3–45. PREFACE TO ARTICLE 120 INSTRUCTIONS

Changes effective 28 June 2012

The National Defense Authorization Act for Fiscal Year 2012 (112 Pub. L. No. 112-81, § 541, 125 Stat. 1298 (2011)) added new articles to the Uniform Code of Military Justice regarding sexual misconduct occurring on and after 28 June 2012. Article 120 now contains only adult sexual assaults (in four different types), while Articles 120b and 120c contain sexual assaults against children and other miscellaneous sexual misconduct, respectively. This preface seeks to conceptualize these changes to make them easier to understand.

Article 120 uses several key terms, which are not defined the same as they were in the October 2007 version of Article 120, nor in the pre-2007 version of Article 120. Understanding these definitions is crucial to understanding how the 28 June 2012 Article 120 is constructed.

"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.

"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.

Touching may be accomplished by any part of the body.

"Bodily harm"means any offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact.

"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.

"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.

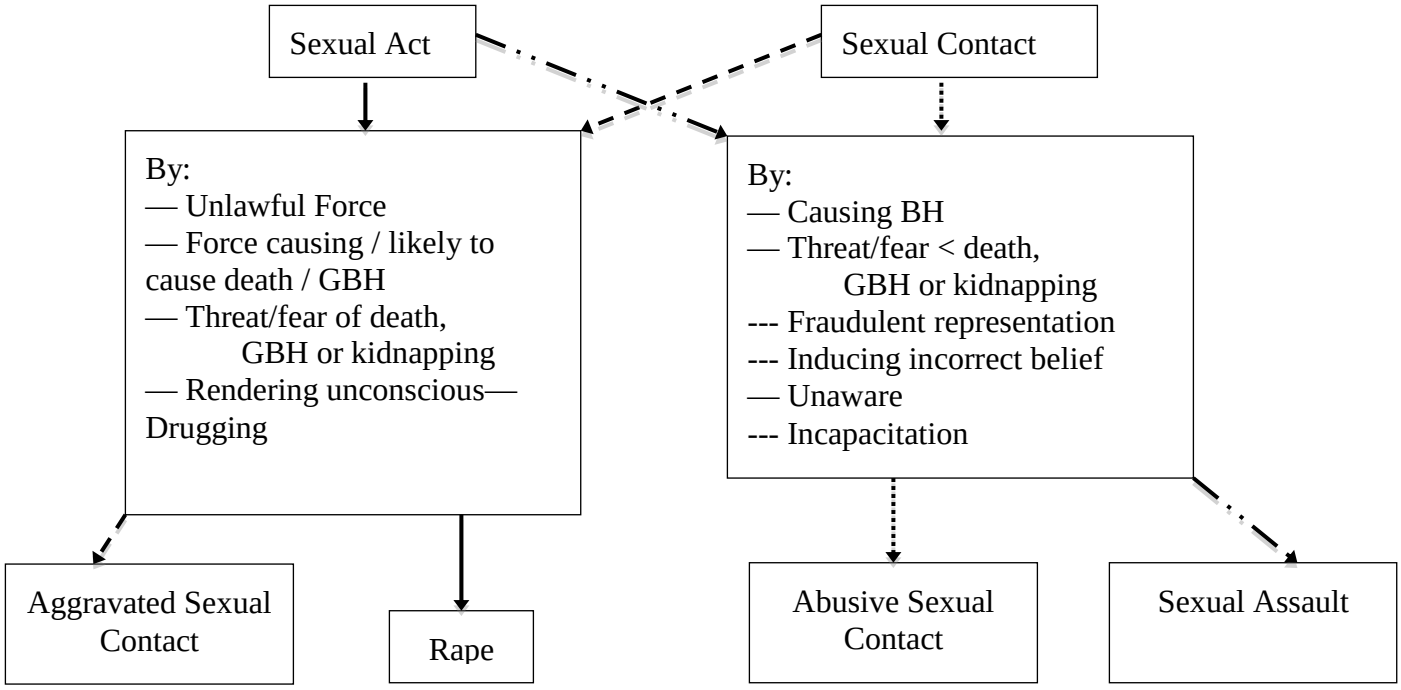
The version of Article 120 effective 28 June 2012 does not further define the term "weapon."

"Unlawful force" means an act of force done without legal justification or excuse.

"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.

Article 120 categorizes offenses by whether the accused engaged in a "sexual act" or "sexual contact," and then the means the accused used to accomplished the sexual act or sexual contact. The chart below graphically represents the four Article 120 offenses effective 28 June 2012. For example, "rape" is a "sexual act" committed by certain means or in a certain manner. "Sexual contact" committed by the same means/in the same manner as the "sexual act" in rape would be "aggravated sexual contact." Likewise, "sexual assault" is a "sexual act" committed by different means/in a different manner than rape. "Sexual contact" committed by the same means/in the same manner as sexual assault would be "abusive sexual contact."

Neither this explanation, nor the chart below, should be relied upon for the elements of any offense under the version of Article 120 effective 28 June 2012. Careful review of the elements of each offense in the instructions that follow this preface is recommended. Until additional clarification is available, it is the responsibility of each trial judge to understand and correctly implement the new provisions.



Article 120b (effective 28 June 2012)

Article 120b contains the three sexual offenses applicable to children and uses several definitions common with the version of Article 120 effective 28 June 2012. As with the 28 June 2012 version of Article 120, some terms used in the October 2007 version of Article 120 have different definitions under the 28 June 2012 version of Article 120b. Understanding these definitions is crucial to understanding how the 28 June 2012 Article 120b is constructed.

The terms **"sexual act"** and **"sexual contact"** have the same definitions under Article 120b as they do under the 28 June 2012 version of Article 120.

"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 child; or

(C) inflicting physical harm.

In the case of a parent-child or similar relationship, the use or abuse of parental or similar authority is sufficient to constitute the use of force.

Article 120b does not further define the term "weapon."

"Threatening or placing that child in fear" means a communication or action that is of sufficient consequence to cause the child to fear that non-compliance will result in the child or another person being subjected to the action contemplated by the communication or action.

"Child" means any person who has not attained the age of 16 years.

"Lewd act" means:

(A) any sexual contact with a child;

(B) intentionally exposing one's genitalia, anus, buttocks, or female areola or nipple to a child by any means, including via any communication technology, with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person;

(C) intentionally communicating indecent language to a child by any means, including via any communication technology, with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person; or

(D) any indecent conduct, intentionally done with or in the presence of a child, including via any communication technology, that amounts to a form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.

Article 120b defines "sexual assault of a child" as any "sexual act" upon a child who has attained the age of 12 years under circumstances not amounting to "rape of a child." Article 120b defines "rape of child" as any "sexual act" upon a child who has not attained the age of 12 years, and a "sexual act" upon a child who has attained the age of 12 years, under certain aggravating conditions. "Lewd Act" with a child is considered "sexual abuse of a child."

This explanation should not be relied upon for the elements of any offense under Article 120b. Careful review of the elements of each offense in the instructions that follow this preface is recommended. Until additional clarification is available, it is the responsibility of each trial judge to understand and correctly implement the new provisions.

Article 120 Instructions (effective 1 October 2007 - 27 June 2012)

The National Defense Authorization Act for Fiscal Year 2006 (109 Pub. L. No. 109-163, § 552, 119 Stat. 3136 (2006)) enacted sweeping changes to the Uniform Code of Military Justice regarding sexual misconduct occurring on and after 1 October 2007. This version of Article 120 encompasses what previously were offenses under a number of different UCMJ provisions, including Article 134. This preface seeks to conceptualize these changes to make them easier to understand.

October 2007 Article 120 uses several common definitions, which are not the same as those which applied to the offenses this version of Article 120 replaces. Understanding these definitions is crucial to understanding how this version of Article 120 is constructed.

"Sexual act" means:

(A) contact between the penis and the vulva, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight; or

(B) the penetration, however slight, of the genital opening of another by a hand or finger 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 the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of another person, or intentionally 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 to arouse or gratify the sexual desire of any person.

"Grievous bodily harm" means serious bodily injury. It does not include minor injuries such as a black eye or a bloody nose, but it does include fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other severe bodily injuries. It is the same level of injury as in Article 128, UCMJ, and a lesser degree of bodily injury than that involving a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

"Force" means action to compel submission of another or to overcome or prevent another's resistance by:

(A) the use or display of a dangerous weapon or object;

(B) the suggestion of possession of a dangerous weapon or object that is used in a manner to cause another to believe it is a dangerous weapon or object; or

(C) physical violence, strength, power, or restraint applied to another person, sufficient that the other person could not avoid or escape the sexual conduct.

"Dangerous weapon or object" means:

(A) any firearm, loaded or not, and whether operable or not;

(B) any other weapon, device, instrument, material, or substance, whether animate or inanimate, that in the manner it is used, or is intended to be used, is known to be capable of producing death or grievous bodily harm; or

(C) any object fashioned or utilized in such a manner as to lead the victim under the circumstances to reasonably believe it to be capable of producing death or grievous bodily harm.

"Threatening or placing that other person in fear" (for rape and aggravated sexual contact) 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 death, grievous bodily harm, or kidnapping.

