

**ARTICLE 120, UCMJ, SUBCOMMITTEE
ISSUES FOR SUBCOMMITTEE CONSIDERATION**

SUBCOMMITTEE MISSION STATEMENT AND OBJECTIVES

Analyze and evaluate the following 17 issues regarding 10 U.S.C. §920 (Article 120, Uniform Code of Military Justice (UCMJ)), the primary military sexual assault statute, and where necessary, make recommendations for amendments to: (1) the statute, (2) the Manual for Courts-Martial, (3) the Military Judges' Benchbook, and/or elsewhere as appropriate.

This outline summarizes the 17 issues for the subcommittee's review and lists a brief summary of witness testimony when a particular witness addressed one of the 17 issues. It was often the case, however, that a witness addressed a variety of the 17 issues in their comments; and some of the witnesses also provided additional written materials before and after the meetings to amplify their comments to the Panel. Where pertinent, an electronic link to the written material prepared by a specific witness has been attached under the summary of that witness's testimony. If you are reviewing this outline on a system that provides access to the internet, you can click on the link and read the material directly from our website at <http://jpp.whs.mil/>.

Bear in mind the written material often addresses many different issues within the 17 issues for the subcommittee's consideration. Accordingly, the reader may find, for instance, that Carol Tracy's testimony touched in part on the definition of "consent" and is summarized under that issue's subheading; yet the reader will then find that her written material addresses many other issues other than that single issue. The 17 issues for the subcommittee's consideration are set forth on pages 36-37 (Article 120, UCMJ) and page 43 (Coercive Sexual Relationships and Abuse of Authority Cases) in the JPP's Initial Report of February, 2015, a copy of which has been provided to you and which may also be accessed here: http://jpp.whs.mil/Public/docs/08-Panel_Reports/JPP_InitialReport_Final_20150204.pdf.

A. ISSUES RELATED TO DEFINITIONS AND ELEMENTS

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

-*Consent* is currently defined in Article 120, UCMJ, as: "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 shall not constitute consent. Lack of consent may be inferred based on the circumstances. 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."

Previous witnesses who spoke at a JPP public meeting regarding this issue:

Carol Tracy (Executive Director of the Women's Law Project)(Aug TR at 131-143): Terms such as rape, sexual abuse, sexual assault, and others have different meanings in different jurisdictions; "consent" is defined differently in each state; the definition of force is broadening beyond physical force alone, to include other modes of coercion. The link to Ms. Tracy's and Ms. Whitman's article on Rape and Sexual Assault is attached:

**ARTICLE 120, UCMJ, SUBCOMMITTEE
ISSUES FOR SUBCOMMITTEE CONSIDERATION**

http://jpp.whs.mil/Public/docs/03_Topic-Areas/02-Article_120/20140807/02_Rape_SexAsslt_LegalSystem_WLP_AEQuitas_20120605.pdf

John Wilkinson (Attorney-Advisor Æquitas)(Aug TR at 144-161) Based on a review of the laws in all 50 states, simple language seems to be the most effective way to communicate what a statute is meant to address; forced, non-consented to, or penetration upon a victim who lacks capacity to consent should be enough, rather than have additional elements in penetration crimes; all states have some element of force and include the issue of consent and capacity to consent; eighteen states criminalize penetration without consent and without force. Article 120 is comprehensive and addresses most of the same scenarios the state statutes address.

Stephen Schulhofer (Professor, New York University School of Law)(Aug TR at 162-172): Professor Schulhofer worked with ALI to revise the Model Penal Code on sexual assault; the problem with almost all sexual assault schemes is they all require some element of force; we need to remove that and focus only on whether there was consent to the alleged act; we should still criminalize forcible sexual assaults, but we should reserve the most punitive sentences for that conduct; we are moving toward five distinct types of offenses: rape (force), intercourse by coercion (non-violent threats or abuse of authority), or imposition (taking advantage of a person's incapacity), or exploitation (abuse of professional trust and use of deception, i.e., the doctor who uses the cloak of a medical exam to make sexual contact), and, lastly, intercourse without affirmative consent (when a victim is in some way prevented from voicing consent). The links to Professor Schulhofer's work with the Model Penal Code, including the proposed revision to MPC 213, the prospectus, the MPC extract on coercion, and his comments on the UCMJ sexual assault framework, are attached:

