Colonel (Retired) Timothy Grammel, United States Army

[*Below are comments on the 11 issues currently before the Judicial Proceedings Panel Subcommittee. I had prepared these comments before the Subcommittee's meeting on April 9, 2015, with one exception. I added the last paragraph under Issue 2 after the meeting, because of some of the discussion during the meeting.*]

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

The current definition of consent is unclear, because it contains some statements that could be interpreted as being inconsistent with other parts of the definition.

The definition is mainly contained in the first sentence. I recommend replacing "freely given" with "voluntary." There are four components to the definition in that sentence: (1) voluntary; (2) agreement; (3) to the conduct at issue; and (4) by a competent person. "Voluntary" narrows the definition by excluding cases involving a person compelled to agree by force, threat, fear, etc. "Agreement" conveys a subjective meeting of the minds on engaging in conduct, and it can be expressed in words or conduct, just as that word is interpreted in the law on conspiracy. "Conduct at issue" excludes circumstances involving fraud as to the purpose of the sexual conduct or the identity of the other person. "By a competent person" excludes people incapable of consenting. The remainder of the definition further clarifies that sentence.

The next sentence was deleted, because it is inconsistent with the last sentence on the totality of the circumstances. The third sentence was deleted because it could confuse people by implying that, if there was no use of force, threat of force, or fear, lack of resistance does constitute consent. The last sentence in subparagraph (A) might be unnecessary, but it is accurate and might serve to dispel myths in the minds of some people, so it should remain.

Subparagraph (B) further clarifies the first, third, and fourth components of the definition of consent in the first sentence of subparagraph (A), by clearly stating situations where the agreement would not be valid consent because it was not voluntary, was not for the true conduct at issue because of a different purpose or identity of the person, or by a person who is not competent to consent.

Subparagraph (C) allows for a permissive inference of lack of consent based on the circumstances, and it states that consent is determined based on the totality of the circumstances. The second half of the last sentence was deleted, because it could confuse some people about the importance of resistance.

Issue 2: Should the statute define defenses relying on the victim's consent or the accused's mistake of fact as to consent in sexual assault cases?

The statute should clearly state that, if raised, valid consent to the sexual conduct at issue is a defense to all of the offenses in Article 120. The issue of how to handle consent has unnecessarily been a major problem in the implementation of the statutes in effect since 2007.

Prior to that, the law required both force and lack of consent. The trend in the law on sexual assaults has been to proscribe nonconsensual sexual activity that may or may not include force. Article 120 should follow that trend, and it should not proscribe consensual sexual activity, which would likely be constitutionally prohibited under *Lawrence v. Texas*. Clearly stating that, if raised by the evidence, valid consent to the sexual conduct at issue is a defense avoids any confusion, even if it is redundant with some of the theories of liability. With the clear and narrowed definition of consent, the statute can state that it is an affirmative defense. All the normal procedural rules for affirmative defenses should apply to this defense.

I had initially thought that there was no need to separately state that, if raised by the evidence, mistake of fact as to consent is a defense, because the statute states that the accused may raise any defense available in the UCMJ or the Rules for Courts-Martial. Mistake of fact is available in R.C.M. 916(j). However, during the meeting of the Judicial Proceedings Panel Subcommittee on April 9, 2015, one of the members mentioned that including such a statement might avoid confusion, because mistake of fact was mentioned in the statute that became effective in 2007, but it was taken out of the statute that became effective in 2012. I do not oppose including such a statement; I had simply thought it was unnecessary. On further thought, I do think it would be best to include the statement. Another reason is that R.C.M. 916(j) still contains provisions about mistake of fact for sexual offenses that occurred under the statute in effect between 2007 and 2012. That highlights the need for a clear statement that, if raised by the evidence, the defense is available. It is not necessary to discuss the standard for the defense in the statute, because the standard and other procedures should be the same as provided in R.C.M. 916. The problem was whether or not the defense applied, and adding one sentence to the statute should resolve that issue. Because of this change, I have attached an updated version of Suggested Amendments to Article 120, in case it would be of assistance to the Subcommittee. The only change to the previous version is the addition of the second sentence in subsection (g) (defenses).