"Threatening or placing that other person in fear" (for aggravated sexual assault and abusive sexual contact) 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 a lesser degree of harm than death, grievous bodily harm, or kidnapping. Such lesser degree of harm includes:

(A) physical injury to another person or to another person's property; or

(B) a threat:

(i) to accuse any person of a crime;

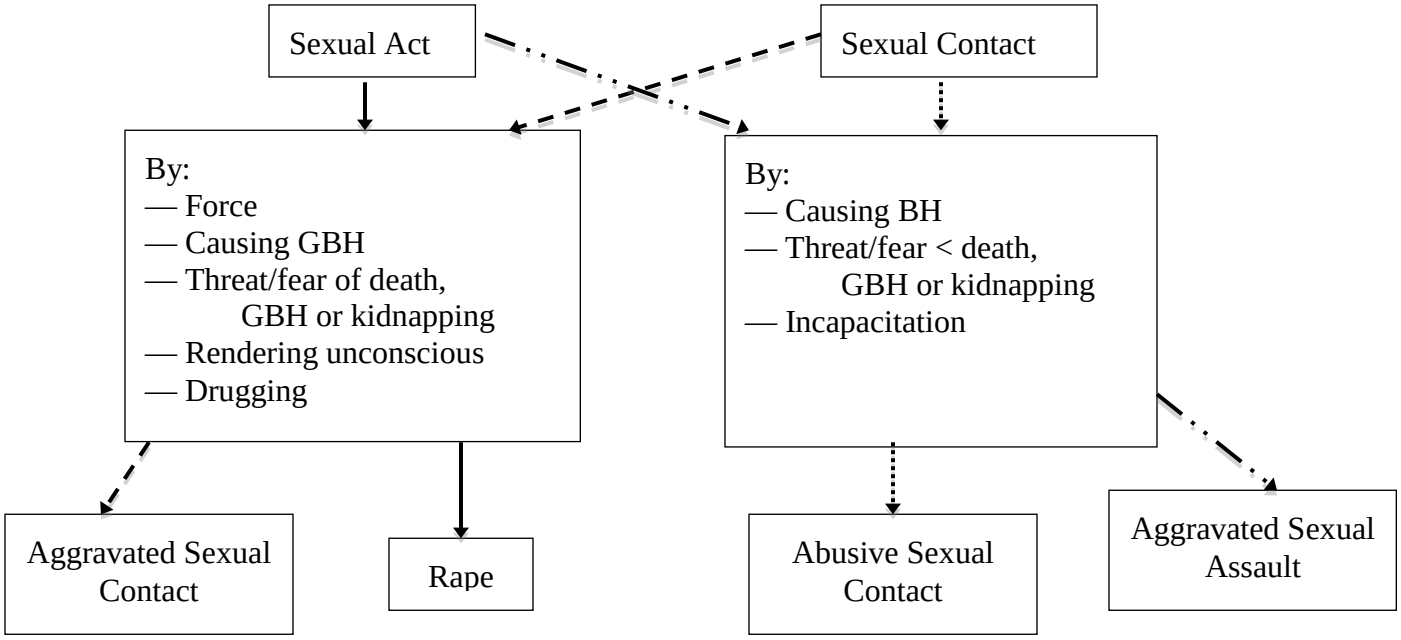
(ii) to expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or

(iii) 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.

"Bodily harm" means any offensive touching of another, however slight.

October 2007 Article 120 defines some offenses by whether the accused engaged in a "sexual act" or "sexual contact," and then the means by which the accused accomplished the sexual act or sexual contact. The chart below graphically represents the definitions of certain October 2007 Article 120 offenses. For example, "rape" is a "sexual act" committed by certain means or in a certain manner. "Sexual contact" committed by the same means/in the same manner as the sexual act in rape would be "aggravated sexual contact." Likewise, "aggravated sexual assault" is a "sexual act" committed by different means/in a different manner than rape. "Sexual contact" committed by the same means/in the same manner as aggravated sexual assault would be "abusive sexual contact."

Neither this explanation, nor the chart below, should be relied upon for the elements of any offense. They do not cover all October 2007 Article 120 offenses. Careful review of the elements of each offense in the instructions that follow this preface is recommended. Until additional clarification is available, it is the responsibility of each trial judge to understand and correctly implement the new provisions.



3–45–13. RAPE (ARTICLE 120)

NOTE 1: Applicability of this instruction. Use this instruction for offenses occurring on and after 28 June 2012.

a. MAXIMUM PUNISHMENT: DD, TF, life without eligibility for parole, E-1. A dishonorable discharge or a dismissal is a mandatory minimum sentence for rape occurring on or after 24 June 2014.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, commit (a) sexual act(s) upon _____, to wit: _____, by [unlawful force, to wit: _____] [force causing or likely to cause death or grievous bodily harm to (him/her) (_____), to wit: (broken leg) (deep cut) (fractured skull) (_____)] [threatening or placing him/her in fear that (he/she) (_____) would be subjected to (death) (grievous bodily harm) (kidnapping)] [first rendering him/her unconscious] [administering to him/her a drug, intoxicant, or other similar substance (by force) (by threat of force) (without his/her knowledge or consent), thereby substantially impairing his/her ability to appraise or control his/her conduct].

c. ELEMENTS:

(1) That (state the time and place alleged), the accused committed (a) sexual act(s) upon (state name of the alleged victim), to wit: (state the act(s) alleged); and

(2) That the accused did so by

(a) using unlawful force against (state the name of the alleged victim), to wit: (state the force alleged).

(b) using force causing or likely to cause death or grievous bodily harm to (state the name of the person alleged), to wit: (state the force alleged).

(c) threatening or placing (state the name of the alleged victim) in fear that (state the name of the person alleged) would be subjected to (death) (or) (grievous bodily harm) (or) (kidnapping).

(d) first rendering (state the name of the alleged victim) unconscious.

(e) administering to (state the name of the alleged victim) a drug, intoxicant, or other similar substance (by force) (or) (by threat of force) (or) (without the knowledge or consent of (state the name of the

alleged victim)), thereby substantially impairing the ability of (state the name of the alleged victim) to appraise or control his/her conduct.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Sexual act" means the penetration, however slight, of the vulva or anus or mouth of another (by the penis) (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).

NOTE 2: Lack of penetration in issue. If lack of penetration is in issue, the military judge should further define what is meant by the "vulva." The instruction below may be helpful.

The "vulva" is the external genital organs of the female, including the entrance of the vagina and the labia majora and labia minora. "Labia" is the Latin and medically correct term for "lips."

NOTE 3: Marriage. Marriage is not a defense for any conduct in issue in any prosecution under Article 120.

NOTE 4: By unlawful force. When the sexual act is alleged by unlawful force, include the following instruction:

"Unlawful force" means an act of force done without legal justification or excuse.

"Force" means the use of a weapon; the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or inflicting physical harm sufficient to coerce or compel submission by the alleged victim.

NOTE 5: By force causing or likely to cause death or grievous bodily harm. When the sexual act is alleged by force causing or likely to cause death or grievous bodily harm, include the following instruction:

"Force" means the use of a weapon; the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or inflicting physical harm sufficient to coerce or compel submission by the alleged victim.

"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.

(The force causing or likely to cause death or grievous bodily harm which caused the alleged victim to engage in the sexual act need not have been applied by the accused to the alleged victim. It is sufficient if the accused applied such force to any person, which thereby caused the alleged victim to engage in the sexual act.)

NOTE 6: By threat or placing in fear. When the sexual act is alleged by threat or by placing in fear, include the following instruction:

"Threatening or placing a 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 alleged victim or another person being subjected to the wrongful action contemplated by the communication or action.

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.

("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.)

("Kidnapping" means the unlawful and intentional detention of a person against that person's will. The detention must be more than a momentary restraint on the person's freedom of movement. Although kidnapping often involves physical restraint, physical restraint is not required for kidnapping. (If the subject of the threat to kidnap is incapable of having a recognizable will, as in the case of a very young child or a mentally incompetent person, the holding must be against the will of the subject's parents or legal guardian.))

(The person to be (killed) (subjected to grievous bodily harm) (kidnapped) need not be the alleged victim. It is sufficient if the accused threatened or placed the alleged victim in fear that any person would be (killed) (subjected to grievous bodily harm) (kidnapped), which thereby caused the alleged victim to engage in the sexual act.)

NOTE 7: Lack of consent as an element. Lack of consent to administration is an element when the accused is charged with rape by administering a drug, intoxicant or similar substance without the consent of the alleged victim. Lack of consent is not an element when the accused is charged with rape by any other method (to include when the accused is charged with administering a drug, intoxicant or similar substance by force or by threat of force). See United States v. Neal, 68 MJ 289, 302-304 (CAAF 2010) (statutory definition of "force" does not imply an element of lack of consent). Accordingly, the military judge should give the following instruction ONLY when the accused is charged with rape by administering a drug, intoxicant or similar substance without the consent of the alleged victim.

As I previously advised you, in (The) Specification(s) (_____) of (The) (Additional) Charge (___), the accused is charged with the offense of rape by administering a drug, intoxicant, or other similar substance without the consent of the alleged victim, thereby substantially impairing the ability of that other person to appraise or control conduct. For this offense, lack of consent to the administration of the drug, intoxicant, or other similar substance is an element of the offense.

"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 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.

(A sleeping, unconscious, or incompetent person cannot consent to the administration of a drug, intoxicant, or other similar substance.)

(A person cannot consent to the administration of a drug, intoxicant, or other similar substance by force causing or likely to cause death or grievous bodily harm.)

(A person cannot consent to the administration of a drug, intoxicant, or other similar substance by being rendered unconscious.)

(A person cannot consent to the administration of a drug, intoxicant, or other similar substance while under threat or in fear.)