http://jpp.whs.mil/Public/docs/03_Topic-Areas/02-Article_120/20140807/03_ProposedRevision_MPC213_Excerpt_201405.pdf

http://jpp.whs.mil/Public/docs/03_Topic-Areas/02-Article_120/20140807/04_ProspectusRevision_MPC213_201205.pdf

http://jpp.whs.mil/Public/docs/03_Topic-Areas/02-Article_120/20140919/30_ProposedRevision_ModelPenalCode_Sec213_2_ALI_20140430.pdf

http://jpp.whs.mil/Public/docs/03_Topic-Areas/02-Article_120/20140807/17_201408_Schulhofer_Art120_UCMJ_Comments_Redacted.pdf

Teresa Scalzo (Navy Civilian Highly Qualified Expert-Prosecutor)(Sep TR at 11-13; 52-53) The Navy Trial Counsel program does not have a problem with the current definition of consent; if we moved to "affirmative consent," I don't think it would make it any easier to obtain convictions.

**ARTICLE 120, UCMJ, SUBCOMMITTEE
ISSUES FOR SUBCOMMITTEE CONSIDERATION**

Professor Rachel Vanlandingham (Southwestern Law School)(Sep TR at 16-19; 27-28; 32-33; 49-50): The definition of consent needs to be clarified; it is internally inconsistent.

Ed O'Brien (U.S. Army Trial Defense Service)(Sep TR at 27-28; 34-35): The application of consent is confusing in Articles 120(a)(1) and 120(a)(5).

LtCol Chris Thielmann, USMC (Sep TR at 62-66): I have worked with all 3 versions of Article 120 in my career; the new Article 120 is workable, but it needs some minor modifications; I think our present definition of consent is workable and does not need to be changed. I think that definition focuses on the totality of the circumstances of any given factual pattern, but at its core comes back to common sense, human experience, and the panel members' understanding of the ways of the world.

Professor Jim Clark: The link to Professor Clark's article analyzing Article 120 is attached:

http://jpp.whs.mil/Public/docs/03_Topic-Areas/02-Article_120/20140807/07_Art120_UCMJ_Crimes_Defenses_Analysis_Clark_2012.pdf

**ARTICLE 120, UCMJ, SUBCOMMITTEE
ISSUES FOR SUBCOMMITTEE CONSIDERATION**

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?

Previous Presenters who spoke to this issue:

Colonel Gary Jackson, USAF (Aug TR at 266-271): Colonel Jackson recommended placing these defenses back into the statute; he also offered recommendations on issues 7 and 10, below. All three recommendations are contained in the attached comments, linked below:

http://jpp.whs.mil/Public/docs/03_Topic-Areas/02-Article_120/20140807/18_201408_Jackson_Art120_UCMJ_Comments_Redacted.pdf

Professor Jim Clark: Noted even though these defenses appear to have been removed from the 2012 statute, a general defense of mistake of fact is still available under Rule for Courts-Martial 916, and military courts have a long history of permitting the accused to argue mistake of fact for any crime, and especially for sexual crimes. See link at pages 7-9:

http://jpp.whs.mil/Public/docs/03_Topic-Areas/02-Article_120/20140807/07_Art120_UCMJ_Crimes_Defenses_Analysis_Clark_2012.pdf

Maj Frank Kostik, USA (Defense Counsel)(Sep TR at 102-107): These defenses should be put back into the statute; they have always been defenses in courts-martial.