<u>Issue 3</u>: Should the statute define "incapable of consenting?"

The statute should definitely define this crucial term. A common theory of liability charged under Article 120(b) and Article 120(d) is that the alleged victim was incapable of consenting to the sexual conduct due to impairment by alcohol. With different and often incorrect information being provided to Soldiers during training on sexual assault in the military, a definition is needed to provide proper guidance for the court members to correctly apply the statutory language.

In cases of sexual assault charged under Article 120(b)(3), the *actus reus* is in the main subparagraph of Article 120(b)(3) – "commits a sexual act upon another person." The required surrounding circumstance is in a prepositional phrase in the main subparagraph: "when the other person is incapable of consenting to the sexual act." That surrounding circumstance is required for all offenses under Article 120(b)(3), and it is frequently the single issue that the panel members struggle with during deliberations. Because that term means several different things to different people, a definition of "incapable of consenting" would greatly assist court members.

In the statute, the required surrounding circumstance is then split into two different causes that could result in incapacity to consent – Article 120(b)(3)(A) addresses when it is due to

impairment by drugs, intoxicants, or similar substances; and Article 120(b)(3)(B) addresses when it is due to a mental disease or defect or a physical disability. Neither of those causes have any required level, just that they cause the incapacity. The word "incapable," which applies to both Article 120(b)(3)(A) and Article 120(b)(3)(B), needs to be defined. For example, a mental defect or physical disability could include PTSD or a missing finger. The critical issue is whether the mental disease or defect or the physical disability resulted in incapacity to consent. Court members need a definition of that required incapacity.

In the elements for the offense of aggravated sexual assault, the previous version of Article 120 made it a crime to engage in a sexual act with another person if that other person was substantially incapable of any one of three functions – "appraising the nature of the sexual act, declining participation in the sexual act, or communicating unwillingness to engage in the sexual act." Trial litigation under the previous version of Article 120 did not indicate that looking at the ability to perform those three functions was either inaccurate or difficult to apply. It was not broken, and it does not need to be fixed.

The following definition clearly defines incapacity in relation to those three functions, and it would clarify the offenses of sexual assault and abusive sexual contact.

> **(h) (9) Incapable of consenting.—** The term "incapable of consenting" means unable to appraise the nature of the sexual conduct at issue, physically decline participation in the sexual conduct at issue, or physically communicate unwillingness to engage in the sexual conduct at issue.

<u>Issue 4</u>: Is the definition concerning the accused's "administration of a drug or intoxicant" overbroad?

The statute should be narrowed in subparagraph (a)(5) by adding the requirement that the administration be for the purpose of impairing the person's capacity to express a lack of consent to the sexual act. Otherwise, the most serious offense of rape would cover someone who spikes the punch for everyone at a party for a reason unrelated to sexual activity and later engages in a sexual act with someone at the party. Also, that subparagraph can be clarified by adding "or caused to be administered." That would make it clearer and easier to apply that offense to someone who indirectly administers the drug, intoxicant, or other similar substance.

<u>Issue 5</u>: Does the definition of "bodily harm" require clarification?

An important phrase is hidden at the end of the definition of "bodily harm" – "including any nonconsensual sexual act or nonconsensual sexual contact." That has been interpreted as meaning that the offensive touching can be one and the same as the alleged sexual act or contact. First of all, this is logically confusing, because the statute requires the sexual act or contact to be accomplished by the bodily harm. That phrase makes the result the cause of itself. A second problem is that it essentially removes an element by merging two elements into one. Under the statute, sexual assault requires the sexual act and then either a cause or surrounding circumstance. This does away with the required means by which the sexual act or contact was

accomplished, but it puts that offense at the same level of culpability as those that do have that separate required cause or surrounding circumstance. A third problem is that this important phrase, which makes criminal a nonconsensual sexual act or contact without any additional required element, is hidden in a definition. That is confusing to prosecutors, defense counsel, and judges, and it could result in error or at least under-utilization. A fourth problem is that, as just mentioned, it is placed at the same level of culpability as other sexual assaults or abusive sexual contact. Under simple principles of crime and punishment, this offense is at a lower level of culpability. The simple solution would be to make this a separate offense under Article 120, which I have added as subsection (e) (wrongful sexual contact). It is the same as the offense of wrongful sexual contact that was in Article 120 from 2007 until 2012, and that offense had a maximum punishment that included confinement for one year.