The prosecution has the burden to prove beyond a reasonable doubt that consent to the administration of the drug, intoxicant, or other similar substance did not exist. Therefore, to find the accused guilty of the offense(s) of rape, as alleged in (the) Specification(s) (___) of (the) (Additional) Charge (___), you must be convinced beyond a reasonable doubt that, at the time of the administration of the drug, intoxicant, or other similar substance alleged, (state the name of the alleged victim) did not consent to the administration of the drug, intoxicant, or other similar substance alleged.

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.)

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).

NOTE 9: Ignorance or mistake of fact generally. Under the 28 June 2012 version of Article 120, there is no statutory mistake of fact defense. Mistake of fact is a defense in RCM 916(j). Mistake of fact under RCM 916(j) is only a defense when it negates an element. When the element goes to premeditation, specific intent, willfulness or knowledge of a particular fact, the mistake must only be honest. When the element requires only general intent or knowledge, the mistake must be honest and reasonable. When the accused's intent or knowledge is immaterial to an element (that is, strict liability), mistake of fact is not a defense.

Accordingly, the military judge must first determine the elements of an offense. Second, the military judge must determine whether the evidence has reasonably raised the accused's mistake which negates an element. Finally, the military judge must determine into which of the above three categories that element falls.

Strict liability offenses are "disfavored." Absent some indication Congress intended to impose strict liability (and the starting point for determining intent is statutory construction), courts have applied a "presumption" of mens rea to criminal offenses. Silence by Congress regarding mens rea for the offense generally does not alone suggest Congress intended strict liability. See, generally, US v. Zachary, 61 MJ 813 (ACCA, 2005), affirmed 63 MJ 438 (CAAF 2006); Staples v. US, 511 US 600 (1994); Liparota v. US, 471 US 419 (1994); and (for a good general discussion of this topic) US v. Burwell, 690 F3d 500 (DC Cir., 2012) (Kavanagh, J., dissenting).

RCM 916(j) has been interpreted to apply not only to situations where, if the facts were as the accused mistakenly believed them, the accused would be absolved of all criminal liability, but also to situations where the accused would be absolved of criminal liability for the charged offense, but not necessarily for a lesser-included offense. See Zachary, supra.

While commonly encountered ignorance or mistake of fact instructions are below, these are not exclusive. The military judge must carefully follow the analytical methodology above to determine if mistake of fact may be applicable in other situations. In those situations, the military judge should use appropriately tailored versions of Instructions 5-11-1 or 5-11-2.

NOTE 10: Mistake of fact as to knowledge of or consent to the administration of a drug, intoxicant, or other substance.

The evidence has raised the issue of (mistake of fact) in relation to the offenses(s) of (state the alleged offense(s)). There has been (evidence) (testimony) tending to show that, at the time of the alleged offenses(s), the accused mistakenly believed that (state the name of the victim) (knew of) (consented to) the administration of the drug, intoxicant, or other similar substance alleged concerning the offense(s) alleged in (the) specification(s) of the (additional) Charge(s).

Mistake of fact is a defense to (that) (those) charged offense(s). "Mistake of fact" means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person (knew of) (consented to) administration of the drug, intoxicant, or other similar substance as alleged. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable, the ignorance or mistake must have been based on information, or lack of it, that would indicate to a reasonable person that the other person (knew of) (consented to) the administration. (Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts. "Negligence" is the absence of due care. "Due care" is what a reasonably careful person would do under the same or similar circumstances.)

You should consider the inherent probability or improbability of the evidence presented on this matter. You should consider the accused's (age) (education) (experience) (_____), along with the other evidence in this case (including, but not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

The burden is on the prosecution to establish the guilt of the accused. If you are satisfied beyond a reasonable doubt that the accused was not under the mistaken belief that the other person (knew of) (consented to)

administration of the drug, intoxicant, or other similar substance as alleged, then the defense of mistake does not exist. Even if you conclude that the accused was under the mistaken belief that the other person (knew of) (consented to) administration of the drug, intoxicant, or other similar substance as alleged, if you are convinced beyond a reasonable doubt that, at the time of the charged offense(s), the accused's mistake was unreasonable, the defense of mistake does not exist.

NOTE 11: Voluntary intoxication and mistake of fact as to knowledge of or consent to the administration of a drug, intoxicant, or other substance. If there is evidence of the accused's voluntary intoxication, the following instruction is appropriate:

There has been some evidence concerning the accused's state of intoxication at the time of the alleged offense. On the question of whether the accused's (ignorance) (belief) was reasonable, you may not consider the accused's intoxication, if any, because a reasonable (ignorance) (belief) is one that an ordinary, prudent, sober adult would have under the circumstances of this case. Voluntary intoxication does not permit what would be an unreasonable (ignorance) (belief) in the mind of a sober person to be considered reasonable because the person is intoxicated.

NOTE 12: Mistake of fact as to consent to the sexual conduct. When the evidence has reasonably raised mistake of fact as to consent to the sexual conduct, include the following instruction on honest and reasonable mistake of fact as to consent. (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.) If instructing on an attempted offense, the honest mistake of fact instruction in Instruction 5-11-1 should be given instead of this instruction. The burden of proof in the instruction below is taken from RCM 916(b)(1). The military judge should state on the record that he/she will not instruct on the burden of proof as provided in RCM 916(b)(4), as that burden has been held to be a "legal impossibility" and the statutory language upon which RCM 916(b)(4) was based has now been repealed for offenses occurring on or after 28 June 2012. See United States v. Prather, 69 MJ 338 (CAAF 2011).

The evidence has raised the issue of mistake on the part of the accused whether (state the name of the alleged victim) consented to the sexual conduct alleged concerning the offense(s) of (state the alleged

offense(s)), as alleged in (the) Specification(s) (___) of (the) (Additional) Charge (___).

Mistake of fact as to consent is a defense to (that) (those) charged offense(s). "Mistake of fact as to consent" means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person engaging in the charged sexual conduct consented to (all) that sexual conduct. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable the ignorance or mistake must have been based on information, or lack of it, that would indicate to a reasonable person that the other person consented. (Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts. "Negligence" is the absence of due care. "Due care" is what a reasonably careful person would do under the same or similar circumstances.)

You should consider the accused's (age) (education) (experience) (_____) along with the other evidence on this issue, (including, but not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

The prosecution has the burden of proving beyond a reasonable doubt that the accused did not reasonably believe that (state the name of the alleged victim) consented to the charged sexual conduct. If you are convinced beyond a reasonable doubt, at the time of the charged offense(s), the accused did not believe that the alleged victim consented to the sexual conduct alleged, the defense does not exist. Furthermore, even if you conclude the accused was under a mistaken belief that the alleged victim consented to the sexual conduct alleged, if you are convinced beyond a reasonable doubt that at the time of the charged offense(s) the accused's mistake was unreasonable, the defense does not exist.

NOTE 13: Voluntary intoxication and mistake of fact as to consent to the sexual conduct. If there is evidence of the accused's voluntary intoxication, the following instruction is appropriate:

> There has been some evidence concerning the accused's state of intoxication at the time of the alleged offense. On the question of whether the accused's (ignorance) (belief) was reasonable, you may not consider the accused's intoxication, if any, because a reasonable (ignorance) (belief) is one that an ordinary, prudent, sober adult would have under the circumstances of this case. Voluntary intoxication does not permit what would be an unreasonable (ignorance) (belief) in the mind of a sober person to be considered reasonable because the person is intoxicated.

NOTE 14: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), Instruction 6-5, Partial Mental Responsibility, Instruction 5-17, Evidence Negating Mens Rea, and Instruction 5-12, Voluntary Intoxication, may be appropriate, as bearing on the issue of intent, if the intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person is in issue.

e. REFERENCES: Definition of "vulva." *See United States v Williams*, 25 MJ 854 (AFCMR 1988) *pet. denied*, 27 MJ 166 (CMA 1988) and *United States v. Tu*, 30 MJ 587 (ACMR 1990).

3–45–14. SEXUAL ASSAULT (ARTICLE 120)

NOTE 1: Applicability of this instruction. Use this instruction for offenses occurring on and after 28 June 2012.

a. MAXIMUM PUNISHMENT: DD, TF, 30 years, E-1. A dishonorable discharge or a dismissal is a mandatory minimum sentence for sexual assault occurring on or after 24 June 2014.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, commit (a) sexual act(s) upon _____, to wit: _____, [by causing bodily harm to him/her, to wit: _____] [by threatening or placing him/her in fear that (state wrongful action that was the subject of threat or fear)] [by making a fraudulent representation that the sexual act(s) served a professional purpose] [by inducing a belief by artifice, pretense, or concealment that the accused was another person] [when the accused knew or reasonably should have known that _____ was (asleep) (unconscious) (otherwise unaware that the sexual act was occurring)] [when _____ was incapable of consenting to the sexual act(s) due to (impairment by a drug, intoxicant, or other similar substance,) (a mental disease or defect, or physical disability,) and that condition was known or reasonably should have been known by the accused].

c. ELEMENTS:

(1) That (state the time and place alleged), the accused committed (a) sexual act(s) upon (state the name of the alleged victim), to wit: (state the act(s) alleged); (and)

[(2)] That the accused did so by

(a) causing bodily harm to (state the name of the alleged victim), to wit: (state the bodily harm alleged).

(b) threatening or placing (state the name of the alleged victim) in fear that (state the threatened wrongful action).

(c) making a fraudulent representation that the sexual act served a professional purpose.

(d) inducing a belief by artifice, pretense, or concealment that the accused was another person.

[(2)] That the accused did so when

(a) he knew or reasonably should have known that (state the name of the person alleged) was (asleep) (or) (unconscious) (or) (otherwise unaware that the sexual act was occurring).