Professor Lisa Schenck (George Washington University Law School): Recommends adding the affirmative defense of mistake of fact as to consent back into Article 120. See link at pages 458-66:

http://jpp.whs.mil/Public/docs/03_Topic-Areas/02-Article_120/20140807/11_SexOffenses_Under_MilitaryLaw_Schenck_2014.pdf

Ed O'Brien (Sep TR at 27-28): The easiest fix is to put these defenses back in the Manual for Courts-Martial so that it's clear they apply. Mr. O'Brien recommended not amending Article 120, but if so, making very limited changes. Mr. O'Brien's paper is attached:

http://jpp.whs.mil/Public/docs/03_Topic-Areas/02-Article_120/20140919/23_Art120_ImplementationChallenge_Obrien_20140919.pdf

Ron White (former Highly Qualified Expert, Army Trial Defense Service): Mr. White's paper, linked below, states that Congress did not intend to make the defenses of consent or mistake of fact unavailable; they are supported in case law and it is of no effect whether they are mentioned in the statute:

http://jpp.whs.mil/Public/docs/03_Topic-Areas/02-Article_120/20140919/26_TheRedemptiveRole_White.pdf

**ARTICLE 120, UCMJ, SUBCOMMITTEE
ISSUES FOR SUBCOMMITTEE CONSIDERATION**

Professor Vanlandingham (Sep TR at 50-51): California allows the defense of consent and reasonable mistake of fact as to consent in very limited factual circumstances, but the accused must choose one; he is not allowed to offer both defenses. This may be an option the military should consider.

Teresa Scalzo (Navy Civilian Highly Qualified Expert-Prosecutor)(Sep TR at 11-13; 52-53): Even if we removed these defenses, I think juries would still look to see if the facts supported reasonable doubt in their minds; I don't think removing these defenses would have any impact on the number of convictions.

**ARTICLE 120, UCMJ, SUBCOMMITTEE
ISSUES FOR SUBCOMMITTEE CONSIDERATION**

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

-the Benchbook instructions address this phrase as follows: "incapable of consenting to the sexual conduct due to impairment by a drug, intoxicant, or other similar substance, or due to a mental disease or defect or physical disability."

-consider *United States v. Torres*, 2014 CCA Lexis 614 (N.M.Ct.Crim.App. 2014)(evidence regarding victim's being incapable of consenting found to be factually sufficient in judge alone trial when judge applied his own knowledge of the ways of the world and human experience to conclude the victim was incapable of consenting). This case is linked below:

<http://www.jag.navy.mil/courts/documents/archive/2014/TORRES-201300396-UNPUB.pdf>

Previous Presenters who spoke to this issue:

Teresa Scalzo (Navy Civilian Highly Qualified Expert-Prosecutor)(Sep TR at 11-13; 20) We do struggle with the definition of “incapable of consenting.” We know that consent must be given by a "competent person," but the law provides no further guidance beyond this; forensic toxicologists called as witnesses disagree over what it means; the definition should be about the capacity to process information, the ability to recognize consequences of the action, the ability to recognize the action itself, the ability to recognize alternatives. So, much like we do with medical care where we look at, “Do they recognize alternatives? Do they understand that they can decline? Do they understand what the end result is?”

Professor Schulhofer: Noted the phrase "incapable of consenting" is conclusory and meaningless. For instance, when is a person incapable? What is the test? He noted civilian courts have worked with similar language and managed convictions from time to time, but the ambiguity impedes the law’s ability to communicate a normative message and may inhibit prosecution of deserving cases. The criteria of incapacity must be defined.

Professor Vanlandingham (Sep TR at 16-19): the definition of “incapable of consenting” needs to be clarified.

LTC Alex Pickands, USA (Trial Counsel)(Sep TR at 59-60; 76): We need a definition of "incapable of consenting;" most state statutes set the bar high, as someone who is physically helpless or unable to understand or perceive what's happening to them, much less form and communicate a decision; something on the order of somebody who's substantially impaired, or significantly impaired by consumption of alcohol or an intoxicant would address the ability for that condition to be observed by others and proven at trial.

LtCol Chris Thielmann, USMC (TC) (Sep TR at 62-66; 76-77): As a judge, I had to pull instructions on this issue from other offenses like Art. 111 (drunken or reckless operation of a vehicle); a definition in the Manual for Courts Martial or the Benchbook instructions could provide a non-exhaustive laundry list of examples, which would aid judges, practitioners and juries.