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

The definition is not ambiguous or too narrow. The definition does require the action to be wrongful, and there might be a desire to cover some situations in which the action might not be wrongful, but removing the requirement for the action to be wrongful would cast too broad a net. Some of these situations can be fairly called nonconsensual, but there are a significant number where the other party initiates the deal and it cannot be considered nonconsensual activity. For the situations that are nonconsensual, they would be covered by the offense of wrongful sexual contact. Also, the Subcommittees consideration of the issues regarding coercive sexual relationships and abuse of authority cases may yield an offense that would cover these situations where the threatened action is not "wrongful."

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

"Fear" does not need to be defined to acknowledge subjective fear. Subjective fear would be relevant to show objective fear. However, this offense should not consider a situation where an accused's actions would not cause fear in a reasonable person to be considered rape, sexual assault, aggravated sexual contact, or abusive sexual contact because the other person was unreasonably fearful. In addition, any change to criminalize conduct based on unreasonable fear would have no practical effect. If the fear was unreasonable, then the prosecution would not be able to prove beyond a reasonable doubt that the accused did not have an honest and reasonable mistake of fact as to consent. Although such a change may look good to the public because it gives additional consideration to the individual victim, it would have no practical effect except to make the statute more confusing and cause problems in the practical business of litigating real trials.

Issue 8: Is the definition of "force" too narrow?

The definition of "force" is not too narrow. Some of the concerns about situations that are not covered could be addressed by other theories of liability, such as "threatening or placing that

other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping."

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

The definitions of "sexual act" and "sexual contact" are too broad. For "sexual act," it could be adequately fixed by deleting two word – "or mouth" – from only subparagraph (B). For "sexual contact," it should be corrected by deleting the majority of subparagraph (B), which criminalizes touching any body part with any body part, including through the clothing, if it is accompanied by an intent to arouse or gratify the sexual desire of any person. That last phrase with the specific intent should be added to subparagraph (A). In addition, with this change, an ambiguity in the last sentence can be corrected, and "or by any object" can be added after "by any body part."

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

The requirement that the accused knew or should have known of the victim's capacity to consent should remain as a required element of sexual assault. The question is phrased about the accused's knowledge, but that is only half of it, and it is in the disjunctive. The requirement is that the "condition is known or reasonably should be known by the person." Therefore, the prosecution does not have to prove the accused's knowledge, but rather only that a reasonable person should have known. That is not a high obstacle for prosecution; it is at the level of the negligence standard. In addition, mistake of fact as to consent would be an available defense, and the prosecution would have to prove beyond a reasonable doubt that any mistake as to consent was not reasonable. Any change to this part of the statute will only serve to confuse the issues, and it will have no practical effect. The current mens rea requirement is relatively low in area of criminal law, and it is not overly generous to Soldiers, Sailors, Airmen, or Marines accused of offenses.

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

The offense of "indecent act," which existed in the statute between 2007 and 2012, should not be added as an enumerated offense under Article 120. A majority of what was in that offense between 2007 and 2012 has been moved to Article 120c(a). The remainder of indecent acts that that should be criminalized and is not covered by Articles 120, 120b, 120c, or 125, can fall within Article 134, as does the offense of indecent language. If the President thinks it warrants being specifically enumerated as an offense under Article 134 in part IV of the Manual for Courts-Martial, then the President can accomplish that by executive order, which is how indecent acts was handled in the past.

Suggested Amendments to Article 120

Colonel Timothy Grammel, United States Army, Retired

(a) **Rape.—** Any person subject to this chapter who commits a sexual act upon another person by—

(1) using unlawful force against that other person;
(2) using force causing or likely to cause death or grievous bodily harm to any person;
(3) threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping;
(4) first rendering that other person unconscious; or
(5) administering or causing to be administered to that other person by force or threat of force, or without the knowledge or consent of that person, for the purpose of impairing that person's capacity to express a lack of consent to the sexual act, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of that other person to appraise or control conduct;

is guilty of rape and shall be punished as a court-martial may direct.