(b) (state the name of the alleged victim) was incapable of consenting to the sexual act(s) due to (impairment by a drug, intoxicant, or other similar substance,) (a mental disease or defect, or physical disability,) and that condition was known or reasonably should have been known by the accused.

NOTE 2: Lack of consent as an element. When the same physical act is alleged as both the actus reus and the bodily harm for the charged sexual assault, include this as a final element:

[(3)] That the accused did so without the consent of (state the name of the alleged victim).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Sexual act" means the penetration, however slight, of the vulva or anus or mouth of another (by the penis) (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).

NOTE 3: Lack of penetration in issue. If lack of penetration is in issue, the military judge should further define what is meant by the "vulva." The instruction below may be helpful.

The "vulva" is the external genital organs of the female, including the entrance of the vagina and the labia majora and labia minora. "Labia" is the Latin and medically correct term for "lips."

NOTE 4: Marriage. Marriage is not a defense for any conduct in issue in any prosecution under Article 120.

NOTE 5: By threat or placing in fear. When the sexual act is alleged by threat or by placing in fear, include the following instruction:

"Threatening or placing a 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 alleged victim or another person being subjected to the wrongful action contemplated by the communication or action.

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.

The threat or fear in this case must be that the alleged victim or another person would be subjected to the wrongful action.

NOTE 6: By causing bodily harm. When the sexual act is alleged by causing bodily harm, include the following instruction:

"Bodily harm" means any offensive touching of another, however slight (, including any nonconsensual sexual act or nonconsensual sexual contact).

NOTE 7: Fraudulent representation. When the sexual act is committed by making a fraudulent representation that it serves a professional purpose, the following may be appropriate:

A "fraudulent representation" is a representation of fact, which the accused knows to be untrue, which is intended to deceive, which does in fact deceive, and which causes the other person to engage in the sexual act(s).

(The fraudulent representation that the sexual act served a professional purpose need not have been made by the accused to (state the name of the alleged victim). It is sufficient if the accused made such a fraudulent representation to any person, which thereby caused (state the name of the alleged victim) to engage in the sexual act.)

NOTE 8: Lack of consent as an element. When the same physical act is alleged as both the actus reus and the bodily harm for the charged sexual assault, the government must prove lack of consent as an element. Accordingly, the following instruction should be given:

The government has alleged the accused committed a sexual act, to wit: (state the act(s) alleged) upon (state the name of the alleged victim) and that the same physical act(s) also constitute(s) the bodily harm required for the charged sexual assault. Under these circumstances, the government also has the burden to prove beyond a reasonable doubt

that (state the name of the alleged victim) did not consent to the physical act(s).

"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.

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).

(A sleeping, unconscious, or incompetent person cannot consent to a sexual act.)

(A person cannot consent to a sexual act by force causing or likely to cause death or grievous bodily harm.)

(A person cannot consent to a sexual act by being rendered unconscious.)

(A person cannot consent to a sexual act while under threat or in fear.)

(A person cannot consent to a sexual act when believing, due to a fraudulent representation, that the sexual act served a professional purpose, or when believing, due to artifice, pretense, or concealment that the accused was another person.)

The government has the burden to prove beyond a reasonable doubt that consent to the physical act(s) did not exist. Therefore, to find the accused guilty of the offense(s) of sexual assault, as alleged in (the) specification(s) ( ) of (the) (Additional) Charge ( ), you must be

convinced beyond a reasonable doubt that (state the name of the alleged victim) did not consent to the physical act(s).

Evidence concerning consent to the sexual conduct, if any, 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).

NOTE 9: Evidence of consent. Generally, the elements of an Article 120(b) 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(b)(1)(C) and 120(b)(1)(D), 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.)

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).

NOTE 10: Ignorance or mistake of fact generally. Under the 28 June 2012 version of Article 120, there is no statutory mistake of fact defense. Mistake of fact is a defense in RCM 916(j). Mistake of fact under RCM 916(j) is only a defense when it negates an element. When the element goes to premeditation, specific intent, willfulness or knowledge of a particular fact, the mistake must only be honest. When the element requires only general intent or knowledge, the mistake must be honest and reasonable. When the accused's intent or knowledge is immaterial to an element (that is, strict liability), mistake of fact is not a defense.

Accordingly, the military judge must first determine the elements of an offense. Second, the military judge must determine whether the evidence has reasonably raised the accused's mistake which negates an element. Finally, the military judge must determine into which of the above three categories that element falls.

Strict liability offenses are "disfavored." Absent some indication Congress intended to impose strict liability (and the starting point for determining intent is statutory construction), courts have applied a "presumption" of mens rea to criminal offenses. Silence by Congress regarding mens rea for the offense generally does not alone suggest Congress intended strict liability. See, generally, US v. Zachary, 61 MJ 813 (ACCA, 2005), affirmed 63 MJ 438 (CAAF 2006); Staples v. US, 511 US 600 (1994); Liparota v. US, 471 US 419 (1994); and (for a good general discussion of this topic) US v. Burwell, 690 F3d 500 (DC Cir., 2012) (Kavanagh, J., dissenting).

RCM 916(j) has been interpreted to apply not only to situations where if the facts were as the accused mistakenly believed them the accused would be absolved of all criminal liability, but also to situations where the accused would be absolved of criminal liability for the charged offense, but not necessarily for a lesser-included offense. See Zachary, supra.

While commonly encountered ignorance or mistake of fact instructions are below, these are not exclusive. The military judge must carefully follow the analytical methodology above to determine if mistake of fact may be applicable in other situations. In those situations, the military judge should use appropriately tailored versions of Instructions 5-11-1 or 5-11-2.

NOTE 11: Mistake of fact as to whether the alleged victim was asleep, unconscious, or otherwise unaware / incapable of consenting. When the government has charged both theories of liability ("knew or reasonably should have known"), the mistake of fact must negate BOTH theories to succeed. While mistake as to knowledge must only be honest, mistake as to "reasonably should have known" must be both honest and reasonable. Accordingly, the below instruction is appropriate when both theories of liability are charged. (If only "knew" is charged, tailoring the below to reflect an honest mistake of fact would be appropriate.)

The evidence has raised the issue of (ignorance) (mistake) on the part of the accused concerning (state the name of the alleged victim)'s condition in relation to the offense(s) of (state the alleged offense(s)).

I advised you earlier that to find the accused guilty of the offense(s) of (state the alleged offense(s)), you must find beyond a reasonable doubt that the accused knew or reasonably should have known that (state the name of the alleged victim) was [(asleep) (or) (unconscious) (or) (otherwise unaware that the sexual conduct was occurring)] [(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 or physical disability)].

The accused is not guilty of the offense of sexual assault if:

(1) the accused (did not know that (state the name of the alleged victim) was) (mistakenly believed (state the name of the alleged victim) was not) [(asleep) (or) (unconscious) (or) (otherwise unaware that the sexual conduct was occurring)] [(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 or physical disability)]; and

(2) such (ignorance) (belief) on (his) (her) part was reasonable.

To be reasonable the (ignorance) (belief) must have been based on information, or lack of it, which would indicate to a reasonable person that (state the name of the alleged victim) was not [(asleep) (or) (unconscious) (or) (otherwise unaware that the sexual conduct was occurring)] [(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 or physical disability)].

(Additionally, the (ignorance) (mistake) cannot be based on a negligent failure to discover the true facts. Negligence is the absence of due care. Due care is what a reasonably careful person would do under the same or similar circumstances.)

You should consider the accused's (age) (education) (experience) (_____) along with the other evidence on this issue, (including, but not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

The burden is on the prosecution to establish the accused's guilt. If you are convinced beyond a reasonable doubt that, at the time of the charged offense(s), the accused was not (ignorant of the fact that (state the name of the alleged victim) was) (mistakenly believed (state the name of the alleged victim) was not) [(asleep) (or) (unconscious) (or) (otherwise unaware that the sexual conduct was occurring)] [(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)], the defense of (ignorance) (mistake) does not exist. Even if you conclude that the accused was (ignorant of the fact that ((state the name of the alleged victim) was) (mistakenly believed (state the name of the alleged victim) was not) [(asleep) (or) (unconscious) (or) (otherwise unaware that the sexual conduct was occurring)] [(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 or physical disability)], if you are convinced beyond a reasonable doubt that, at the time of the charged offense(s), the accused's (ignorance) (mistake) was unreasonable, the defense of (ignorance) (mistake) does not exist.

NOTE 12: Voluntary intoxication and mistake of fact as to whether the alleged victim was asleep, unconscious, or otherwise unaware / incapable of consenting. If there is evidence of the accused's voluntary intoxication, the following instruction is appropriate:

There has been some evidence concerning the accused's state of intoxication at the time of the alleged offense. On the question of whether the accused's (ignorance) (belief) was reasonable, you may not consider the accused's intoxication, if any, because a reasonable (ignorance) (belief) is one that an ordinary, prudent, sober adult would

have under the circumstances of this case. Voluntary intoxication does not permit what would be an unreasonable (ignorance) (belief) in the mind of a sober person to be considered reasonable because the person is intoxicated.

NOTE 13: Mistake of fact as to consent in cases involving "bodily harm" (lack of consent is an element).

The evidence has raised the issue of mistake of fact as to consent in relation to the offenses(s) of (state the alleged offense(s)). There has been (evidence) (testimony) tending to show that, at the time of the alleged offenses(s), the accused mistakenly believed that (state the name of the victim) consented to the sexual conduct alleged in (the) specification(s) of the (additional) Charge(s).