**ARTICLE 120, UCMJ, SUBCOMMITTEE
ISSUES FOR SUBCOMMITTEE CONSIDERATION**

Maj Mark Rosenow, USAF (TC) (Sep TR at 78-79): This issue in Air Force cases is typically a battle of toxicologists giving an opinion on the victim's blood-alcohol content and impairment.

LtCol Julie Pitvorec, USAF (DC) (Sep TR at 97- 98): We need clear definitions of “incapable of consenting,” impairment, constructive force and bodily harm.

Maj Frank Kostik, USA (DC) (Sep TR at 102-107): We need a definition of "incapable of consenting."

LTC John Kiel, USA (Army Criminal Law Division)(Sep TR at 218): We need to define “impairment” and give a further definition of “incapable of consenting.”

**ARTICLE 120, UCMJ, SUBCOMMITTEE
ISSUES FOR SUBCOMMITTEE CONSIDERATION**

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

Previous Presenters who spoke to this issue:

Professor Schulhofer: Professor Schulhofer noted that Article 120(a)(5), which criminalizes committing a sexual act by administering a drug or intoxicant to the victim and thereby substantially impairing the victim, may be overbroad as presently written; he recommends further requiring the government to prove the accused *intentionally* used a drug or intoxicant for the purpose of impairing the victim's capacity to consent. His comments on this issue are on page 2 of the link:

http://jpp.whs.mil/Public/docs/03_Topic-Areas/02-Article_120/20140807/17_201408_Schulhofer_Art120_UCMJ_Comments_Redacted.pdf

**ARTICLE 120, UCMJ, SUBCOMMITTEE
ISSUES FOR SUBCOMMITTEE CONSIDERATION**

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

-Bodily harm defined: "any offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact." Military Judges' Benchbook at 474.

Previous Presenters who spoke to this issue:

LtCol Julie Pitvorec, USAF (DC) (Sep TR at 121-123): There is just no real definition of "bodily harm" that actually lends itself to be easily defended when it is used in terms of incapacitation or with alcohol. It is used in various different ways. And because of that, it is hard to articulate what exactly "bodily harm" means. So the term "bodily harm" needs to have a definition that is actually workable. This can be done by Executive Order in the Manual for Courts-Martial or it can be handled in the Benchbook instructions.

Professor Schulhofer: Professor Schulhofer noted that the concept of "bodily harm" is confusing as used in several places in Article 120 and should be more clearly defined; 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 of "physical pain, illness or any impairment of physical condition." His comments on bodily harm are set forth on pages 2-4 of the attached:

http://jpp.whs.mil/Public/docs/03_Topic-Areas/02-Article_120/20140807/17_201408_Schulhofer_Art120_UCMJ_Comments_Redacted.pdf

**ARTICLE 120, UCMJ, SUBCOMMITTEE
ISSUES FOR SUBCOMMITTEE CONSIDERATION**

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

-*Threatening or placing that other person in fear* is defined as "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." Military Judges' Benchbook, at 474 (page numbers in the benchbook are located on the lower left side of the page), at link:

http://jpp.whs.mil/Public/docs/03_Topic-Areas/02_Article_120/20140807/12_Benchbook_Excerpt.pdf

Previous Presenters who spoke to this issue:

LTC Alex Pickands, USA (Sep TR at 58-59): The definition would arguably not cover the situation in which a senior observes a deficiency in a subordinate and is within his authority to report it, but he tells a victim he will not report it in exchange for sexual favors. The contemplated action in reporting a deficiency is not a wrongful action.

Col Mike Lewis, USAF (Sep TR at 210-214): The Air Force had a case in which the accused was convicted of Article 120 for placing the victim in fear. *U.S. v. Walker*, 2014 CCA LEXIS 306 (A.F.C.A.A. 2014). But *Walker* was tried under the 2007 version of Article 120.