(b) **Sexual Assault.—** Any person subject to this chapter who—

(1) commits a sexual act upon another person by—
(A) threatening or placing that other person in fear;
(B) causing bodily harm to that other person;
(C) making a fraudulent representation that the sexual act serves a professional purpose; or
(D) inducing a belief by any artifice, pretense, or concealment that the person is another person;
(2) commits a sexual act upon another person when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring; or
(3) commits a sexual act upon another person when the other person is incapable of consenting to the sexual act due to—
(A) impairment by any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known by the person; or
(B) a mental disease or defect, or physical disability, and that condition is known or reasonably should be known by the person;

is guilty of sexual assault and shall be punished as a court-martial may direct.

(c) **Aggravated Sexual Contact.—** Any person subject to this chapter who commits or causes sexual contact upon or by another person, if to do so would violate subsection (a) (rape) had the sexual contact been a sexual act, is guilty of aggravated sexual contact and shall be punished as a court-martial may direct.

(d) **Abusive Sexual Contact.—** Any person subject to this chapter who commits or causes sexual contact upon or by another person, if to do so would violate subsection (b) (sexual assault) had the sexual contact been a sexual act, is guilty of abusive sexual contact and shall be punished as a court-martial may direct.

(e) **Wrongful Sexual Contact.—** Any person subject to this chapter who, without legal justification or lawful authorization, commits or causes sexual contact upon or by another person without that other person's permission is guilty of wrongful sexual contact and shall be punished as a court-martial may direct.

(ef) **Proof of Threat.—** In a prosecution under this section, 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.

(fg) **Defenses.—** As defined in subsection (h)(8), valid consent to the sexual conduct at issue, if raised by the evidence, is an affirmative defense to the offenses in subsections (a) (rape), (b) (sexual assault), (c) (aggravated sexual contact), (d) (abusive sexual contact), and (e) (wrongful sexual contact). Mistake of fact as to consent, if raised by the evidence, is an affirmative defense to the offenses in subsections (a) (rape), (b) (sexual assault), (c) (aggravated sexual contact), (d) (abusive sexual contact), and (e) (wrongful sexual contact). An accused may raise any applicable defenses available under this chapter or the Rules for Courts-Martial. Marriage is not a defense for any conduct in issue in any prosecution under this section.

(gh) **Definitions.—** In this section:

(1) **Sexual act.—** The term "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.

(2) **Sexual contact.—** The term "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 or by any object.

(3) **Bodily harm.—** The term "bodily harm" means any offensive touching of another, however slight~~, including any nonconsensual sexual act or nonconsensual sexual contact~~.

(4) **Grievous bodily harm.—** The term "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.

(5) **Force.—** The term "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.

(6) **Unlawful force.—** The term "unlawful force" means an act of force done without legal justification or excuse.

(7) **Threatening or placing that other person in fear.—** The term "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.

(8) **Consent.—**

(A) The term "consent" means a ~~freely given~~ voluntary 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.

(B) A sleeping~~,~~ or unconscious~~, or incompetent~~ person cannot consent. A person cannot consent to sexual activity if impairment by any drug, intoxicant, or other similar substance or a mental disease or defect, or physical disability, causes the person to be unable to appraise the nature of the sexual conduct at issue, physically decline participation in the sexual conduct at issue, or physically communicate unwillingness to engage in the sexual conduct at issue. A person cannot consent to force causing or likely to cause death or grievous bodily harm or to being rendered unconscious. ~~A person cannot consent while under~~ An agreement given as a result of threat or ~~in~~ fear is involuntary and not valid consent. ~~or~~ An agreement given under the circumstances described in subparagraph (C) or (D) of subsection (b)(1) is not an agreement to the true conduct at issue and is not valid consent.

(C) Lack of consent may be inferred based on the circumstances of the offense. 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~~.

(9) **Incapable of consenting.—** The term "incapable of consenting" means unable to appraise the nature of the sexual conduct at issue, physically decline participation in the sexual conduct at issue, or physically communicate unwillingness to engage in the sexual conduct at issue.