Mistake of fact as to consent is a defense to (that)(those) charged offense(s). "Mistake of fact as to consent" means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person consented to the sexual conduct as alleged. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable, the ignorance or mistake must have been based on information, or lack of it, that would indicate to a reasonable person that the other person consented. (Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts. "Negligence" is the absence of due care. "Due care" is what a reasonably careful person would do under the same or similar circumstances.)

You should consider the inherent probability or improbability of the evidence presented on this matter. You should consider the accused's (age) (education) (experience) (_____), along with the other evidence in this case (including, but not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

The burden is on the prosecution to establish the guilt of the accused. If you are satisfied beyond a reasonable doubt that the accused was not under the mistaken belief that the other person consented to the alleged sexual conduct, then the defense of mistake does not exist. Even if you conclude that the accused was under the mistaken belief that the other person consented to the sexual conduct as alleged, if you are convinced beyond a reasonable doubt that, at the time of the charged offense(s), the accused's mistake was unreasonable, the defense of mistake does not exist.

NOTE 14: Voluntary intoxication and mistake of fact as to consent in cases involving "bodily harm" (lack of consent is an element). If there is evidence of the accused's voluntary intoxication, the following instruction is appropriate:

There has been some evidence concerning the accused's state of intoxication at the time of the alleged offense. On the question of whether the accused's (ignorance) (belief) was reasonable, you may not consider the accused's intoxication, if any, because a reasonable (ignorance) (belief) is one that an ordinary, prudent, sober adult would have under the circumstances of this case. Voluntary intoxication does not permit what would be an unreasonable (ignorance) (belief) in the mind of a sober person to be considered reasonable because the person is intoxicated.

NOTE 15: Mistake of fact as to offensive touching in cases involving "bodily harm" (lack of consent is not an element).

The evidence has raised the issue of mistake of fact as to the offensiveness of the touching in relation to the offenses(s) of (state the alleged offense(s)). There has been (evidence) (testimony) tending to show that, at the time of the alleged offenses(s), the accused mistakenly believed that the touching alleged in (the) specification(s) of the (additional) Charge(s) was not offensive to (state the name of the alleged victim).

Mistake of fact is a defense to (that)(those) charged offense(s). "Mistake of fact" means the accused held, as a result of ignorance or mistake, an

incorrect belief that the touching alleged as bodily harm was not offensive to the other person. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable, the ignorance or mistake must have been based on information, or lack of it, that would indicate to a reasonable person that the touching was not offensive to the other person. (Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts. "Negligence" is the absence of due care. "Due care" is what a reasonably careful person would do under the same or similar circumstances.)

You should consider the inherent probability or improbability of the evidence presented on this matter. You should consider the accused's (age) (education) (experience) (_____), along with the other evidence in this case (including, but not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

The burden is on the government to establish the guilt of the accused. If you are satisfied beyond a reasonable doubt that the accused was not under the mistaken belief that the touching was not offensive to the other person, then the defense of mistake does not exist. Even if you conclude that the accused was under that mistaken belief, if you are convinced beyond a reasonable doubt that, at the time of the charged offense(s), the accused's mistake was unreasonable, the defense of mistake does not exist.

NOTE 16: Voluntary intoxication and mistake of fact as to offensive touching in cases involving "bodily harm" (lack of consent is not an element). If there is evidence of the accused's voluntary intoxication, the following instruction is appropriate:

There has been some evidence concerning the accused's state of intoxication at the time of the alleged offense. On the question of whether the accused's (ignorance) (belief) was reasonable, you may not consider the accused's intoxication, if any, because a reasonable (ignorance) (belief) is one that an ordinary, prudent, sober adult would

have under the circumstances of this case. Voluntary intoxication does not permit what would be an unreasonable (ignorance) (belief) in the mind of a sober person to be considered reasonable because the person is intoxicated.

NOTE 17: Mistake of fact as to consent to the sexual conduct. When the evidence has reasonably raised mistake of fact as to consent to the sexual conduct, include the following instruction on honest and reasonable mistake of fact as to consent. (Note that even for offenses under Article 120(b)(1)(C) and 120(b)(1)(D), 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.) If instructing on an attempted offense, the honest mistake of fact instruction in Instruction 5-11-1 should be given instead of this instruction. The burden of proof in the instruction below is taken from RCM 916(b)(1). The military judge should state on the record that he/she will not instruct on the burden of proof as provided in RCM 916(b)(4), as that burden has been held to be a "legal impossibility" and the statutory language upon which RCM 916(b)(4) was based has now been repealed for offenses occurring on or after 28 June 2012. See United States v. Prather, 69 MJ 338 (CAAF 2011).

The evidence has raised the issue of mistake on the part of the accused whether (state the name of the alleged victim) consented to the sexual conduct alleged concerning the offense(s) of (state the alleged offense(s)), as alleged in (the) Specification(s) (___) of (the) (Additional) Charge (___).

Mistake of fact as to consent is a defense to (that) (those) charged offense(s). "Mistake of fact as to consent" means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person engaging in the charged sexual conduct consented to (all) that sexual conduct. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable the ignorance or mistake must have been based on information, or lack of it, that would indicate to a reasonable person that the other person consented. (Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts. "Negligence" is the absence of due care. "Due care" is what a reasonably careful person would do under the same or similar circumstances.)

You should consider the accused's (age) (education) (experience) (_____) along with the other evidence on this issue, (including, but not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

The prosecution has the burden of proving beyond a reasonable doubt that the accused did not reasonably believe that (state the name of the alleged victim) consented to the charged sexual conduct. If you are convinced beyond a reasonable doubt, at the time of the charged offense(s), the accused did not believe that the alleged victim consented to the sexual conduct alleged, the defense does not exist. Furthermore, even if you conclude the accused was under a mistaken belief that the alleged victim consented to the sexual conduct alleged, if you are convinced beyond a reasonable doubt that at the time of the charged offense(s) the accused's mistake was unreasonable, the defense does not exist.

NOTE 18: Voluntary intoxication and mistake of fact as to consent to the sexual conduct. If there is evidence of the accused's voluntary intoxication, the following instruction is appropriate:

There has been some evidence concerning the accused's state of intoxication at the time of the alleged offense. On the question of whether the accused's (ignorance) (belief) was reasonable, you may not consider the accused's intoxication, if any, because a reasonable (ignorance) (belief) is one that an ordinary, prudent, sober adult would have under the circumstances of this case. Voluntary intoxication does not permit what would be an unreasonable (ignorance) (belief) in the mind of a sober person to be considered reasonable because the person is intoxicated.

NOTE 19: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), Instruction 6-5, Partial Mental Responsibility, Instruction 5-17, Evidence Negating Mens Rea, and Instruction 5-12, Voluntary Intoxication, may be appropriate, as bearing on the issue of intent, if the intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person is in issue.

e. REFERENCES: Definition of "vulva." *See United States v Williams*, 25 MJ 854 (AFCMR 1988) *pet. denied*, 27 MJ 166 (CMA 1988) and *United States v. Tu*, 30 MJ 587 (ACMR 1990).

3–45–15. AGGRAVATED SEXUAL CONTACT (ARTICLE 120)

NOTE 1: Applicability of this instruction. Use this instruction for offenses occurring on and after 28 June 2012.

a. MAXIMUM PUNISHMENT: DD, TF, 20 years, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, [commit sexual contact upon _____, to wit: _____,] [cause sexual contact by _____, to wit: _____,] by [unlawful force, to wit: _____] [force causing or likely to cause death or grievous bodily harm to (him/her) (_____), to wit: (broken leg) (deep cut) (fractured skull) (_____)] [threatening or placing him/her in fear that (he/she) (_____) would be subjected to (death) (grievous bodily harm) (kidnapping)] [first rendering him/her unconscious] [administering to him/her a drug, intoxicant, or other similar substance (by force) (by threat of force) (without his/her knowledge or consent), thereby substantially impairing his/her ability to appraise or control his/her conduct].

c. ELEMENTS:

(1) That (state the time and place alleged), the accused [committed sexual contact upon] [caused sexual contact by] (state name of the alleged victim), to wit: (state the act(s) alleged); and

(2) That the accused did so by

(a) using unlawful force against (state the name of the alleged victim), to wit: (state the force alleged).

(b) using force causing or likely to cause death or grievous bodily harm to (state the name of the person alleged), to wit: (state the force alleged).

(c) threatening or placing (state the name of the alleged victim) in fear that (state the name of the person alleged) would be subjected to (death) (or) (grievous bodily harm) (or) (kidnapping).

(d) first rendering (state the name of the alleged victim) unconscious.

(e) administering to (state the name of the alleged victim) a drug, intoxicant, or other similar substance (by force) (or) (by threat of force) (or) (without the knowledge or consent of (state the name of the alleged victim)), thereby substantially impairing the ability of (state the name of the alleged victim) to appraise or control his/her conduct.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"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.

Touching may be accomplished by any part of the body.

NOTE 2: Marriage. Marriage is not a defense for any conduct in issue in any prosecution under Article 120.

NOTE 3: By unlawful force. When the sexual contact is alleged by unlawful force, include the following instruction:

"Unlawful force" means an act of force done without legal justification or excuse.

"Force" means the use of a weapon; the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or inflicting physical harm sufficient to coerce or compel submission by the alleged victim.

NOTE 4: By force causing or likely to cause grievous bodily harm. When the sexual contact is alleged by force causing or likely to cause death or grievous bodily harm, include the following instruction:

"Force" means the use of a weapon; the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or inflicting physical harm sufficient to coerce or compel submission by the alleged victim.

