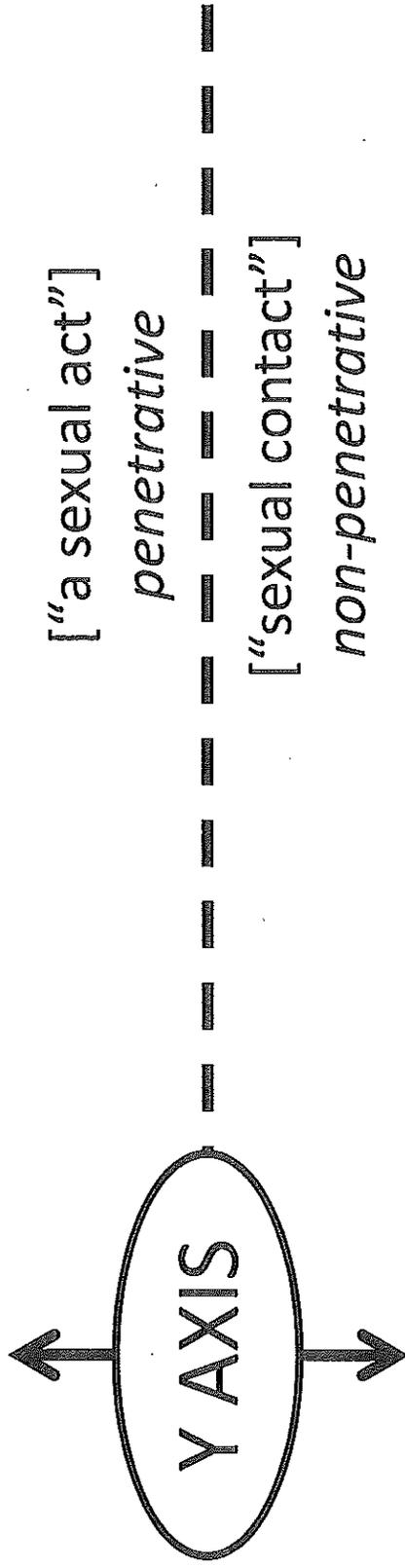
- using unlawful force against that other person;
- using force causing or likely to cause death or grievous bodily harm to any person;
- threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping;
- first rendering that other person unconscious; or
- 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.

### Degree of force:

- threatening or placing that other person in fear;
- causing bodily harm;
- making a fraudulent representation that the sexual act serves a professional purpose;
- inducing a belief by any artifice, pretense or concealment that the person is 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
- when the other person is incapable of consenting to the sexual act due to impairment by any drug, intoxicant, or other similar substance, mental disease or defect, or physical disability, and this condition is known or reasonably should be known by the person.