Capt Robert Crow, USN (Navy Criminal Law Division)(Sep TR at 215-17; 226-30): We can prosecute this misconduct under the current framework. The Navy recently had a conviction using an implied threat theory. *U.S. v. Wylie*, No. 20120008 (N.M.Ct.Crim.App. 2012). Accused pled guilty to rape in violation of Article 120, for creating an implied threat to negatively affect the victim's career. The case is linked below:

<http://www.jag.navy.mil/courts/documents/archive/2012/WYLIE-201200088-UNPUB.pdf>

Professor Schulhofer: Noted this term is either too ambiguous or too narrow in its application to an officer or NCO who seeks 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. He recommends it be clarified and these types of scenarios be treated as a coercive sexual crime. See link at page 3:

http://jpp.whs.mil/Public/docs/03_Topic-Areas/02-Article_120/20140807/17_201408_Schulhofer_Art120_UCMJ_Comments_Redacted.pdf

**ARTICLE 120, UCMJ, SUBCOMMITTEE
ISSUES FOR SUBCOMMITTEE CONSIDERATION**

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

Previous Presenters who spoke to this issue:

Professor Lisa Schenck: Recommends 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. See link at 452-53:

http://jpp.whs.mil/Public/docs/03_Topic-Areas/02-Article_120/20140807/11_SexOffenses_Under_MilitaryLaw_Schenck_2014.pdf

Colonel Gary Jackson, USAF: Similar to Professor Schenck, he recommends redefining the phrase "threatening or placing that other person in fear," found under the definition section of Article 120(a), from an objective standard of reasonableness to a subjective standard of actual/honest fear. Currently to constitute a threat that would support a rape or sexual assault committed by a threat or placement of an alleged victim in fear, the alleged victim's fear must be both honest (subjective) and reasonable (objective). 18 U.S.C §2241 and 18 U.S.C. §2242, statutes upon which our current rape and sexual assault laws are based, only require the alleged victim's fear be actual/honest. See attached link at pages 1-2.

http://jpp.whs.mil/Public/docs/03_Topic-Areas/02-Article_120/20140807/18_201408_Jackson_Art120_UCMJ_Comments_Redacted.pdf

**ARTICLE 120, UCMJ, SUBCOMMITTEE
ISSUES FOR SUBCOMMITTEE CONSIDERATION**

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

-*Force* defined: "(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 alleged victim." Benchbook at 474.

-*Unlawful force* defined: "means an act of force done without legal justification or excuse." MJBB at 474

Previous Presenters who spoke to this issue:

LtCol Julie Pitvorec, USAF (DC) (Sep TR at 121-123): The use of the term "constructive force" should be clarified.

Jim Clark: Notes that the concept of "unlawful force" in the present version of Article 120 is not defined clearly enough. He suggests modification to the Manual for Courts-Martial through Executive action. See link at page 3:

http://jpp.whs.mil/Public/docs/03_Topic-Areas/02-Article_120/20140807/07_Art120_UCMJ_Crimes_Defenses_Analysis_Clark_2012.pdf

Professor Schenck: Recommends modifying the definition of force to include situations in which the accused suggests he/she has possession of a weapon; at this time the definition only covers situations in which a weapon is actually used. See link at pages 451-52:

http://jpp.whs.mil/Public/docs/03_Topic-Areas/02-Article_120/20140807/11_SexOffenses_Under_MilitaryLaw_Schenck_2014.pdf

Professor Schulhofer: Noted, "I do not know all the reasons why prevention and prosecution of sexual crimes in the military are thought to be inadequate, but I would be very surprised if the current awkwardness of Article 120 is not among them, even with respect to situations that it technically can be read to cover. The shift from the old, force-based concept of sexual offenses to a concept centered on the absence of consent is fundamental, and efforts to patch it on to an existing force-based framework inevitably leads to cumbersome drafting and poor communication to non-lawyer audiences." See attached link at page 5:

http://jpp.whs.mil/Public/docs/03_Topic-Areas/02-Article_120/20140807/17_201408_Schulhofer_Art120_UCMJ_Comments_Redacted.pdf

**ARTICLE 120, UCMJ, SUBCOMMITTEE
ISSUES FOR SUBCOMMITTEE CONSIDERATION**

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

Sexual act defined: "(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.