"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.

(The force causing or likely to cause death or grievous bodily harm which caused the alleged victim to engage in the sexual contact need not have been applied by the accused to the alleged victim. It is sufficient if the accused applied such force to any person, which thereby caused the alleged victim to engage in the sexual contact.)

NOTE 5: By threat or placing in fear. When the sexual contact is alleged by threat or by placing in fear, include the following instruction:

"Threatening or placing a 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 alleged victim or another person being subjected to the wrongful action contemplated by the communication or action.

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.

("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.)

("Kidnapping" means the unlawful and intentional detention of a person against that person's will. The detention must be more than a momentary restraint on the person's freedom of movement. Although kidnapping often involves physical restraint, physical restraint is not required for kidnapping. (If the subject of the threat to kidnap is incapable of having a recognizable will, as in the case of a very young child or a mentally incompetent person, the holding must be against the will of the subject's parents or legal guardian.))

(The person to be (killed) (subjected to grievous bodily harm) (kidnapped) need not be the alleged victim. It is sufficient if the accused threatened or placed the alleged victim in fear that any person would be

(killed) (subjected to grievous bodily harm) (kidnapped), which thereby caused the alleged victim to engage in the sexual contact.)

NOTE 6: <u>Lack of consent as an element</u>. Lack of consent to administration is an element when the accused is charged with aggravated sexual contact by administering a drug, intoxicant or similar substance without the consent of the alleged victim. Lack of consent is not an element when the accused is charged with aggravated sexual contact by any other method (to include when the accused is charged with administering a drug, intoxicant or similar substance by force or by threat of force). See United States v. Neal, 68 MJ 289, 302-304 (CAAF 2010) (statutory definition of "force" does not imply an element of lack of consent). Accordingly, the military judge should give the following instruction ONLY when the accused is charged with aggravated sexual contact by administering a drug, intoxicant or similar substance without the consent of the alleged victim.

As I previously advised you, in (The) Specification(s) (_____) of (The) (Additional) Charge (___), the accused is charged with the offense of aggravated sexual contact by administering a drug, intoxicant, or other similar substance without the consent of the alleged victim, thereby substantially impairing the ability of that other person to appraise or control conduct. For this offense, lack of consent to the administration of the drug, intoxicant, or other similar substance is an element of the offense.

"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 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.

(A sleeping, unconscious, or incompetent person cannot consent to the administration of a drug, intoxicant, or other similar substance.)

(A person cannot consent to the administration of a drug, intoxicant, or other similar substance by force causing or likely to cause death or grievous bodily harm.)

(A person cannot consent to the administration of a drug, intoxicant, or other similar substance by being rendered unconscious.)

(A person cannot consent to the administration of a drug, intoxicant, or other similar substance while under threat or in fear.)

The prosecution has the burden to prove beyond a reasonable doubt that consent to the administration of the drug, intoxicant, or other similar substance did not exist. Therefore, to find the accused guilty of the offense(s) of aggravated sexual contact, as alleged in (the) Specification(s) (___) of (the) (Additional) Charge (___), you must be convinced beyond a reasonable doubt that, at the time of the administration of the drug, intoxicant, or other similar substance alleged, (state the name of the alleged victim) did not consent to the administration of the drug, intoxicant, or other similar substance alleged.

NOTE 7: 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) (where a person cannot consent to force causing or likely to cause death or grievous bodily harm, while under the threat or fear that any person will be subjected to death, grievous bodily harm or kidnapping, or to being rendered unconscious), 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.)

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).

NOTE 8: Ignorance or mistake of fact generally. Under the 28 June 2012 version of Article 120, there is no statutory mistake of fact defense. Mistake of fact is a defense in RCM 916(j). Mistake of fact under RCM 916(j) is only a defense when it negates an element. When the element goes to premeditation, specific intent, willfulness or knowledge of a particular fact, the mistake must only be honest. When the element requires only general intent or knowledge, the mistake must be honest and reasonable. When the accused's intent or knowledge is immaterial to an element (that is, strict liability), mistake of fact is not a defense.

Accordingly, the military judge must first determine the elements of an offense. Second, the military judge must determine whether the evidence has reasonably raised the accused's mistake which negates an element. Finally, the military judge must determine into which of the above three categories that element falls.

Strict liability offenses are "disfavored." Absent some indication Congress intended to impose strict liability (and the starting point for determining intent is statutory construction), courts have applied a "presumption" of mens rea to criminal offenses. Silence by Congress regarding mens rea for the offense generally does not alone suggest Congress intended strict liability. See, generally, United States v. Zachary, 61 MJ 813 (ACCA, 2005), affirmed 63 MJ 438 (CAAF 2006); Staples v. United States, 511 US 600 (1994); Liparota v. United States, 471 US 419 (1994); and (for a good general discussion of this topic) United States v. Burwell, 690 F3d 500 (DC Cir., 2012) (Kavanagh, J., dissenting).

RCM 916(j) has been interpreted to apply not only to situations where if the facts were as the accused mistakenly believed them the accused would be absolved of all criminal liability, but also to situations where the accused would be absolved of criminal liability for the charged offense, but not necessarily for a lesser-included offense. See Zachary, supra.

While commonly encountered ignorance or mistake of fact instructions are below, these are not exclusive. The military judge must carefully follow the analytical methodology above to determine if mistake of fact may be applicable in other situations. In those situations, the military judge should use appropriately tailored versions of Instructions 5-11-1 or 5-11-2.

NOTE 9: Mistake of fact as to knowledge of or consent to the administration of a drug, intoxicant, or other substance.

The evidence has raised the issue of (mistake of fact) in relation to the offenses(s) of (state the alleged offense(s)). There has been (evidence) (testimony) tending to show that, at the time of the alleged offenses(s), the accused mistakenly believed that (state the name of the victim) (knew of) (consented to) the administration of the drug, intoxicant, or other similar substance alleged concerning the offense(s) alleged in (the) specification(s) of the (additional) Charge(s).

Mistake of fact is a defense to (that)(those) charged offense(s). "Mistake of fact" means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person (knew of) (consented to) administration of the drug, intoxicant, or other similar substance as alleged. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable, the ignorance or mistake must have been based on information, or lack of it, that would indicate to a reasonable person that the other person (knew of) (consented to) the administration. (Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts. "Negligence" is the absence of due care. "Due care" is what a reasonably careful person would do under the same or similar circumstances.)

You should consider the inherent probability or improbability of the evidence presented on this matter. You should consider the accused's (age) (education) (experience) (_____), along with the other evidence in this case (including, but not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

The burden is on the prosecution to establish the guilt of the accused. If you are satisfied beyond a reasonable doubt that the accused was not under the mistaken belief that the other person (knew of) (consented to) administration of the drug, intoxicant, or other similar substance as

alleged, then the defense of mistake does not exist. Even if you conclude that the accused was under the mistaken belief that the other person (knew of) (consented to) administration of the drug, intoxicant, or other similar substance as alleged, if you are convinced beyond a reasonable doubt that, at the time of the charged offense(s), the accused's mistake was unreasonable, the defense of mistake does not exist.

NOTE 10: Voluntary intoxication and mistake of fact as to knowledge of or consent to the administration of a drug, intoxicant, or other substance. If there is evidence of the accused's voluntary intoxication, the following instruction is appropriate. (If the mistake of fact relates to consent to the sexual conduct, do not use this voluntary intoxication instruction, use NOTE 12 instead):

There has been some evidence concerning the accused's state of intoxication at the time of the alleged offense. On the question of whether the accused's (ignorance) (belief) was reasonable, you may not consider the accused's intoxication, if any, because a reasonable (ignorance) (belief) is one that an ordinary, prudent, sober adult would have under the circumstances of this case. Voluntary intoxication does not permit what would be an unreasonable (ignorance) (belief) in the mind of a sober person to be considered reasonable because the person is intoxicated.

NOTE 11: Mistake of fact as to consent to the sexual conduct. When the evidence has reasonably raised mistake of fact as to consent to the sexual conduct, include the following instruction on honest and reasonable mistake of fact as to consent. (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.) If instructing on an attempted offense, the honest mistake of fact instruction in Instruction 5-11-1 should be given instead of this instruction. The burden of proof in the instruction below is taken from RCM 916(b)(1). The military judge should state on the record that he/she will not instruct on the burden of proof as provided in RCM 916(b)(4), as that burden has been held to be a "legal impossibility" and the statutory language upon which RCM 916(b)(4) was based has now been repealed for offenses occurring on or after 28 June 2012. See United States v. Prather, 69 MJ 338 (CAAF 2011).

The evidence has raised the issue of mistake on the part of the accused whether (state the name of the alleged victim) consented to the sexual

conduct alleged concerning the offense(s) of (state the alleged offense(s)), as alleged in (the) Specification(s) (___) of (the) (Additional) Charge (___).

Mistake of fact as to consent is a defense to (that) (those) charged offense(s). "Mistake of fact as to consent" means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person engaging in the charged sexual conduct consented to (all) that sexual conduct. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable the ignorance or mistake must have been based on information, or lack of it, that would indicate to a reasonable person that the other person consented. (Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts. "Negligence" is the absence of due care. "Due care" is what a reasonably careful person would do under the same or similar circumstances.)