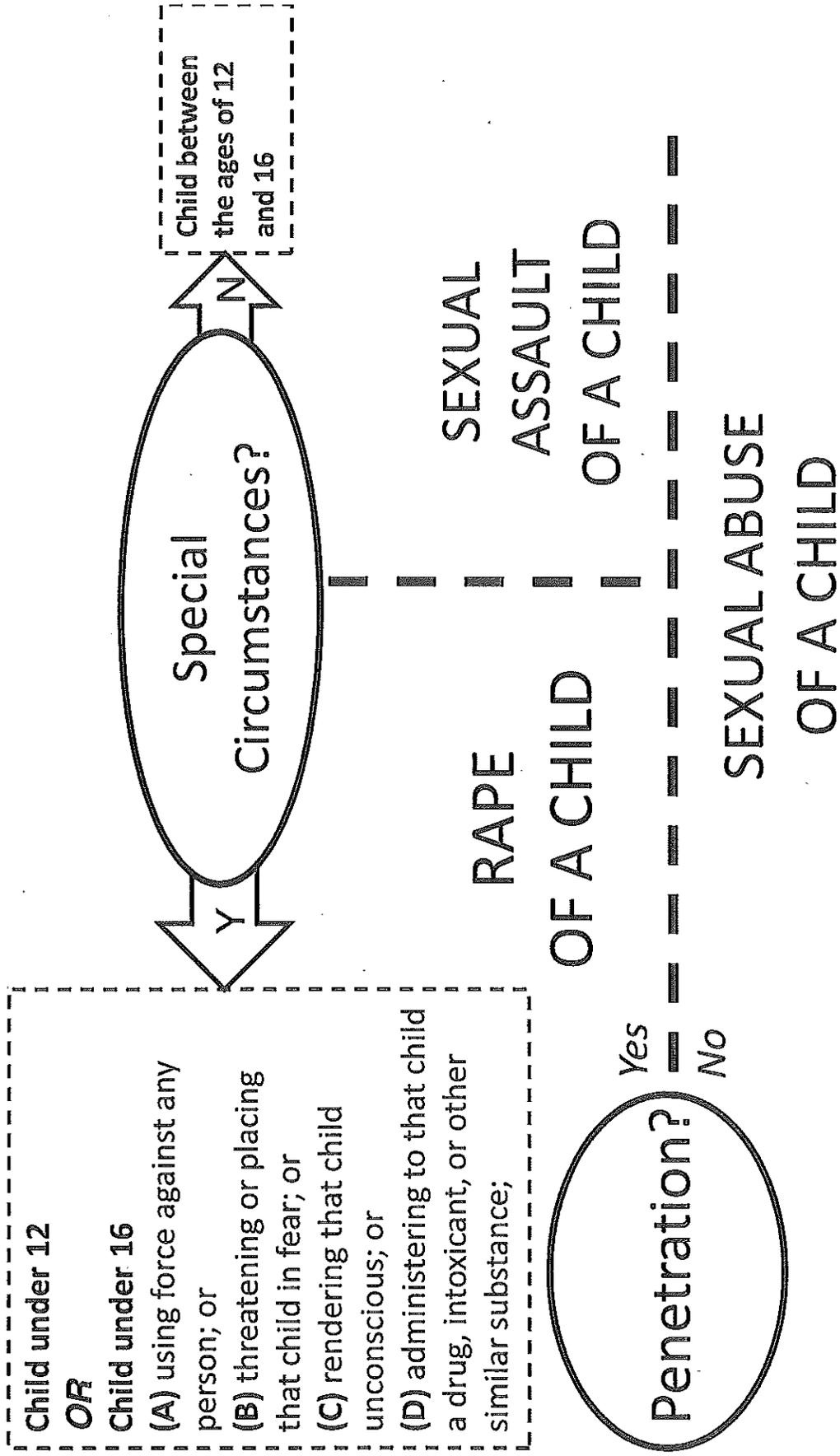
## Draft Article 120:

**A**—*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.*



“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, with an intent to abuse, humiliate or degrade any person; or any touching, or causing another person to touch, either directly or through the clothing, any body part of any person, if done with an intent to arouse or gratify the sexual desire of any person. Touching may be accomplished by any part of the body, including but not limited to the hands or mouth.

# Draft Article 120b (Sex offenses against children)



[Three child sex offenses rather than six – Replaces Rape, Aggravated Sexual Abuse of a Child, Aggravated Sexual Contact with a Child, Abusive Sexual Contact with a Child, and Indecent Liberties with a Child.]

## Draft Article 120c (Other sexual misconduct)

- Indecent Viewing, Visual Recording or Broadcasting
  - Clarifies former Art 120(k) – Indecent Act
  - Prohibits both viewing and recording and adds distribution
- Forcible Pandering
  - No significant changes from former Art 120(l), language clarification only
- Indecent Exposure
  - Change from former Art 120(n) to remove family exception to indecent exposure

# Backup Slides

# Subpoena of Documents:

Referral of charges

**Issue:** *How to obtain documents (phone records, bank records, ISP records) with evidentiary value before referral of charges?*

Subpoena duces tecum (draft Art. 47)

by Government Representative; appeal to Convening Authority

[Article 32 Investigation]

Referral of charges to C-M

Subpoena to appear at trial (Art. 46 + RCM 703)

by Trial Counsel; appeal to Military Judge

Prior to referral, the Convening Authority, Staff Judge Advocate, Deputy SJA, and Chief of Justice exercise oversight on subpoena power.

Subpoena enforcement is in civilian courts.

## Draft additions to Article 47:

### **Art 47. Refusal to appear or testify**

(a) Any person not subject to this chapter who—

(1) has been duly subpoenaed to appear as a witness before a court-martial, military commission, court of inquiry, or any other military court or board, or before any military or civil officer designated to take a deposition to be read in evidence before such a court, commission, or board  $\Delta$ ; and  
(2) willfully neglects or refuses to appear, or refuses to qualify as a witness or to testify or to produce any evidence which that person may have been legally subpoenaed to produce;  
is guilty of an offense against the United States.