Sexual contact defined: "(A) touching, or causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, or degrade any person; or (B) any touching, or causing another person to touch, either directly or through the clothing, any body part of any person, if done with an intent to arouse or gratify the sexual desire of any person. Touching may be accomplished by any part of the body."

-consider *United States v. Schloff*, Misc. No. 20140708 (A. Ct. Crim. App. Dec. 16, 2014) (unpublished opinion)(touching with stethoscope found to state offense of sexual contact).
Opinion linked below:

[https://www.jagcnet.army.mil/Portals/Files/ACCAOther.nsf/MOD/BA24E6F27A8FE7F085257DB10072DFC3/\\$FILE/MO%20-%20Schloff.pdf](https://www.jagcnet.army.mil/Portals/Files/ACCAOther.nsf/MOD/BA24E6F27A8FE7F085257DB10072DFC3/$FILE/MO%20-%20Schloff.pdf)

Previous Presenters who spoke to this issue:

Maj Frank Kostik, USA (DC) (Sep TR at 102-107): The definition of "sexual act" should be amended to reflect the federal statute, specifically with reference to penetration of the mouth by any body part.

Teresa Scalzo: (Sep TR at 47-49): The definition of sexual contact at this time does not include objects like a stethoscope. (The *Schloff* opinion was unpublished and accordingly does not serve as precedent).

LTC John Kiel, USA (Sep TR at 217-19): The definition of sexual contact needs to be amended to cover the use of an object.

Capt. Robert Crow, USN (Sep TR at 230-31): Agrees with LTC Kiel.

**ARTICLE 120, UCMJ, SUBCOMMITTEE
ISSUES FOR SUBCOMMITTEE CONSIDERATION**

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

-In a prosecution for sexual assault or abusive sexual contact, in which the government proceeds under a theory that the victim is incapable of consenting due to impairment by substance or mental disease or defect or physical disability, the government must also prove the accused knew or reasonably should have known of the victim's condition.

Previous Presenters who spoke to this issue:

Professor Schenck: Recommends deleting this requirement and returning to the 2007 version that required only that a victim be substantially incapacitated or substantially incapable of— (A) appraising the nature of the sexual act; (B) declining participating in the sexual act; or (C) communicating unwillingness to engage in the sexual act. See link at pages 453-54:

http://jpp.whs.mil/Public/docs/03_Topic-Areas/02-Article_120/20140807/11_SexOffenses_Under_MilitaryLaw_Schenck_2014.pdf

Colonel Gary Jackson, USAF: Similar to Professor Schenck, he recommends modifying Article 120(b)(2) and Article 120(b)(3) by eliminating the requirement that the Accused must know or reasonably should know the alleged victim was asleep, unconscious, unaware that the sexual act was occurring or otherwise incapable of consenting to the sexual act due to alcohol/drug impairment or a mental/physical defect. 18 U.S.C. §2242, the law upon which Article 120(b)(2) and Article 120(b)(3) are based, does not have this extra mens rea requirement. This extra mens rea requirement in Article 120(b)(2) and Article 120(b)(3) give the military accused more rights to which he is entitled on this issue and place an additional burden on the alleged victim and the prosecution. See attached link at page 2:

http://jpp.whs.mil/Public/docs/03_Topic-Areas/02-Article_120/20140807/18_201408_Jackson_Art120_UCMJ_Comments_Redacted.pdf

**ARTICLE 120, UCMJ, SUBCOMMITTEE
ISSUES FOR SUBCOMMITTEE CONSIDERATION**

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

-Indecent act was an enumerated offense under Article 134 under the old and the 2007 version of the UCMJ.

Previous Presenters who spoke to this issue:

LTC Alex Pickands, USA (Sep TR at 60-61): We used to have a specifically enumerated offense for indecent acts, but we don't now. We should have it put back into the UCMJ as a separate, specifically enumerated offense.

Professor Schenck: Recommends adding indecent acts back into Article 120. See link at pages 448-51:

http://jpp.whs.mil/Public/docs/03_Topic-Areas/02-Article_120/20140807/11_SexOffenses_Under_MilitaryLaw_Schenck_2014.pdf