You should consider the accused's (age) (education) (experience) (_____) along with the other evidence on this issue, (including, but not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

The prosecution has the burden of proving beyond a reasonable doubt that the accused did not reasonably believe that (state the name of the alleged victim) consented to the charged sexual conduct. If you are convinced beyond a reasonable doubt, at the time of the charged offense(s), the accused did not believe that the alleged victim consented to the sexual conduct alleged, the defense does not exist. Furthermore, even if you conclude the accused was under a mistaken belief that the alleged victim consented to the sexual conduct alleged, if you are convinced beyond a reasonable doubt that at the time of the charged offense(s) the accused's mistake was unreasonable, the defense does not exist.

NOTE 12: Voluntary intoxication and mistake of fact as to consent to the sexual conduct. If there is evidence of the accused's voluntary intoxication, the following instruction is appropriate:

There has been some evidence concerning the accused's state of intoxication at the time of the alleged offense. On the question of whether the accused's (ignorance) (belief) was reasonable, you may not consider the accused's intoxication, if any, because a reasonable (ignorance) (belief) is one that an ordinary, prudent, sober adult would have under the circumstances of this case. Voluntary intoxication does not permit what would be an unreasonable (ignorance) (belief) in the mind of a sober person to be considered reasonable because the person is intoxicated.

NOTE 13: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), Instruction 6-5, Partial Mental Responsibility, Instruction 5-17, Evidence Negating Mens Rea, and Instruction 5-12, Voluntary Intoxication, may be appropriate, as bearing on the issue of intent, regarding the intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person is in issue.

3–45–16. ABUSIVE SEXUAL CONTACT (ARTICLE 120)

NOTE 1: Applicability of this instruction. Use this instruction for offenses occurring on and after 28 June 2012.

a. MAXIMUM PUNISHMENT: **DD, TF, 7 years, E-1.**

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, [commit sexual contact upon _____, to wit: _____,] [cause sexual contact by _____, to wit: _____,] [by causing bodily harm to him/her, to wit: _____] [by threatening or placing him/her in fear that (state wrongful action that was the subject of threat or fear)] [by making a fraudulent representation that the sexual contact served a professional purpose] [by inducing a belief by artifice, pretense, or concealment that the accused was another person] [when the accused knew or reasonably should have known that _____ was (asleep) (unconscious) (otherwise unaware that the sexual contact was occurring)] [when _____ was incapable of consenting to the sexual contact due to (impairment by a drug, intoxicant, or other similar substance,) (a mental disease or defect, or physical disability,) and that condition was known or reasonably should have been known by the accused] .

c. ELEMENTS:

(1) That (state the time and place alleged), the accused [committed sexual contact upon] [caused sexual contact by] (state the name of the alleged victim), to wit: (state the act(s) alleged); and

[(2)] That the accused did so by

(a) causing bodily harm to (state the name of the alleged victim), to wit: (state the bodily harm alleged).

(b) threatening or placing (state the name of the alleged victim) in fear that (state the threatened wrongful action).

(c) making a fraudulent representation that the sexual contact served a professional purpose.

(d) inducing a belief by artifice, pretense, or concealment that the accused was another person.

[(2)] That the accused did so when

(a) he knew or reasonably should have known that (state the name of the person alleged) was (asleep) (or) (unconscious) (or) (otherwise unaware that the sexual contact was occurring).

(b) (state the name of the alleged victim) was incapable of consenting to the sexual contact due to (impairment by a drug, intoxicant, or other similar substance,) (a mental disease or defect, or physical disability,) and that condition was known or reasonably should have been known by the accused.

NOTE 2: Lack of consent as an element. When the same physical act is alleged as both the actus reus and the bodily harm for the charged sexual contact, include this as a final element:

[(3)] That the accused did so without the consent of (state the name of the alleged victim).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"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.

Touching may be accomplished by any part of the body.

NOTE 3: Marriage. Marriage is not a defense for any conduct in issue in any prosecution under Article 120.

NOTE 4: By threat or placing in fear. When the sexual contact is alleged by threat or by placing in fear, include the following instruction:

"Threatening or placing a 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 alleged victim or another person being

subjected to the wrongful action contemplated by the communication or action.

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.

The threat or fear in this case must be that the alleged victim or another person would be subjected to the wrongful action.

NOTE 5: By causing bodily harm. When the sexual contact is alleged by causing bodily harm, include the following instruction:

"Bodily harm" means any offensive touching of another(, however slight, including any nonconsensual sexual act or nonconsensual sexual contact).

NOTE 6: Fraudulent representation. When the sexual contact is committed by making a fraudulent representation that it serves a professional purpose, the following may be appropriate:

A "fraudulent representation" is a representation of fact, which the accused knows to be untrue, which is intended to deceive, which does in fact deceive, and which causes the other person to engage in the sexual contact.

The fraudulent representation that the sexual contact served a professional purpose need not have been made by the accused to (state the name of the alleged victim). It is sufficient if the accused made such a fraudulent representation to any person, which thereby caused (state the name of the alleged victim) to engage in the sexual contact.

NOTE 7: Lack of consent as an element. When the same physical act is alleged as both the actus reus and the bodily harm for the charged abusive sexual contact, the government must prove lack of consent as an element. Accordingly, the following instruction should be given:

The government has alleged the accused committed a sexual contact, to wit: (state the contact(s) alleged) upon (state the name of the alleged victim) and that the same physical act(s) also constitute(s) the bodily

harm required for the charged abusive sexual contact. Under these circumstances, the government also has the burden to prove beyond a reasonable doubt that (state the name of the alleged victim) did not consent to the physical act(s).

"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.

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).

(A sleeping, unconscious, or incompetent person cannot consent to a sexual contact.)

(A person cannot consent to a sexual contact by force causing or likely to cause death or grievous bodily harm.)

(A person cannot consent to a sexual contact by being rendered unconscious.)

(A person cannot consent to a sexual contact while under threat or in fear.)

(A person cannot consent to a sexual contact when believing, due to a fraudulent representation, that the sexual contact served a professional purpose, or when believing, due to artifice, pretense, or concealment that the accused was another person.)

The government has the burden to prove beyond a reasonable doubt that consent to the physical act(s) did not exist. Therefore, to find the accused guilty of the offense(s) of abusive sexual contact, as alleged in (the) specification(s) ( ) of (the) (Additional) Charge ( ), you must be convinced beyond a reasonable doubt that (state the name of the alleged victim) did not consent to the physical act(s).

Evidence concerning consent to the sexual conduct, if any, 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).

NOTE 8: Evidence of consent. Generally, the elements of an Article 120(b) 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(b)(1)(C) and 120(b)(1)(D), 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.)

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).

NOTE 9: Ignorance or mistake of fact generally. Under the 28 June 2012 version of Article 120, there is no statutory mistake of fact defense. Mistake of fact is a defense in RCM 916(j). Mistake of fact under RCM 916(j) is only a defense when it negates an element. When the element goes to premeditation, specific intent, willfulness or knowledge of a particular fact, the mistake must only be honest. When the element requires only general intent or knowledge, the mistake must be honest and reasonable. When the accused's intent or knowledge is immaterial to an element (that is, strict liability), mistake of fact is not a defense.

Accordingly, the military judge must first determine the elements of an offense. Second, the military judge must determine whether the evidence has reasonably raised the accused's mistake which negates an element. Finally, the military judge must determine into which of the above three categories that element falls.

Strict liability offenses are "disfavored." Absent some indication Congress intended to impose strict liability (and the starting point for determining intent is statutory construction), courts have applied a "presumption" of mens rea to criminal offenses. Silence by Congress regarding mens rea for the offense generally does not alone suggest Congress intended strict liability. See, generally, US v. Zachary, 61 MJ 813 (ACCA, 2005), affirmed 63 MJ 438 (CAAF 2006); Staples v. US, 511 US 600 (1994); Liparota v. US, 471 US 419 (1994); and (for a good general discussion of this topic) US v. Burwell, 690 F3d 500 (DC Cir., 2012) (Kavanagh, J., dissenting).

RCM 916(j) has been interpreted to apply not only to situations where if the facts were as the accused mistakenly believed them the accused would be absolved of all criminal liability, but also to situations where the accused would be absolved of criminal liability for the charged offense, but not necessarily for a lesser-included offense. See Zachary, supra.

While commonly encountered ignorance or mistake of fact instructions are below, these are not exclusive. The military judge must carefully follow the analytical methodology above to determine if mistake of fact may be applicable in other situations. In those situations, the military judge should use appropriately tailored versions of Instructions 5-11-1 or 5-11-2.

NOTE 10: Mistake of fact as to whether the alleged victim was asleep, unconscious, or otherwise unaware / incapable of consenting. When the government has charged both theories of liability ("knew or reasonably should have known"), the mistake of fact must negate BOTH theories to succeed. While mistake as to knowledge must

only be honest, mistake as to "reasonably should have known" must be both honest and reasonable. Accordingly, the below instruction is appropriate when both theories of liability are charged. (If only "knew" is charged, tailoring the below to reflect an honest mistake of fact would be appropriate.)

The evidence has raised the issue of (ignorance) (mistake) on the part of the accused concerning (state the name of the alleged victim)'s condition in relation to the offense(s) of (state the alleged offense(s)).

I advised you earlier that to find the accused guilty of the offense(s) of (state the alleged offense(s)), you must find beyond a reasonable doubt that the accused knew or reasonably should have known that (state the name of the alleged victim) was [(asleep) (or) (unconscious) (or) (otherwise unaware that the sexual conduct was occurring)] [(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 or physical disability)].

The accused is not guilty of the offense of sexual assault if:

(1) the accused (did not know that (state the name of the alleged victim) was) (mistakenly believed (state the name of the alleged victim) was not) [(asleep) (or) (unconscious) (or) (otherwise unaware that the sexual conduct was occurring)] [(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 or physical disability)]; and

(2) such (ignorance) (belief) on (his) (her) part was reasonable.