(b) Any person who commits an offense named in subsection (a) shall be tried on indictment or information in a United States district court or in a court of original criminal jurisdiction in any of the Commonwealths or possessions of the United States, and jurisdiction is conferred upon those courts for that purpose. Upon conviction, such a person shall be fined or imprisoned, or both, at the court's discretion.

(c) The United States attorney or the officer prosecuting for the United States in any such court of original criminal jurisdiction shall, upon the certification of the facts to him by the military court, commission, court of inquiry, board,  $\Delta$  file an information against and prosecute any person violating this article.

or has been  
duly issued a  
subpoena  
duces tecum  
for an  
investigation,  
including an  
investigation  
pursuant to  
section 832(b)  
of this title  
(article 32(b))



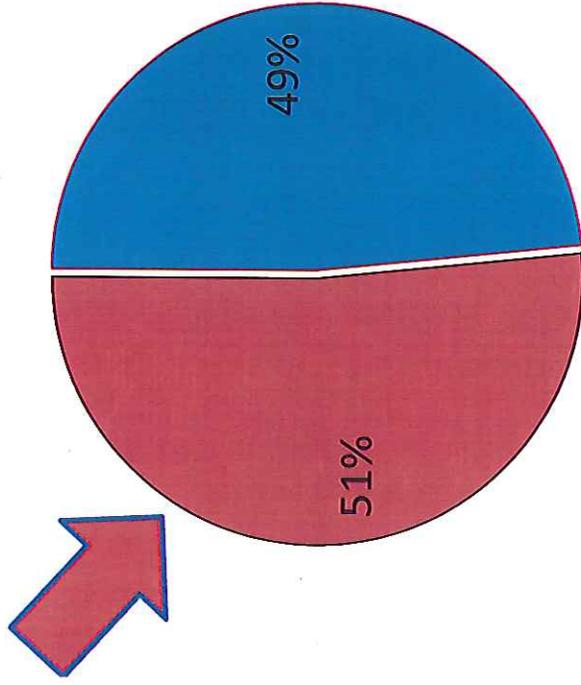
trial counsel,  
or convening  
authority,



# Legal Impossibility of Double Burden Shift

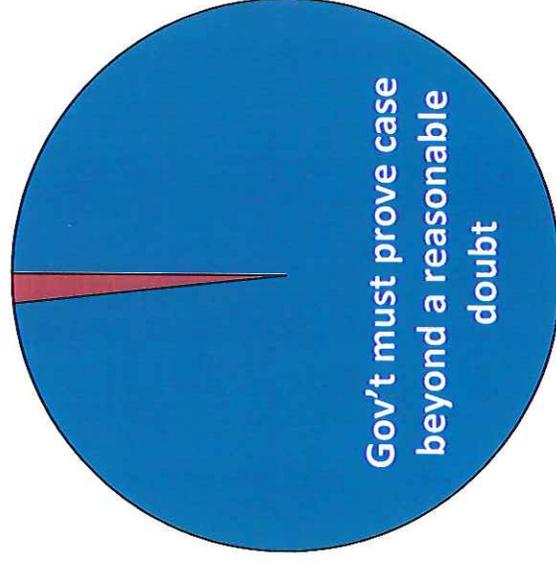
## Shift

Burden Shift to Defense  
to Prove Consent



■ Preponderance

Burden Shift back to Gov't  
to Disprove Consent



■ Beyond a Reasonable Doubt (BRD)

If defense proves consent by a preponderance, the Gov't cannot disprove it BRD

# Force-Based vs. Consent-Based:

## Rape

### Proposed Art 120: Rape

1. Sexual Act +
2. Unlawful Force

- Use of physical strength sufficient to overcome, restrain or injure
- Done w/o legal justification or excuse

Max Punishment =  
LWOP

### Consent-based Statute Felony of the First Degree (FL)

1. Sexual Act +

2. Without Consent +

3. Threatening to use force or violence likely to cause serious personal injury, and V believes offender has the present ability to execute the threat

Max Punishment =  
30 years

# Force-Based vs. Consent-Based:

## Sexual Assault

**Proposed Art 120:  
Sexual Assault**

**1. Sexual Act +**

**2. Bodily Harm**

- Any offensive touching of another, however slight
- Only requires force necessary to achieve penetration

**Consent-based Statute  
Felony of the Second  
Degree (FL)**

**1. Sexual Act +**

**2. No Consent**

**Max Punishment =  
30 years**

**Max Punishment =  
15 years**