To be reasonable the (ignorance) (belief) must have been based on information, or lack of it, which would indicate to a reasonable person that (state the name of the alleged victim) was not [(asleep) (or) (unconscious) (or) (otherwise unaware that the sexual conduct was occurring)] [(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 or physical disability)].

(Additionally, the (ignorance) (mistake) cannot be based on a negligent failure to discover the true facts. Negligence is the absence of due care. Due care is what a reasonably careful person would do under the same or similar circumstances.)

You should consider the accused's (age) (education) (experience) (_____) along with the other evidence on this issue, (including, but not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

The burden is on the prosecution to establish the accused's guilt. If you are convinced beyond a reasonable doubt that, at the time of the charged offense(s), the accused was not (ignorant of the fact that (state the name of the alleged victim) was) (mistakenly believed (state the name of the alleged victim) was not) [(asleep) (or) (unconscious) (or) (otherwise unaware that the sexual conduct was occurring)] [(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 or physical disability)], the defense of (ignorance) (mistake) does not exist. Even if you conclude that the accused was (ignorant of the fact that ((state the name of the alleged victim) was) (mistakenly believed (state the name of the alleged victim) was not) [(asleep) (or) (unconscious) (or) (otherwise unaware that the sexual conduct was occurring)] [(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 or physical disability)], if you are convinced beyond a reasonable doubt that, at the time of the charged offense(s), the accused's (ignorance) (mistake) was unreasonable, the defense of (ignorance) (mistake) does not exist.

NOTE 11: Voluntary intoxication and mistake of fact as to whether the alleged victim was asleep, unconscious, or otherwise unaware / incapable of consenting. If there is evidence of the accused's voluntary intoxication, the following instruction is appropriate:

There has been some evidence concerning the accused's state of intoxication at the time of the alleged offense. On the question of whether the accused's (ignorance) (belief) was reasonable, you may not consider the accused's intoxication, if any, because a reasonable (ignorance) (belief) is one that an ordinary, prudent, sober adult would have under the circumstances of this case. Voluntary intoxication does not permit what would be an unreasonable (ignorance) (belief) in the mind of a sober person to be considered reasonable because the person is intoxicated.

NOTE 12: Mistake of fact as to consent in cases involving "bodily harm" (lack of consent is an element).

The evidence has raised the issue of mistake of fact as to consent in relation to the offenses(s) of (state the alleged offense(s)). There has been (evidence) (testimony) tending to show that, at the time of the alleged offenses(s), the accused mistakenly believed that (state the name of the victim) consented to the sexual conduct alleged in (the) specification(s) of the (additional) Charge(s).

Mistake of fact as to consent is a defense to (that)(those) charged offense(s). "Mistake of fact as to consent" means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person consented to the sexual conduct as alleged. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable, the ignorance or mistake must have been based on information, or lack of it, that would indicate to a reasonable person that the other person consented. (Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts. "Negligence" is the absence of due care. "Due care" is what a reasonably careful person would do under the same or similar circumstances.)

You should consider the inherent probability or improbability of the evidence presented on this matter. You should consider the accused's (age) (education) (experience) (_____), along with the other

evidence in this case (including, but not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

The prosecution has the burden of proving beyond a reasonable doubt that the accused did not reasonably believe that (state the name of the alleged victim) consented to the sexual conduct. If you are convinced beyond a reasonable doubt, at the time of the charged offense(s), the accused did not believe that the alleged victim consented to the sexual conduct alleged, the defense does not exist. Furthermore, even if you conclude the accused was under a mistaken belief that the alleged victim consented to the sexual conduct alleged, if you are convinced beyond a reasonable doubt that at the time of the charged offense(s) the accused's mistake was unreasonable, the defense does not exist.

NOTE 13: Voluntary intoxication and mistake of fact as to consent in cases involving "bodily harm" (lack of consent is an element). If there is evidence of the accused's voluntary intoxication, the following instruction is appropriate:

There has been some evidence concerning the accused's state of intoxication at the time of the alleged offense. On the question of whether the accused's (ignorance) (belief) was reasonable, you may not consider the accused's intoxication, if any, because a reasonable (ignorance) (belief) is one that an ordinary, prudent, sober adult would have under the circumstances of this case. Voluntary intoxication does not permit what would be an unreasonable (ignorance) (belief) in the mind of a sober person to be considered reasonable because the person is intoxicated.

NOTE 14: Mistake of fact as to offensive touching in cases involving "bodily harm" (lack of consent is not an element).

The evidence has raised the issue of mistake of fact as to the offensiveness of the touching in relation to the offenses(s) of (state the alleged offense(s)). There has been (evidence) (testimony) tending to show that, at the time of the alleged offenses(s), the accused mistakenly believed that the touching alleged in (the) specification(s) of the

(additional) Charge(s) was not offensive to (state the name of the alleged victim).

Mistake of fact is a defense to (that)(those) charged offense(s). "Mistake of fact" means the accused held, as a result of ignorance or mistake, an incorrect belief that the touching alleged as bodily harm was not offensive to the other person. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable, the ignorance or mistake must have been based on information, or lack of it, that would indicate to a reasonable person that the touching was not offensive to the other person. (Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts. "Negligence" is the absence of due care. "Due care" is what a reasonably careful person would do under the same or similar circumstances.)

You should consider the inherent probability or improbability of the evidence presented on this matter. You should consider the accused's (age) (education) (experience) (_____), along with the other evidence in this case (including, but not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

The burden is on the government to establish the guilt of the accused. If you are satisfied beyond a reasonable doubt that the accused was not under the mistaken belief that the touching was not offensive to the other person, then the defense of mistake does not exist. Even if you conclude that the accused was under that mistaken belief, if you are convinced beyond a reasonable doubt that, at the time of the charged offense(s), the accused's mistake was unreasonable, the defense of mistake does not exist.

NOTE 15: Voluntary intoxication and mistake of fact as to offensive touching in cases involving "bodily harm" (lack of consent is not an element). If there is evidence of the accused's voluntary intoxication, the following instruction is appropriate:

There has been some evidence concerning the accused's state of intoxication at the time of the alleged offense. On the question of whether the accused's (ignorance) (belief) was reasonable, you may not consider the accused's intoxication, if any, because a reasonable (ignorance) (belief) is one that an ordinary, prudent, sober adult would have under the circumstances of this case. Voluntary intoxication does not permit what would be an unreasonable (ignorance) (belief) in the mind of a sober person to be considered reasonable because the person is intoxicated.

NOTE 16: Mistake of fact as to consent to the sexual conduct. When the evidence has reasonably raised mistake of fact as to consent to the sexual conduct, include the following instruction on honest and reasonable mistake of fact as to consent. (Note that even for offenses under Article 120(b)(1)(C) and 120(b)(1)(D), 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.) If instructing on an attempted offense, the honest mistake of fact instruction in Instruction 5-11-1 should be given instead of this instruction. The burden of proof in the instruction below is taken from RCM 916(b)(1). The military judge should state on the record that he/she will not instruct on the burden of proof as provided in RCM 916(b)(4), as that burden has been held to be a "legal impossibility" and the statutory language upon which RCM 916(b)(4) was based has now been repealed for offenses occurring on or after 28 June 2012. See United States v. Prather, 69 MJ 338 (CAAF 2011).

The evidence has raised the issue of mistake on the part of the accused whether (state the name of the alleged victim) consented to the sexual conduct alleged concerning the offense(s) of (state the alleged offense(s)), as alleged in (the) Specification(s) (___) of (the) (Additional) Charge (___).

Mistake of fact as to consent is a defense to (that) (those) charged offense(s). "Mistake of fact as to consent" means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person engaging in the charged sexual conduct consented to (all) that sexual conduct. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable the ignorance or mistake must have been based on information, or lack of it, that would indicate to a reasonable person that

the other person consented. (Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts. "Negligence" is the absence of due care. "Due care" is what a reasonably careful person would do under the same or similar circumstances.)

You should consider the accused's (age) (education) (experience) (_____) along with the other evidence on this issue, (including, but not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

The prosecution has the burden of proving beyond a reasonable doubt that the accused did not reasonably believe that (state the name of the alleged victim) consented to the charged sexual conduct. If you are convinced beyond a reasonable doubt, at the time of the charged offense(s), the accused did not believe that the alleged victim consented to the sexual conduct alleged, the defense does not exist. Furthermore, even if you conclude the accused was under a mistaken belief that the alleged victim consented to the sexual conduct alleged, if you are convinced beyond a reasonable doubt that at the time of the charged offense(s) the accused's mistake was unreasonable, the defense does not exist.

NOTE 17: Voluntary intoxication and mistake of fact as to consent to the sexual conduct. If there is evidence of the accused's voluntary intoxication, the following instruction is appropriate:

There has been some evidence concerning the accused's state of intoxication at the time of the alleged offense. On the question of whether the accused's (ignorance) (belief) was reasonable, you may not consider the accused's intoxication, if any, because a reasonable (ignorance) (belief) is one that an ordinary, prudent, sober adult would have under the circumstances of this case. Voluntary intoxication does not permit what would be an unreasonable (ignorance) (belief) in the

mind of a sober person to be considered reasonable because the person is intoxicated.

NOTE 18: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), Instruction 6-5, Partial Mental Responsibility, Instruction 5-17, Evidence Negating Mens Rea, and Instruction 5-12, Voluntary Intoxication, may be appropriate, as bearing on the issue of intent, regarding the intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person is in issue.